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PERSPECTIVES ON THE UN CONVENTION ON

An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention

by Tracy R. Justesen,* Troy R. Justesen**

Human history is scarred by accounts of discrimination against individuals with disabilities.¹ Individuals with disabilities received unequal access to medical and social services, education and employment, and were often barred from active social and political participation.² Countries justified these practices through an array of economic, legal and social practices that separated disability from the rest of the human experience.³

Worldwide, roughly 650 million people have disabilities.⁴ The Office of the UN High Commissioner for Human Rights reported in 2003 that individuals with disabilities “are united in one common experience — being exposed to various forms of discrimination and social exclusion.”⁵ According to Mary Robinson, former United Nations (UN) High Commissioner for Human Rights, “[I]ndividuals with disabilities frequently live in deplorable conditions and face physical, legal, and social barriers which prevent their integration and participation in the community.”⁶ Experts claim disability is relegated to the lowest ebb of consideration by member-states of the UN.⁷

Slowly, however, the worldwide tide of ignorance and projected shame toward individuals with disabilities is changing, laying the groundwork for increased acceptance and attention to the rights of individuals with disabilities. Canada and the Netherlands, for instance, have created governmental systems to provide services directly to individuals with disabilities.⁸ Some countries now include provisions in their constitutions prohibiting discrimination on the basis of disability.⁹ And in 2002 the UN, recognizing the wide-scale discrimination persistently experienced by individuals with disabilities,¹⁰ formed an Ad Hoc Committee (the Committee) to begin drafting a comprehensive treaty to finally recognize rights for all individuals with disabilities.¹¹

This article reviews efforts by the UN to combat disability discrimination through the new Convention on the Rights of Persons with Disabilities (the Convention), describes some of its major weaknesses, and explores possibilities for its enhancement.

This article also delves into the reasons why the U.S., though involved in the drafting process, continues to remain a nonparty to the Convention.

“The U.S. has a long history of equal treatment of individuals with disabilities as demonstrated by its many domestic laws and internal policies, and the U.S. implied that a Convention would be viewed as an intrusion into the exclusive realm of national law and policy.”

INTERNATIONAL LAW ADDRESSING INDIVIDUALS WITH DISABILITIES

Individuals with disabilities are afforded some international protections of their civil, political, cultural, economic, and social rights under select international instruments; however, these agreements have been far from comprehensive, protecting only select groups of individuals with disabilities under select conditions.¹² Furthermore, only a limited number of countries have ratified these instruments, and regionally developed conventions restrict which states may become parties.¹³

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THE RIGHTS OF PERSONS WITH DISABILITIES

The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify

by Tara J. Melish*

Following almost five years of highly committed, transparent, and engaged work by a drafting committee made up of nearly all nations of the world, the United Nations General Assembly unanimously adopted the Convention on the Rights of Persons with Disabilities (Disability Convention, or the Convention) on December 13, 2006 at UN Headquarters in New York. The Convention is historic and pathbreaking on several levels, both in protection terms for the world's 650 million persons with disabilities who may now draw upon its provisions in defense of their internationally-protected rights, and in relation to the unprecedented level of civil society input and engagement in the negotiation process. This sustained and constructive engagement has given rise to a dynamic process of dialogue, cooperation, and mutual trust that will fuel monitoring and implementation work, at national and international levels alike, long into the future.¹

This article draws attention to the two overarching paradigm shifts ushered into international human rights law by the Disability Convention. First, the Convention represents an historic break from a state-centric model of treaty negotiation, in which instruments are negotiated behind closed doors, away from the very people they are intended to benefit. It moves instead toward a participatory approach that takes the views and lived experience of the affected as the principal point of departure. The second relates to the way disability is conceived and problematized. The Convention shifts away from a "medical-social welfare" model of disability that fixates on *inability* and sorting of impairment as a way to "parallel track" difference and socially justify exceptions to universally-held human rights. It embraces instead a "social-human rights" model that focuses on *capability* and *inclusion*: on lifting the environmental and attitudinal barriers that prevent persons with disabilities from full inclusion and equal participation in all aspects of community life.

These critical paradigm shifts are foundational to the Disability Convention and the dynamic processes that brought it to life. Provided they continue to be actively and constructively embraced in the implementation phase, they will ensure that the supervisory and subsidiary framework of international human rights law can successfully be engaged to effect real, meaningful, and

enduring change for the day-to-day realities of persons with disabilities in all countries and regions of the world. The prospects for this are encouraging. Indeed, as the opening date for the Convention's signature/ratification approaches, the expectation remains strong that the Disability Convention will enjoy a level of State acceptance matched only by the Convention on the Rights of the Child (CRC), a treaty boasting ratification by all but two UN Member States.² In the face of such broad global support, the decision of the United States not to pursue ratification is highly troubling. The U.S. position, particularly in light of the nation's strong historic commitment to disability rights, is unjustified and warrants reversal.

TOWARD A CONVENTION: THE WORK OF THE AD HOC COMMITTEE

The decisive push for the Disability Convention came from Mexico in 2001. The UN General Assembly responded by establishing an Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee or Committee), mandated to consider proposals for a specialized disability convention.³ Composed of delegates from all UN Member States, the Committee held its first two sessions in 2002 and 2003, with the broad participation of NGOs, disabled persons organizations (DPOs), academia, UN agencies, inter-governmental organizations, and national human rights institutions.

These sessions resulted in a practical decision to establish a smaller expert Working Group⁴ to prepare a single draft text that would form the basis for further Committee negotiations. Finalized at a ten-day meeting in January 2004, the Working Group's draft text served as the core document upon which all further proposals were based at the Ad Hoc Committee's third through eighth sessions.⁵ By common agreement, these sessions were marked by a degree of transparency, enthusiasm, lack of politicization, and cooperation unparalleled in UN treaty negotiations or general meetings.

This cooperative spirit allowed the Committee to work quickly and diligently and, in August 2006, the Committee agreed by consensus on the final texts of both the draft Disability Convention and an Optional Protocol. Both instruments were formally adopted by the Ad Hoc Committee at a one-day resume session on November 25, 2006, whereupon they were sent to the General Assembly for formal adoption at the close of its 61st Session in December 2006. They will be opened for signature/ratification on March 30, 2007 at UN headquarters in New York.⁶

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Earlier international agreements pertaining to disability rights do form a foundation for the comprehensive recognition of the rights of individuals with disabilities.¹⁴ Some examples include the Standard Rules on the Equalization of Opportunities for Persons with Disabilities,¹⁵ the Declaration on the Rights of Mentally Retarded Persons,¹⁶ and the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.¹⁷ Other regional instruments also inform a comprehensive recognition of the rights of the disabled by addressing vocational,¹⁸ rehabilitative, and employment training needs,¹⁹ and prohibiting all forms of discrimination on the basis of disability.²⁰

Notwithstanding these instruments, six other international documents not specifically focused on disability-related matters are worth noting.²¹ These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination. Though these instruments do not contain language specific to protection on the basis of disability, together they outline general principles regarding fundamental human rights.²²

Recognizing that international law was far from comprehensive, on December 19, 2001, the UN General Assembly, through resolution 56/168, established an Ad Hoc Committee to consider the recommendations of the Commission on Human Rights and the Commission for Social Development to advance the rights of individuals with disabilities.²³ This resolution invited the participation of member-states, nongovernmental organizations, and other bodies and individuals with an interest in the subject to contribute to the work of the Committee.²⁴

The preamble to this Convention states that all individuals with disabilities are “entitled to all the rights and freedoms . . . without distinction of any kind” and they are “guaranteed their full enjoyment without discrimination.”²⁵ The Convention contains fifty articles, and encompasses such issues as the unique needs of women and children with disabilities, access to law and its protection, liberty of movement and right to a nationality, independent living and community integration, opportunities for a meaningful education, the right to establish a family, access to adequate health care, and the right to equal opportunity in employment.²⁶

MAJOR WEAKNESSES OF THE CONVENTION

Although the Convention represents an international accomplishment for the rights of individuals with disabilities, it likely will not be as effective as was hoped. Key articles require further action by member-states, but as history reveals, these articles may be nothing more than aspirational. Therefore, in order to prevent the momentum gained from fading into history as another lost attempt to equalize opportunities for individuals with disabilities worldwide, the international community must act to fulfill the intent of the Convention.

ISSUES OF ACCESSIBILITY

Article 9 calls for the development of measures to ensure that individuals with disabilities have “access, on an equal basis

with others, to the physical environment . . . and to other facilities and services open or provided to the public, both in urban and rural areas.”²⁷ Further, it provides that private entities offering services to the general public must “take into account all aspects of accessibility.”²⁸



Press conference on the Disability Convention: Thomas Schindlmayr of the UN Department of Economic and Social Affairs briefs correspondents

In this manner, Article 9 suggests that member-states must independently create architectural design and construction standards for facilities to meet the accessibility requirements of the Convention.²⁹ The article provides no additional support or technical assistance specifying which building elements and features must be accessible, or how and by when member-states should meet such standards. Likewise, there is no reasonable means for measuring a member-state’s progress or lack thereof in this regard.³⁰

International recognition of the need for accessible design standards is not new to the international community. The UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities made similar assertions, but it too lacked specific requirements.³¹

A proposal to the Ad Hoc Committee, submitted by Mexico in 2002, was the first to recommend that “urban outfitting and public services and facilities for public use have the adaptations necessary to facilitate access, use, and circulation for [individuals]

with disabilities.”³² This proposal espoused lofty ideals, but it lacked any specific architectural design and construction standards or even best practice design guidance for how to make facilities accessible to individuals with disabilities.³³ Nevertheless, the committee was put on notice of the need for accessible design standards to be a part of the Convention.

In 2004, the chief of the Inclusive Development Section of the UN Department of Economic and Social Affairs, in a speech about the Convention before the International Conference Designing for the 21st Century III, stated that “it is likely that the concept of accessibility, and to some extent that of universal design will soon ... become core reference in the context of fundamental human rights.”³⁴ He also acknowledged that it was likely the Committee would not expand on the requirements for accessible design standards, and stated that “[t]his lack of elaboration is a reflection of the fact that the human rights experts who [were] negotiating the text of the convention d[id] not have enough information or expertise on issues of technology and universal design” to incorporate them into the Convention.³⁵ He proposed that if accessible design standards were included in the Convention, it would “open the way for universal design to become a universal concept and for the values it stands for to gain global acceptance.”³⁶

A UN publication discussing the Convention references a World Bank study that found the cost of building new facilities that incorporate accessible design is “minimal” by “add[ing] less than one percent to the construction costs.”³⁷ Arguments that facilities in developing nations cannot be built to accommodate the needs of the disabled or that such facilities will not be built if accessibility requirements are imposed are without merit. New facilities are constructed daily in developing countries, and these structures can be built using minimum accessible design requirements. If the construction costs are beyond reach because of the need for accessible features, the solution is clear — the physical size of the structure can be reduced to a percentage equal to the minimal costs of making the facility accessible.

The U.S. has extensive experience in the development of accessibility standards. National standards dating back to 1968 have been revised periodically to take into account advances in technology, new construction techniques and materials, and the needs of individuals with disabilities.³⁸ The U.S. offered technical assistance to the Ad Hoc Committee, but the Committee did not elect to consider design standards.³⁹

The economic benefits alone of opening doors to individuals with disabilities are enough to justify accessible construction requirements. Individuals with disabilities have financial resources to spend and they need and want services equal to others. Providing accessible facilities will draw the patronage of consumers with disabilities. Moreover, the social benefits of creating inclusive environments for all members of society cannot be measured by money alone. The international community, therefore, must act to establish minimum design standards that incorporate accessibility.

MONITORING REQUIREMENTS

Articles 33 through 40 establish monitoring requirements.⁴⁰ A Committee on the Rights of Persons with Disabilities will be created, comprised of elected experts in the field with balanced gender representation. However, the Convention does not provide that this committee must include anyone with a disability. The

Convention merely calls for the “participation of experts with disabilities.”⁴¹ Participation can occur in many ways, not necessarily as a committee member. This lack of recognition of the expertise that individuals with disabilities can bring to the Convention not only as a result of life experience, but as professionals who happen to also have disabilities reinforces the stereotypical and discriminatory perceptions that the majority of experts likely cannot be individuals with disabilities. This philosophy feeds the perception that “experts” without disabilities are more plentiful and knowledgeable, and more capable of acting in the best interests of those perceived as less able or capable simply because they have a physical or mental impairment.

The requirement that the Committee on the Rights of Persons with Disabilities has a balance of gender, but not a requirement for balanced racial or ethnic participation represents another concern and lost opportunity.⁴² The international community should have made an effort to recognize the contributions that a diverse Committee membership would make to the Convention’s objectives and in the lives of millions of individuals with disabilities worldwide.

WHY THE UNITED STATES WILL NOT SIGN THE CONVENTION

During the Ad Hoc Committee session in June 2003, the U.S. provided testimony that it would not sign or ratify the Convention.⁴³ Instead, the message delivered was that the U.S. has a long history of equal treatment of individuals with disabilities as demonstrated by its many domestic laws and internal policies, and the U.S. implied that a Convention would be viewed as an intrusion into the exclusive realm of national law and policy.⁴⁴ To advocate otherwise would reveal a lack of knowledge of the foundations of the federal government and its autonomous states that, by necessity, may at times supersede considerations of disability.⁴⁵

In support of its position, the United States points to its numerous domestic laws evidencing its long history of equal treatment of individuals with disabilities. The Architectural Barriers Act of 1968 (ABA) represents a milestone recognizing rights for individuals with disabilities in the US.⁴⁶ Among other requirements, the ABA requires accessible design and construction of certain federal government facilities.⁴⁷ Provisions include the stipulation of the width of doors, dimensions for ramps, location of toilets, lavatory positioning, and accessible parking. Federal government resources are dedicated to the development and maintenance of these enforceable standards, and failure to comply with them carries potential for significant penalties.⁴⁸

The Rehabilitation Act of 1973, one of the first broad federal statutes to recognize the rights of individuals with disabilities to receive equal treatment, prohibits entities receiving federal funds or conducting federal programs from discriminating on the basis of disability.⁴⁹ The Act contains provisions for determining employment discrimination by federal agencies,⁵⁰ requires affirmative action and prohibits employment discrimination by contractors and subcontractors utilized by the federal government,⁵¹ and establishes accessibility requirements for electronic and information technology developed, procured, maintained, or used by the federal government.⁵²

In 1990, the most expansive requirements prohibiting discrimination against individuals with disabilities became law.⁵³ The Americans with Disabilities Act of 1990 (ADA) recognizes

protection from discrimination on the basis of disability as a civil right,⁵⁴ prohibits, in some circumstances, private and public employment discrimination, requires equal access to services,⁵⁵ promotes the construction of accessible buildings, and requires removal of existing physical barriers, where appropriate.⁵⁶ The ADA also contains minimum architectural design standards that covered entities must meet when designing, constructing, or altering buildings and facilities. Significantly, the ADA protects individuals with disabilities regardless of whether or not they are U.S. citizens.⁵⁷

participate in community life. Federal agencies and subsidiaries must self-examine policies and procedures to remove unnecessary and discriminatory barriers when appropriate to ensure the full participation of individuals with disabilities. Many federal agencies have acted to enhance opportunities for individuals with disabilities to set an example for all of society of the benefits of their inclusion in all aspects of life.⁶⁶

As part of the NFI, the president issued executive orders to further the federal government's efforts to set a nationwide example. Executive orders were issued to ensure the needs of individu-

“Although seemingly contrary to the foundations of the U.S. not to support an international convention promoting the rights and opportunities of one of its most insular and discrete populations, the U.S. is among the leading nations to recognize and implement policy and legal remedies to eliminate discrimination on the basis of disability in nearly every facet of its society.”

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) is the latest version of federal efforts in special education for children with disabilities first made law in 1975. Eligible children “must have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁵⁸ The IDEA represents a major shift away from segregated educational settings that kept children with disabilities in separate and often inferior classrooms toward the full integration of children along with the necessary educational supports.⁵⁹ Additionally, this law aims to specifically assist other minority students including American Indian and Alaskan Native children living with disabilities.⁶⁰

The Help America Vote Act of 2002 (HAVA) is a national law that is designed to improve the administration of elections in the U.S.⁶¹ This law provides, among other requirements, access to the voting process for individuals with disabilities.⁶² In fiscal years 2002 through 2004, fifteen million dollars in federal funding was spent to improve access to voting for people with disabilities.⁶³ Thirteen million dollars was awarded to states to ensure accessibility to polling places, train poll workers, and to disseminate information to individuals with disabilities about their rights.⁶⁴

In 2004, President George W. Bush established the New Freedom Initiative (NFI).⁶⁵ The NFI represents an important step to ensure that all Americans with disabilities have the opportunity to engage in productive employment, choose where to live, and

als with disabilities are taken into account in nearly every aspect of daily life.⁶⁷ For instance, an executive order requires federal emergency planning, including during crises created by natural disasters and acts of terrorism, to consider the unique needs of individuals with disabilities.⁶⁸ Another executive order called for recommendations to improve policies to enhance educational opportunities for students with disabilities.⁶⁹

The U.S. takes seriously its international obligations; in fact, international treaties and conventions hold equal status to U.S. domestic law.⁷⁰ Consequently, the government is careful to avoid ratifying international agreements that may potentially conflict with existing domestic laws,⁷¹ particularly as a world leader in the recognition and preservation of the rights of individuals with disabilities to participate equally in society.⁷² National laws protect disabled individuals' rights to compete for employment, access many private entities, receive services from public agencies, and equally elect their representatives at all levels of state and federal government.⁷³ The ADA and other federal laws create opportunities for individuals with disabilities never before witnessed in the world.⁷⁴ The domestic laws and policies of the U.S. are clearly stronger and represent meaningful substantive objectives when compared to the newly drafted UN Convention. The U.S. commitment to the new Convention would be a gesture without significant meaning for its citizens. For the U.S. to consent to an international Convention that could potentially cause havoc within its sovereign borders merely to appear deferential to the needs of individuals with disabilities would be disastrous.

CONCLUSION

This article reviewed recent efforts by the UN to combat discrimination on the basis of disability through the newly drafted Convention of the Rights of Persons with Disabilities. This article also delved into the reasons why the U.S. expressed initial caution in pursuing the Convention, and why it continues to hold its position not to be a party.

The U.S. openly stated from the beginning of the Ad Hoc Committee's negotiations that it would not be a party to the end product. Although seemingly contrary to the foundations of the U.S. not to support an international convention promoting the rights and opportunities of one of its most insular and discrete populations, the U.S. is among the leading nations to recognize and implement policy and legal remedies to eliminate discrimination on the basis of disability in nearly every facet of its society. This Convention proposes no measure of increased protections or accessibility than U.S. federal law and policy now provide. The issue to enjoin the U.S. in this Convention is a question of U.S.

policy with respect to all international conventions development, not simply this treaty alone.⁷⁵

Given the global influence of U.S. policy and actions, the determination not to sign and ratify the Convention raises important questions of whether other nations will choose to sign and ratify the treaty. Though this is a consideration, particularly in developing nations, there is no added value to citizens and others within the U.S. that would outweigh the risk to U.S. sovereignty. While stricter provisions to increase accessibility for those living with disabilities would be beneficial, it is reasonable to predict that many nations would not be able to ratify the instrument because of the lack of adequate technological and financial resources necessary to promote adequate accessibility and enforce antidiscrimination disability law. At this stage of global development, it appears a debate of more than mere symbolic ideology in disability policy worldwide is unattainable, as member-states are likely to consistently fall short of current U.S. standards regarding disability rights and policy.

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2 *Id.*; See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

3 *Id.*; *Disabled Yet Denied: Bureaucratic Injustice in the Disability Determination System*, U.S. Senate Special Committee on Aging, J. Disability Policy, Vol. 1, No. 4, 57-80 (Winter 1990).

4 Press release, UN News Centre, *New pact allowing surprise visits to detention centres hailed by UN official* (November 6, 2006); Press release, UN News Centre, *Annan hails agreement on treaty protecting rights of persons with disabilities* (August 28, 2006).

5 *Human Rights and Disability*, UN High Commissioner for Human Rights, available at <http://www.unhcr.ch/disability/intro.htm#> (2003); see also *Convention on the Rights of Persons with Disabilities*, UN Web Services Section, Department of Public Information, available at <http://www.un.org/disabilities/convention/unsystem.shtml> (2006).

6 Office of the Special Rapporteur on Disability, UN Commission for Social Development, available at http://www.un.org/esa/socdev/enable/stockholm_nov2000a.htm (2001).

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8 Leonard Marsh, *Report on Social Security for Canada*, Buffalo N.Y.: University of Toronto (1975); Center for International Rehabilitation, International Disability Rights Monitor, *International Disability Rights Compendium*, 221-26 (2003); Can. Const. (Constitution Act, 1982) pt. 1 § 15 (Canadian Charter of Rights and Freedoms). Equal Treatment of People with a Handicap or Chronic Illness, Ministry of Health, Welfare, and Sport, the Netherlands (November 18, 2006); the Law on the Reintegration of Persons That Have a Disability to Perform Labor of 1998, April 23, 1998, Staatsblad 290, as amended; the Law on Labor for Disabled Employees, May 16, 1986, Staatsblad 300, as amended.

9 These include Argentina and Canada. Constitution of Argentina (Const. Arg.), Imprenta del Congreso de la Nacion, Buenos Aires (1996). Canadian Constitution, R.S.C., ch. 44, Sch. B, § 15 (Appendix 1985).

10 Lawrence O. Gostin & Henry A. Beyer, *Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans*, 229-251 (Paul H. Brookes Pub. Co. 1993); also available at <http://www.ohchr.org/english/issues/disability/study.htm>.

11 UN High Commissioner for Human Rights, *Statement to General Assembly Ad Hoc Committee's 7th Session on the Adoption of the International Convention on the Rights of Persons with Disabilities*, Jan. 27, 2006, available at <http://www.ohchr.org/english/issues/disability/index.htm>. At the printing of this article, the UN had tentatively scheduled, at its General Assembly Plenary session on December 13, 2006, to adopt the convention with March 30, 2007, as the date the convention will open for signature and ratification by UN member-states with the expectation that it will enter into effect within two years or after twenty nations ratify it.

12 For example, as of August 2003, only 147 of the 191 members had ratified the International Covenant on Civil and Political Rights and only 97 are parties to the optional protocol (2002), 999 U.N.T.S. 171 (December 16, 1966) and 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

13 *Id.*

14 See World Programme of Action concerning Disabled Persons, adopted by G.A. Res. 37/52. 1, U.N. Doc. A/37/52 (December 3, 1982); Declaration on the Rights of Disabled Persons, proclaimed by G.A. Res. 3447 (XXX) (December 9, 1975) available at <http://www.unhcr.ch/html/menu3/b/72.htm>; The protection of persons with mental illness and the improvement of mental health care, adopted by G.A. Res. 46/119, U.N. Doc. A/RES/46/119 (December 17, 1991).

15 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by G.A. Res. 48/96, U.N. Doc. A/48/96 (December 20, 1993).

16 Declaration on the Rights of Mentally Retarded Persons, proclaimed by G.A. Res. 2856 (XXVI) (December 20, 1971) available at http://www.unhcr.ch/html/menu3/b/m_mental.htm.

17 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by G.A. Res. 46/119, U.N. Doc. A/46/119 (December 17, 1991).

18 See generally D. Harris, *The European Social Charter* (University Press of Virginia, 1984); European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155.

19 International Labor Organization, Convention No. 159, Vocational Rehabilitation and Employment of Persons with Disabilities (1983).

ENDNOTES: UN Disability Convention (Justesen and Justesen) *continued from page 41*

- 20 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted June 7, 1999 *available at* <http://scm.oas.org/Reference/english/CONVENTIONS/DISCRIMINATION%20DISABILITIES.txt>.
- 21 *See* Quinn & Degener, *Human Rights and Disability*.
- 22 *Id.*; Quinn and Degener summarize these instruments and their relation to individuals with disabilities. *Id.*, at 31.
- 23 The first Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities was formed by UN resolution 56/168 of December 19, 2001.
- 24 The first of eight two-week sessions began on July 29, 2002; the second session from June 16–27, 2003; a working group met from January 5–16, 2004; the third session took place from May 24 to June 4, 2004; the fourth session from August 23 to September 3, 2004; the fifth session from January 24 to February 4, 2005; the sixth session from August 1–12, 2005; the seventh session from January 16 to February 3, 2006; and the ad hoc committee's work concluded with the final session on August 25, 2006.
- 25 *Id.*, at Preamble.
- 26 Convention on the Rights of Persons with Disabilities and the Optional Protocol to the International Convention on the Rights of Persons with Disabilities, adopted 25 August 2006 *available at* <http://www.ohchr.org/english/law/disabilities-op.htm>.
- 27 *Id.*; Draft Convention on the Rights of Persons with Disabilities, art. 9(1).
- 28 *Id.*, art. 9(2)(b).
- 29 *Id.*, art 9(2)(a), 9(2)(h).
- 30 *Id.*, arts. 1-50.
- 31 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by G. A. Res. 48/96, Rule 5, U.N. Doc. A/48/96 (December 20, 1993).
- 32 *Elements for a future UN Comprehensive and Integral Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, proposal submitted by Mexico to the UN, articles 1(c) and 6(a), (July 26, 2002).
- 33 *Id.*
- 34 Jean-Pierre Gonnot, *Statement to the International Conference Designing for the 21st Century III*, Keynote Presentation for the Designing For The 21st Century III, An International Conference on Universal Design, Rio de Janeiro, Brazil (December 7–12, 2004).
- 35 *Id.*
- 36 *Id.*
- 37 United Nations, *A Convention on the Rights of Persons with Disabilities available at* <http://www.un.org/disabilities/convention/pdfs/qna/pdf> (December 1, 2006).
- 38 36 C.F.R.1190, 1191.
- 39 The U.S. provided oral testimony essentially declaring no need for an international instrument because of national laws prohibiting discrimination on the basis of disability. *See* Statement of Ralph F. Boyd, Jr., Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities (June 18, 2003) *available at* <http://www.un.org/esa/socdev/enable/rights/contrib-us.htm>.
- 40 Convention on the Rights of Persons with Disabilities and the Optional Protocol to the International Convention on the Rights of Persons with Disabilities, arts. 33-40.
- 41 *Id.*, art. 34.
- 42 *Id.*
- 43 Statement by Ralph F. Boyd, Jr.
- 44 *Id.*
- 45 *Id.*
- 46 42 U.S. C. §§ 4151 et seq.; *see also* 41 CFR Subpart 101-19.6.
- 47 *Id.*; Examples of federal laws recognizing rights or providing opportunities for individuals with disabilities prior to the ABA include: P.L. 74-732; the Housing Act of 1937, as amended, P.L. 93-383; the Small Business Act of 1953, as amended, P.L. 92-595, P.L. 95-89, and P.L. 97-35. 15 U.S.C. §§ 631 et seq.
- 48 *Id.*; each federal agency is tasked with the responsibility of developing and enforcing regulations under the Rehabilitation Act that implement its section 504 obligations. 29 U.S.C. § 794.
- 49 29 U.S.C. § 794.
- 50 29 U.S.C. § 791; 41 CFR § 1614.203.
- 51 29 U.S. C. § 793; 41 CFR Part 60-741.
- 52 29 U.S.C. § 794d.
- 53 Americans with Disabilities Act of 1990, P.L. 101-336.
- 54 *Id.*
- 55 *Id.*
- 56 *Id.* Appendix A to the title III implementing regulations, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (1991).
- 57 *Id.*
- 58 34 CFR § 300.1(a).
- 59 *Id.*
- 60 Troy Justesen, Robert Gilmore, & Deborah Morrow, *The Individuals with Disabilities Education Act (IDEA)*, 45 J. Am. Indian Ed. 68 (2006).
- 61 P.L. No. 107-252, 116 Stat. 1666 (2002); 42 U.S.C. §§ 15301-15545.
- 62 *Id.*
- 63 *The President's New Freedom Initiative for People with Disabilities: The 2004 Progress Report*, Executive Summary (2004) *available at* <http://www.whitehouse.gov/infocus/newfreedom/summary-2004.pdf>.
- 64 *Id.*
- 65 *Id.*
- 66 U.S. Department of Justice, *Access for All: Five Years of Progress, A Report from the Department of Justice on Enforcement of the Americans with Disabilities Act* (2006) *available at* <http://www.ada.gov/5yearadarpt/fiveyearada.pdf>.
- 67 Exec. Order No. 13330, 69 Fed. Reg. 9185 (Feb. 24, 2004); Exec. Order No. 13217, 66 Fed. Reg. 33155 (June 18, 2001); Exec. Order No. 13263, 67 Fed. Reg. 22337 (April 29, 2002); Exec. Order No. 13360, 69 Fed. Reg. 62549 (October 20, 2004).
- 68 Exec. Order No. 13347, 69 Fed. Reg. 44573 (July 22, 2004).
- 69 Exec. Order No. 13227, 66 Fed. Reg. 51287 (October 2, 2001).
- 70 U. S. Const. art. VI.
- 71 It is a practice of member-states to clarify understandings about a convention through reservations. However, for the U.S. to reserve the right to explain its positions concerning the convention's various provisions and how these provisions conflict with internal laws would be entirely unworkable in this situation.
- 72 *See* Americans with Disabilities Act, 42 U.S.C. § 12101 et seq (1990).
- 73 *Id.*; 29 U.S.C. § 794 (2002).
- 74 Americans with Disabilities Act, *supra* note 72.
- 75 Edwin Lee Aralica, *The Inherent Conflict—Vienna Convention on Consular Relations and U.S. Domestic Law*, *supra* note 28. Aralica notes that “the U.S. has signed very few international treaties that have ramifications affecting the application of domestic law.”

The UN Disability Convention (Melish) *continued from page 37*

MAJOR THEMES AND MOTIVATING TENETS

The Disability Convention is composed of a Preamble; four initial articles on Purpose, Definitions, General Principles, and General Obligations; twenty-six substantive rights provisions addressing, from a disability perspective, the full range of civil, cultural, economic, political, and social rights; ten articles on national and international monitoring and supervision; and ten final provisions. These Convention-based undertakings, which include a periodic reporting process and biennial Conference of States Parties, are supplemented by an Optional Protocol that establishes an individual complaints mechanism and an inquiry procedure.

None of these provisions can, however, be read in isolation from the broader themes and shared tenets that gave rise to them in the Ad Hoc Committee. These commonly-held understandings must remain front and center in efforts to construe the scope and meaning of the Convention and to understand the intent behind certain drafting choices; attempts to single out and find fault in isolated provisions risk losing the broader vision of what the Convention does as a whole. Four themes dominated the Committee's approach to the Convention's terms, meaning, and intended objectives.

make substantive statements on the UN floor following discussion of each draft article, actively lobby state delegations during sessions, receive official documents, and make written and other presentations.⁹

Second, and tantamount in importance, Member States were formally encouraged by the Ad Hoc Committee to incorporate persons with disabilities and/or other experts on disability into their official delegations at meetings, as well as to consult with them at home in the preparatory process in establishing positions and priorities. Virtually all Member States obliged, actively incorporating persons with disabilities either as official heads of delegation — as did Bosnia and Herzegovina, Chile, Serbia, South Africa, Thailand, Yemen, and others — or as official advisors. Drawn equally from government ministries, national disability councils, DPOs and NGOs, these experts contributed an unusual degree of substantive expertise, sensitivity, receptiveness, creativity, and commitment to the drafting committee.

Third, to promote equal NGO representation from the richest and poorest countries, the Committee established a UN Voluntary Fund on Disability to support the participation of civil society experts from the least developed countries. This Fund sup-

“The Convention represents an historic break from a state-centric model of treaty negotiation, in which instruments are negotiated behind closed doors, away from the very people they are intended to benefit. It embraces a ‘social-human rights’ model that focuses on lifting the environmental and attitudinal barriers that prevent persons with disabilities from full inclusion and equal participation in all aspects of community life.”

ACTIVE CONSULTATION WITH PERSONS WITH DISABILITIES AND CIVIL SOCIETY ORGANIZATIONS

The foremost guiding principle of the Disability Convention is the necessity of civil society participation in all treaty-related processes. Recognizing that official UN delegations, composed largely of career diplomats, lacked specialized expertise in disability issues and hence were not well-positioned to make meaningful drafting proposals, the Ad Hoc Committee made three critical decisions at its first session.⁷ The first was to authorize representatives of accredited NGOs to participate in all public meetings of the Ad Hoc Committee,⁸ a decision later extended to informal consultations and closed meetings, and which included extensive formal representation in the Working Group. NGOs thus became full and active partners in the negotiation process, authorized to

ported the travel and accommodation at each session of dozens of persons with disabilities and their assistants, ensuring that the voices of persons with disabilities from all regions of the world were heard. This was coupled, moreover, with efforts by the Secretariat to make official documents immediately available in Braille and in other accessible formats.

These decisions had a profound impact on the way the treaty was negotiated, both in terms of substance and process. For example, given the UN's remarkable gaps in architectural and informational accessibility, the Ad Hoc Committee was forced to break with the standard drafting methodology of negotiating distinct articles or pieces of the treaty separately in small informal working groups of interested members. Instead, full article-by-article debate on the Convention had to take place in the *plenary* of the Ad Hoc

Committee (in the UN building's single wheel-chair accessible large conference room), with the full participation of all Member State delegations and hundreds of civil society representatives. This process required a level of transparency, cooperation, self-restraint, and consensus unmatched in human rights treaty drafting and allowed civil society to monitor, participate in, and influence all decision-making discussions.

The extraordinary success of this participatory methodology ensured that it was likewise reflected in the implementation and monitoring methodologies envisioned under the Convention. Thus, Articles 4.3 and 33 require States Parties to “closely consult with and actively involve” persons with disabilities and their representative organizations in the implementation and development of legislation and policies to give effect to the Convention, as well as in its monitoring and supervision. Similarly, States Parties are invited to consult with persons with disabilities, through their representative organizations, in nominating experts — especially experts with disabilities — to serve on the UN Committee charged with supervising implementation of the Convention's commitments.¹⁰ These structured participatory processes — both domestic and international — will ensure that the Disability Convention can effectively be harnessed by governments and civil society to bring meaningful, relevant, context-specific reform to persons with disabilities in all areas of the world.



Disabled youth delegates from Bangladesh, China, and the United Kingdom address the UN General Assembly Ad Hoc Committee on the Disability Convention

UNDERSTANDING RIGHTS FROM A DISABILITY PERSPECTIVE

Given deeply entrenched attitudes and stereotypes about disability that have rendered many of the most flagrant abuses of the rights of persons with disabilities “invisible” from the mainstream human rights lens, it was decided early on that the Disability Convention had to encompass a holistic and comprehensive approach, elaborating the particular ways and contexts in which rights abuses are experienced in the day-to-day lived reality of persons with disabilities.¹¹ In this sense, although the Disability Convention creates no new rights, it is not “just” a non-discrimination treaty. Its motivating purpose is gap-filling and substantive: to make existing human rights law *relevant* to persons with disabilities by comprehensively elaborating the full range of internationally-protected human rights from a disability perspective.

The Convention represents, in this respect, a global consensus that the architecture of the current human rights regime — despite its universal application to persons with disabilities and clear prohibitions of discrimination on the basis of disability — has proved ineffective in ensuring equal rights for persons with disabilities *in practice*.¹² That is, persons with disabilities experience rights violations not only in the same ways those without disabilities do, but also — most abusively — in ways directly tied to their disabilities or in ways in fact *justified* by them. These abuses remain hidden, normalized through widespread assumptions that conflate disability with inability, even incompetence. The mainstream human rights community has thus tended to remain silent when persons with disabilities are forcibly institutionalized, stripped of their legal capacity, rendered immobile by barriers in the built and social environment, or denied the right to bear or rear children, marry, inherit, access insurance or loans, or own property on the basis of their disability. Nor has alarm been raised when persons with disabilities are segregated from the general education system, restricted to sheltered employment or income assistance due to barriers on the open labor market, or prevented from living in the community through restricted housing and service options.

The Disability Convention shines international light on these common abuses, requiring States Parties to address them through all appropriate and reasonable measures, including the guarantee of reasonable accommodation, procedural safeguards, accessibility and universal design standards, individualized support where necessary, and effective public awareness campaigns. Such measures must be tailored to ensure that persons with disabilities *in practice* enjoy their universally-recognized human rights on an equal basis with others in all aspects of life.

This is a critical point for observers to understand in appreciating the significant contribution to human rights law that the Disability Convention represents, and why it is so important for States to ratify the Convention regardless of the formal existence of domestic non-discrimination guarantees. It also speaks to the imperative that a UN Committee on the Rights of Persons with Disabilities be established to supervise compliance with the treaty's disability-specific terms, rather than leaving supervision to non-specialized UN treaty bodies with more general non-discrimination mandates.

PARADIGM SHIFT: FROM EXCLUSION TO INCLUSION

Third, and equally important, the Disability Convention represents a fundamental paradigm shift in the way disability is conceptualized, both nationally and internationally. It aims to transition disability policy away from a “medical” or “social welfare” model based on sorting and separating persons with disabilities onto “parallel tracks” or exclusive living spaces, toward a “social” or “human rights” model that focuses on *capability* and takes *inclusion, individual dignity, personal autonomy and social solidarity* as the principle points of departure. Under this approach, the disability problematic is no longer how to provide for those deemed “unable” to integrate into mainstream society, but rather how to make society accessible to all persons, on an equal, non-separate basis.

The Convention thus impels States to rethink the underlying assumptions upon which their policies and practices have historically been based. Rather than resigning persons with disabilities to institutionalized living arrangements, segregated education, sheltered employment and qualified income support, it refocuses the

lens of domestic social policy on the societal barriers that prevent persons with disabilities from full and effective participation and inclusion in all aspects of community life, including employment, education, housing, health, political participation, access to justice, cultural expression, entertainment, and leisure.¹³

Ratification of the Convention will thus require States to think strategically about accessibility and reasonable accommodation for persons with disabilities in all of these areas of life. It will require the creative development of methodologies to ensure that universal design standards are incorporated into buildings open to the public, the provision of services, and new information and communication technologies. It will also require the provision of individualized support measures and the promulgation and enforcement of procedural safeguards to secure the protection of basic rights and prevent future abuses.

Undoubtedly, full implementation of this paradigm shift will take time, resources, and commitment by every UN Member State. It will likewise take a wide diversity of forms in our many global communities. The Convention requires only that the process begins, that civil society be actively engaged in it, and that the inexorable shift in policy be from one of *exclusion* to one of *inclusion* in all aspects of community life.

abuse as they arose, as well as the vastly different challenges faced by States at different levels of development. It also wished to avoid the negative inference that anything not expressly included in a detailed provision was intended to be excluded. Thus, broadly exemplary terms with inclusive references and a higher level of generality were consistently preferred to overly-specific, narrowly-tailored ones or “lists” of abuse and standardized implementing measures. The choice and design of precise implementing measures is properly left to the discretion of States, in consultation with civil society and informed by the processes of constructive dialogue and information sharing envisioned by the supervisory framework established under the Convention. Again, this is a strength, not a weakness.

PROSPECTS FOR EFFECTIVE IMPLEMENTATION AND ENFORCEMENT

The four guiding principles enumerated above suggest that the prospects for effective enforcement of the Convention throughout the world are strong. Many States are already preparing for signature and ratification by raising awareness about the Convention and engaging civil society on the implementation process. Israel, for example, has already translated the Convention

“Given deeply entrenched attitudes and stereotypes about disability that have rendered many of the most flagrant abuses of the rights of persons with disabilities ‘invisible’ from the mainstream human rights lens, it was decided that the Disability Convention should encompass a holistic and comprehensive approach that considered the day-to-day lived reality of persons with disabilities.”

THE IMPORTANCE OF FLEXIBILITY

Finally, some commentators have chosen to focus not on what the Convention *says*, but rather on what it does *not* say. The Convention does not reference *every* widely-experienced abuse suffered by persons with disabilities, including many of those pressed in negotiations. Nor does it include detailed accessibility standards or concrete benchmarks of achievement in distinct social fields; rather, it leaves the development of such minimum standards, guidelines, and benchmarks to States Parties themselves, in consultation with civil society and in accordance with locally-relevant needs, priorities, and capabilities. This, however, is part of its *strength*, not its weakness.

Indeed, the Committee carefully avoided “shopping lists” and over-specification of details and standards as an agreed operational modality in the drafting process. It did so precisely to ensure that the Convention’s text would remain relevant and vital over time and space, capable of responding to new challenges and modes of

into Hebrew for broad distribution to relevant entities within and without government, and is establishing disability studies centers to train professionals about the principles and practices of implementing the Convention. Significantly, it is also developing a quantitative monitoring mechanism to track progress in the domestic implementation of both its domestic Equal Rights Law and the provisions of the Disability Convention.¹⁴ Other States are taking equally proactive and creative steps in their domestic jurisdictions.

At the regional level, the Organization of American States has declared 2006-2016 the “Decade of the Americas for the Rights and Dignity of Persons with Disabilities,” and, in consultation with civil society, is preparing a Program of Action establishing objectives and specific measures to be taken in the areas of education, employment, accessibility, and political participation.¹⁵ This regional program, established in broad strokes, must be supplemented by national plans, which in turn shall be drafted,

monitored, and implemented with the participation of civil society, particularly persons with disabilities.

The real key to implementation in all contexts, however, is the degree to which civil society-government dialogue is fostered and engaged to identify substantive areas of concern and remedial proposals. The Convention promotes such interactive domestic dialogue by requiring States Parties to designate one or more focal points (and a framework) for matters relating to the implementation of the Convention.¹⁶ The objective is to ensure that civil society knows *who* in government to contact for discussion. It likewise encourages States Parties to consider establishing a coordination mechanism within government to facilitate related action in different sectors and at different levels, in accordance with the particular legal and administrative system of the country.¹⁷ In so doing, civil society is to be fully involved in the monitoring process.¹⁸

The opportunities for effective international supervision are equally strong, although the actual mechanisms created under the Convention, as noted by many participants, are characterized by less creativity than had initially been hoped. Indeed, a priority of the Ad Hoc Committee had been to establish innovative new forms of international supervision that could hopefully serve as models for the larger UN treaty-body reform process under discussion. Unfortunately, such innovation was largely scuttled in the final session by a group of states flexing muscle in a politicized showdown unrelated to either international monitoring or persons with disabilities. The result was a UN Committee on Persons with Disabilities with formidable but standard powers: review of periodic state reports, issuance of general comments and recommendations,¹⁹ and — for States Parties to an Optional Protocol — an individual petitions process and inquiry procedure, with the possibility of onsite visits. These mechanisms are supplemented by a mechanism not enjoyed under other human rights treaties: a biennial Conference of States Parties.²⁰ Modeled on the similar procedure under the Mine Ban Treaty,²¹ it is designed to allow States Parties to meet regularly to discuss best practices, difficulties, needs, and other matters regarding implementation of the Convention. All of these supervisory procedures, if effectively engaged by social partner networks, will prove critical for bringing international attention to the best and worst ways rights are guaranteed in practice for persons with disabilities, and hence for stimulating domestic-level policy change in all countries of the world.

WHY THE U.S. SHOULD RATIFY

The United States has historically been in the global vanguard on disability issues. Given this leadership position, together with the U.S.'s strong commitment to democracy and civil society consultation, disability advocates were disappointed by the U.S. announcement that it did not intend to ratify the Disability Convention or to play an active role in the Ad Hoc Committee.²²

Two standard reasons are generally offered by administration officials for the decision not to ratify: the lack of value-added in ratification given strong existing U.S. protections for persons with disabilities (e.g., under the Americans with Disabilities Act, Individuals with Disabilities Education Improvement Act, Voting Rights Act, Rehabilitation Act, etc.) and constitutional constraints in a federal form of government. The frustration for U.S. disability advocates is that neither rationale is credible, nor are they internally consistent. Indeed, official U.S. treaty policy is precisely to postpone ratification *until* domestic implementing legislation has

been authorized by Congress.²³ Where such legislation is already in place — as the U.S. contends with respect to the Disability Convention, and as it did with respect to the International Covenant on Civil & Political Rights (ICCPR)²⁴ — there are no legal constraints to ratification. That is, under current U.S. policy, the existence of domestic implementing legislation is *a condition* for ratification, not a reason to reject it. In this context, the question of “value-added” is one that should be left to the disability community, which has clearly stated its desire for U.S. ratification.²⁵

Justifications based on concern about undue federal interference in state matters are equally unconvincing. Such concerns have not impeded the U.S. from adopting detailed federal disability legislation in many areas traditionally within the reserve of state power, including education, state and local elections, and town planning. Indeed, much of the legislation the U.S. now touts as *exceeding* the minimum guarantees in the Disability Convention falls into this area. Nor have federalism concerns stopped the U.S. from ratifying other treaties that similarly prohibit discrimination on the basis of disability, such as the ICCPR,²⁶ for which the Disability Convention may be viewed as *lex specialis*. Areas traditionally within the reserve of state power may, moreover, always be encumbered by federal legislation or treaty commitments in the exercise of constitutionally-delegated power, such as under §5 of the 14th Amendment, the Commerce Clause, or the Article II treaty power.²⁷ The relevant issue then is not one of constitutional constraints, but rather of state-federal comity. It is, however, precisely accommodation of this federalism-based sensitivity that underlies U.S. adherence to the non-self-execution doctrine — i.e., the requirement that any treaty-mandated change to U.S. law be implemented through the ordinary legislative process.²⁸ State-elected House and Senate representatives therein can give expression to state interests with respect to each piece of implementing legislation.²⁹ Given that the U.S. contends that appropriate implementing legislation is already in place, federalism-based comity concerns are simply not relevant to the ratification debate.

It is, however, the *affirmative* reasons why the U.S. should ratify that are most compelling. While the U.S. has historically been a global leader in disability issues — influencing the policies of many other countries — it is likewise true that there are significant gaps and lacunae that need to be filled in U.S. law, policy, and practice. We are doing well, but *we can do better*. The national monitoring and periodic reporting procedures under the Convention are designed precisely to routinize an internal process of continual self-awareness and self-reform that will help us become better in our domestic human rights protections. They will require us to take a good hard look at exactly where we are, project where we want to be, and begin a process of figuring out how, with all our human, financial, and technological resources, we can get ourselves there. In this sense, ratification is inherently a democracy-enhancing project, a basic exercise in reflective and deliberative self-governance. It is something that all Americans can support. While we have much to teach the world, particularly given our federal structure and the localized experimentation it fosters, we also have much to learn from it and its own diverse experiments. Ratification will allow us simultaneously to serve as a model for the rest of the world, projecting our commitment to the rights of persons with disabilities outward, while ensuring that we are in fact living up to that projection as a nation and social community of equals at home. In doing so, we make ourselves a stronger democracy: there is no excuse not to ratify. HRB

ENDNOTES: UN Disability Convention (Melish)

1 It will also likely affect how all future human rights treaties are negotiated. While the Ad Hoc Committee specified that the participatory modalities it adopted in relation to the Disability Convention “shall in no way create a precedent for other Ad Hoc Committees of the General Assembly,” U.N. Doc. A/58/118 & Corr.1 (2003), ¶ 15, the remarkable success of the modality suggests that it will likewise be adopted by future treaty-drafting committees in the human rights field.

2 Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) entered into force Sept. 2, 1990. Together with Somalia, the United States remains the only non-party among UN Member States.

3 See G.A. Res. 56/168, ¶ 1, U.N. Doc. A/RES/56/168 (Feb. 26, 2002) (establishing an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development”).

4 The Working Group was composed of representatives from 27 governments (designated by regional groups), 12 NGOs, and one national human rights institution.

5 Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Annex 1, available at <http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>. Technically, the Ad Hoc Committee Chair put forth a “Chair’s text” at the seventh session, updating the Working Group text with proposals receiving a high degree of support at subsequent sessions.

6 UN Enable, *The Plenary of the General Assembly adopted the Convention on the Rights of Persons with Disabilities*, available at <http://www.un.org/esa/socdev/enable/plenaryofga06.htm> (Dec. 13, 2006); see also Convention on the Rights of Persons with Disabilities and Optional Protocol, Dec. 13, 2006, available at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.

7 See *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, ¶¶ 10, 16, UN Doc. A/57/357 (2002), available at <http://www.un.org/esa/socdev/enable/rights/adhoca57357e.htm>.

8 *Id.* at ¶ 10.

9 Under the motto “Nothing about us, without us,” NGOs responded with enthusiasm, commitment, and a high degree of organization, actively engaging all aspects of the negotiations both individually and through a broad-based Disability Caucus. Composed of over 70 national, regional, and international NGOs, the Caucus was organized to ensure common lobbying positions, a shared agenda, and hence an efficient and effective presence.

10 Convention on the Rights of Persons with Disabilities, *supra* note 8, at art. 34.

11 Indeed, one of the first debates undertaken by the Ad Hoc Committee related to which treaty typology the Disability Convention should follow was whether it should be modeled on express non-discrimination treaties, such as CEDAW and CERD, without substantive elaboration of the content and scope of the protected rights for their holders, or should follow a holistic, comprehensive model, paralleling the CRC, in which the particular ways and contexts in which rights abuses are experienced in the day-to-day lived reality of distinct rights-holders are elaborated specifically. The Committee ultimately adopted a hybrid approach. Toward this end, the treaty title “comprehensive and inte-

gral,” initially specified by the General Assembly itself in establishing the Ad Hoc Committee, was used — and repeatedly recalled — in all eight sessions of the Committee, dropped only for brevity’s sake in the final approved draft.

12 See, e.g., Gerard Quinn & Theresia Degener, *Human Rights and Disability: The current use and future potential of UN human rights instruments in the context of disability* (2002), available at <http://www.nhri.net/pdf/disability.pdf> (describing the failure of the UN treaty body system to address effectively the rights of persons with disabilities).

13 See Convention on the Rights of Persons with Disabilities, *supra* note 8, at arts. 13–33.

14 Statement by Dr. Dina Feldman, Ministry of Justice, State of Israel, during the adoption of the Convention on the Rights of Persons with Disabilities (61st Session of the General Assembly, United Nations, Dec. 13, 2006), available at <http://www.un.org/esa/socdev/enable/convstatementgov.htm#il>.

15 See, e.g., OAS Permanent Council, Committee on Juridical and Political Affairs, *Program of Action, Decade of the Americas for Persons with Disabilities* (2006–2016), OEA/Ser.G, CP/CAJP-2362/06 corr.1 (2006).

16 See Convention on the Rights of Persons with Disabilities, *supra* note 8, at art. 33(1) & (2).

17 *Id.* at art. 33(2).

18 *Id.* at art. 33(3).

19 *Id.* at arts. 34–38.

20 *Id.* at art. 40.

21 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 11, Sept. 18, 1997, available at <http://www.un.org/millennium/law/xxvi-22.htm>.

22 Announced at the Ad Hoc Committee’s second session in 2003, the position was partially reversed only at the seventh session in January 2006, at which the US delegation was authorized to take a more dynamic role in the Ad Hoc Committee. Its position on ratification remained unchanged.

23 See *Core document forming part of the reports of States parties: United States* [hereinafter *U.S. Core Document*], ¶¶ 156–57, U.N. Doc. HRI/CORE/USA/2005 (Jan. 16, 2006).

24 *Id.* at ¶157.

25 The “value added” debate should also take account of the undisputed foreign policy benefits of ratification, as well as the ability of the U.S. to nominate and elect national experts to sit on the UN monitoring committee.

26 International Covenant on Civil and Political Rights, G.A. Res. 2200A, ¶ 21, U.N. Doc. A/6316 (1966). The U.S. ratified the ICCPR in 1992.

27 See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920) (finding that federal treaty power is not limited by the scope of congressional authority over domestic matters).

28 See U.S. Core Document, at ¶¶ 153 (“[Despite *Missouri v. Holland*], the expectation has been that any changes to United States law required by treaty ratification will be accomplished in the ordinary legislative process.”).

29 For views that this requirement is in fact “anticonstitutional” given the Framers’ intent to bypass House participation in the law-making-by-treaty process, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int’l L. 341, 346–47 (1995).

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