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

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

Worldwide, roughly 650 million people have disabilities. 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." 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." Experts claim disability is relegated to the lowest ebb of consideration by member-states of the UN.

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. Some countries now include provisions in their constitutions prohibiting discrimination on the basis of disability. And in 2002 the UN, recognizing the wide-scale discrimination persistently experienced by individuals with disabilities, formed an Ad Hoc Committee (the Committee) to begin drafting a comprehensive treaty to finally recognize rights for all individuals with disabilities.

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.

"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. Furthermore, only a limited number of countries have ratified these instruments, and regionally developed conventions restrict which states may become parties.
Earlier international agreements pertaining to disability rights do form a foundation for the comprehensive recognition of the rights of individuals with disabilities. Some examples include the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, the Declaration on the Rights of Mentally Retarded Persons, and the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. Other regional instruments also inform a comprehensive recognition of the rights of the disabled by addressing vocational, rehabilitative, and employment training needs, and prohibiting all forms of discrimination on the basis of disability.

Notwithstanding these instruments, six other international documents not specifically focused on disability-related matters are worth noting. 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.

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. 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.

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.” 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.

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.” Further, it provides that private entities offering services to the general public must “take into account all aspects of accessibility.”

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. 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.

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.

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." 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. 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." 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 did not have enough information or expertise on issues of technology and universal design" to incorporate them into the Convention. 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."

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 "adding less than one percent to the construction costs." 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. The U.S. offered technical assistance to the Ad Hoc Committee, but the Committee did not elect to consider design standards.

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. 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." 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. 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. 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. 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.

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 U.S. Among other requirements, the ABA requires accessible design and construction of certain federal government facilities. 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.

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. The Act contains provisions for determining employment discrimination by federal agencies, requires affirmative action and prohibits employment discrimination by contractors and subcontractors utilized by the federal government, and establishes accessibility requirements for electronic and information technology developed, procured, maintained, or used by the federal government.

In 1990, the most expansive requirements prohibiting discrimination against individuals with disabilities became law. The Americans with Disabilities Act of 1990 (ADA) recognizes
protection from discrimination on the basis of disability as a civil right,\textsuperscript{54} prohibits, in some circumstances, private and public employment discrimination, requires equal access to services,\textsuperscript{55} promotes the construction of accessible buildings, and requires removal of existing physical barriers, where appropriate.\textsuperscript{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.\textsuperscript{57}

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.”\textsuperscript{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.\textsuperscript{59} Additionally, this law aims to specifically assist other minority students including American Indian and Alaskan Native children living with disabilities.\textsuperscript{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.\textsuperscript{61} This law provides, among other requirements, access to the voting process for individuals with disabilities.\textsuperscript{62} In fiscal years 2002 through 2004, fifteen million dollars in federal funding was spent to improve access to voting for people with disabilities.\textsuperscript{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.\textsuperscript{64}

In 2004, President George W. Bush established the New Freedom Initiative (NFI).\textsuperscript{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 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.\textsuperscript{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-
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.

ENDNOTES: UN Disability Convention (Justesen and Justesen)


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


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


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 15, 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.


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

21 See Quin & Degener, Human Rights and Disability.
22 Id.; Quin 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.
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.
32 Elements for a future UN Comprehensive and Integral Convention to Promote 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.
35 Id.
36 Id.
38 36 C.F.R.1190, 1191.
41 Id., art. 34.
42 Id.
43 Statement by Ralph F. Boyd, Jr.