

**The Association of the Bar of the City of New York  
Committee on Legal Issues Affecting People with Disabilities**

**The United Nations Convention  
on the Rights of Persons with Disabilities**

**I. Introduction**

The United Nations Convention on the Rights of Persons with Disabilities (“the Convention” or “CRPD”) became binding international law on May 3, 2008, an historic event that promises to improve the lives of some 650 million people with disabilities throughout the world. The Convention has been called “revolutionary” by some commentators for its holistic and visionary approach to disability, rejecting the traditional individual, physical, and medical model for one that views disability as the consequence of the impaired individual’s interaction with an unaccommodating society.

The CRPD is noteworthy in several respects: it is the first human rights treaty of the 21<sup>st</sup> Century, it was negotiated in record time (fewer than five years), and had record input from people with disabilities acting under the umbrella of the International Disability Caucus, an advocacy organization.<sup>1</sup> In little more than one year after being opened for signature, having been ratified by more than the requisite twenty nations, the CRPD became a legally-enforceable treaty. As is set forth at Part IV of this report however, the United States - - although it did participate in the negotiating sessions - - has thus far chosen not to ratify the CRPD.

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<sup>1</sup> The text of the Convention, reports of the negotiating sessions leading to its completion, lists of the myriad non-governmental organizations participating in the sessions, lists of the countries that have signed and ratified the Convention, and a wealth of additional background information are available at [un.org/esa/socdev/enable](http://un.org/esa/socdev/enable).

Part II of this report summarizes the CRPD's provisions. Part III compares key provisions of the CRPD with United States law. Part IV discusses the CRPD's significance and concludes with a recommendation that it be ratified by the United States.

## **II. Summary of the Convention's Provisions**

The CRPD consists of a Preamble setting forth its visionary philosophy, and fifty Articles. The first five Articles (sometimes referred to as "Cornerstone Principles"<sup>2</sup>) state the Convention's purpose, define key terms, articulate fundamental principles, and establish the general obligations of ratifying nations (called "States Parties"). Articles 6 through 30 set goals and mandates regarding civil and political rights (Articles 12 through 20) and economic, social, and cultural rights (Articles 22 – 30); they also contain several "tailored" provisions covering specific matters such as natural disasters and emergency planning. The remaining Articles address the Convention's monitoring and enforcement mechanisms and other procedural issues (Articles 31 through 50).

A United Nations oversight committee ("the Committee") is created at Article 34 to monitor compliance with the Convention. An Optional Protocol accompanying the Convention establishes Committee procedures for addressing complaints of Convention violations made against particular States Parties. By ratifying the Optional Protocol, a State Party consents to the Committee's jurisdiction to address such complaints; in the absence of such ratification, the Committee will not receive or consider complaints regarding that State Party.

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<sup>2</sup> Professor Maya Sabatello lecture, NYC Bar Association, Committee on Legal Issues Affecting People with Disabilities, February 13, 2008 ("Sabatello").

The Convention neither creates a private right of action nor requires State Parties to create such a right. Instead, enforcement of the Convention's requirements occurs through the reporting and monitoring mechanisms created in Article 34 and -- if the Optional Protocol has been ratified by a particular State Party - - by the Committee's responses to complaints against that State Party from individuals or groups.

The Convention was opened for signature by all States (and regional organizations) on March 30, 2007. (Article 42). It then became subject to ratification by signatory States Parties, confirmation by signatory regional organizations, and "accession" by non-signatory States. The Convention "entered into force," *i.e.*, became binding international law, 30 days after ratification or accession by twenty States had occurred (Article 45), and the Optional Protocol also became effective, having been ratified by more than ten States. When this paper went to press, the Convention had been signed by one hundred and thirty-six States and ratified by forty-one States, and the Optional Protocol had been signed by seventy-nine States and ratified by twenty-five States.

The Convention's key provisions are summarized below.

### **The Preamble**

Notably, the Convention's authors were unable - - due to philosophical differences - - to agree on a definition of "disability."<sup>3</sup> The resulting compromise was to define it parenthetically at paragraph (e) of the Preamble and to offer another non-exhaustive definition in the body of the Convention (see the discussion of Article 1, below). The Preamble states:

*"Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental

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<sup>3</sup> Sabatello; *see also* [conventionyes.org/content.cfm?ID=58547F](http://conventionyes.org/content.cfm?ID=58547F), International Disability Caucus News Page posted on Feb. 1, 2006.

barriers that hinders their full and effective participation in society on an equal basis with others, . . .”

This description of disability as not an individual’s condition but rather the flawed interaction between that impaired condition and society’s adaptation to it, departs radically from conventional thought and is a core concept of the Convention.

The Preamble identifies myriad factors underscoring the need for the Convention, including each individual’s inherent dignity, worth, and right to equality; the importance of mainstreaming disability issues as part of strategic development; the need to fight discrimination and to protect human rights; the need to improve the living conditions of persons with disabilities; the importance of autonomy and self-determination; the particular risks faced by women and children with disabilities; the majority of persons with disabilities live in poverty; the crucial need to make all spheres of life accessible to persons with disabilities; and the key importance of the family. This recitation culminates in the Preamble’s final paragraph, which expresses the drafters’ confidence in the Convention’s salutary impact:

*Convinced* that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries, . . .

### **Article 1: Purpose**

The Convention’s purpose is stated in sweeping language: “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

“Disability” is then partially defined:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

## **Article 2: Definitions**

Five terms are given broad definitions here, including “reasonable accommodation,” which is described as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” The concept, critical to the Convention, of “universal design” is defined as the design of products, environments, programs, and services which do not require additional adaptation for use by all persons.<sup>4</sup> Finally, “discrimination on the basis of disability” is defined to include conduct which has the purpose *or effect* of denying equal rights and freedoms.

## **Article 3: General principles**

Echoing the concepts highlighted in the Preamble, eight core principles of the Convention are identified: Respect for the individual’s inherent dignity, autonomy, and independence; non-discrimination; full participation in society; respect for human diversity; equality of opportunity; accessibility; gender equality; and children’s rights.

## **Article 4: General obligations**

This Article speaks generally to States Parties’ obligations to prevent discrimination against, promote accessibility by, and work to achieve full realization of economic, social, and cultural rights for persons with disabilities.

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<sup>4</sup> This concept has relevance to the current debate within the United States about how to revamp our currency so as to make bills of different denominations distinguishable from one another to the blind, as a federal appeals court has recently ruled is required. *Am. Council of the Blind v. U.S. Treasury*, 525 F.3d. 1256 (C.A.D.C. 2008).

### **Article 5: Equality and non-discrimination**

The Convention here stresses the right of individuals with disabilities to equal protection and benefit of the law, prohibits discrimination, and requires that reasonable accommodation be provided. Notably, “affirmative action” measures, such as preferential treatment to achieve equality, are explicitly barred being characterized as (reverse) discrimination. (subsec. 4.)

### **Article 6: Women with disabilities; Article 7: Children with disabilities**

These two Articles note that females with disabilities are doubly victimized by discrimination, and that in matters affecting children with disabilities, the best interests of the child should be paramount and the child’s views and preferences should be respected to the extent appropriate.

### **Article 8: Awareness-raising**

States Parties are obligated to undertake educational campaigns to eliminate discrimination against and foster respect for persons with disabilities.

### **Article 9: Accessibility**

One of the Convention’s key provisions, this Article mandates equal access for persons with disabilities to the physical environment, transportation, information and communication including the Internet, and all facilities open to the public. Braille signage is encouraged, as is early incorporation of accessible technology into technology system design.

Space limitations do not allow for discussion of each of the remaining substantive Articles of the Convention. Section III of the Report highlights specific Articles of particular interest to lawyers in the United States.

The “procedural” Articles require States Parties to collect data on their implementation efforts and report periodically on their progress to the international Committee established in

Article 34. The Committee, consisting initially of twelve experts to be elected by the States Parties, in turn makes recommendations to States Parties and submits biennial reports to the United Nations. (The Committee also addresses complaints made against particular States Parties which have ratified the Optional Protocol.) In addition to the Committee, the Convention also establishes a Conference of States Parties to be held regularly.

With respect to monitoring compliance with the Convention, it is noteworthy that the Convention requires States Parties to ensure full participation of persons with disabilities and their representative organizations in the monitoring process.

Finally, Article 46 permits Reservations to accompany a State's ratification of the Convention, so long as the Reservations are not incompatible with the Convention's object and purpose.

### **III. Comparison of CRPD Provisions with U.S. Law**

#### **Article 7. Children's Rights**

Several provisions of the CRPD differ from federal laws in the United States relating to the rights of children with disabilities.

In the realm of education, the CRPD contains a more robust vision for educating children with disabilities than the primary U.S. statute related to education for children with disabilities, the Individuals with Disabilities Education Act ("IDEA").<sup>5</sup> The CRPD provides that on the basis of equal opportunity, States Parties must ensure an education system directed, *inter alia*, to developing to their "fullest potential" the mental and physical abilities of persons with

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<sup>5</sup> See, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)* at 20-21. National Council on Disability, May 12, 2008, ("NCD Report"). The NCD is an independent federal agency composed of members appointed by the President of the United States, by and with the advice and consent of the U.S. Senate. The NCD provides advice to the President, Congress, and executive branch agencies to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

disabilities.<sup>6</sup> This systemic objective of developing the child with disabilities’ “fullest potential” is absent from the IDEA (in contrast to its inclusion in other domestic education law)<sup>7</sup> and, depending on how it is interpreted, could conceivably have budgetary consequences for school districts. However, in articulating the rights of individual children as opposed to aspirational principles, the CRPD is similar to the IDEA, stating that children with disabilities have the right to a free, quality education.”<sup>8</sup>

Article 7 of the CRPD also contains key concepts drawn directly from the Convention on the Rights of the Child, which was adopted in 1989. These concepts in turn intersect with the CRPD’s core principles of autonomy and independence for persons with disabilities. Children are given the power to express their views on all matters affecting them, albeit weighted in accordance with their age and maturity.<sup>9</sup>

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<sup>6</sup> UNCRPD, Article 24(1) (“States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education at all levels and lifelong learning directed to...(b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential”).

<sup>7</sup> See, e.g., No Child Left Behind Act of 2001 § 1234(a) (“In carrying out an Even Start program under this subpart, a recipient of funds under this subpart shall use those funds to...assist children in reaching their full potential as learners...”); § 1802 (“The purpose of this part is to provide for school dropout prevention and reentry and to raise the academic achievement levels by providing grants that...(1) challenge all children to attain their highest academic potential...”).

<sup>8</sup> UNCRPD, Article 24 (2)(b)(“States Parties shall ensure that...[p]ersons with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live”). The IDEA similarly grants a “free appropriate public education.” 20 U.S.C. § 1400(d)(1)(A)(2005). The Supreme Court has held that a child’s educational programming need only be calculated to provide some educational benefit to the child, rather than to ensure that the child reaches his or her maximum educational potential. *Board of Education v. Rowley*, 458 U.S. 176 (1982). Although it is not clear how the CRPD’s language requiring a “quality” education will be interpreted, it appears that the CRPD’s provision regarding “fullest potential” is limited to systemic objectives, and would not apply on an individual rights basis.

<sup>9</sup> UNCRPD, Article 7(3) (“States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”).



The protections found in Article 7 are meant to be horizontally integrated across all other provisions of the Convention.<sup>10</sup> Thus, the CRPD provides children with disabilities the right to express their views freely and assist in decisions regarding what constitutes an appropriate education. Moreover, importantly, the CRPD specifies that children shall be provided with “disability and age-appropriate assistance to realize that right.”<sup>11</sup> This model of “supported” decision-making, as opposed to “substituted” decision-making, is a key component of increased autonomy for persons with disabilities found throughout the CRPD.<sup>12</sup> The CRPD recognizes the importance of developing this decision-making power early in the life of a person with a disability.

Although the IDEA anticipates that students’ interests will be taken into account in planning for the transition from the secondary education system to adulthood, the IDEA generally does not require input from the children with disabilities themselves for aspects of primary or secondary education. For example, under the IDEA students are not required or encouraged to be present at Individualized Education Plan (IEP) planning meetings that map out and determine the content and structure of all educational programs and services for the academic year.<sup>13</sup> Multiple considerations are taken into account when formulating this plan,

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<sup>10</sup> Michael Ashley Stein, A QUICK OVERVIEW OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLICATIONS FOR AMERICANS WITH DISABILITIES, 31 *Mental & Physical Disability L. Rep.* 679, 679 (2007) (“Stein Overview”).

<sup>11</sup> UNCRPD, Article 7(3).

<sup>12</sup> Arlene Kanter, remarks made at American University Washington College of Law conference entitled, “The New UN Disability Rights Convention: Building Support in the United States for Ratification and Implementation,” April 9, 2007. This child-centered concept of decision-making is found in other areas of law where similar interest exists in ensuring that children’s voices are heard and the perspective of the child is taken into account. *See, e.g.*, Linda D. Elrod, CLIENT-DIRECTED LAWYERS FOR CHILDREN: IT IS THE “RIGHT” THING TO DO, 27 *Pace. L. Rev.* 869 (2007).

<sup>13</sup> Under the IDEA, the child is allowed to participate “whenever appropriate,” however, the child is not a required member of the IEP development team. 20 U.S.C. § 1414(d)(1)(B)(vii). The interests of the child are only taken into account for purposes of developing a transition plan to post-secondary activities and these services begin to be developed at age sixteen. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) and 20 U.S.C. § 1401(34)(B) (transition services are in part based on “the child’s strengths, preferences, and interests”).

including the concerns of the parent, but the perspective of the child is notably absent.<sup>14</sup>

Parents are given directly enforceable rights with respect to the child under the IDEA, and parents are given full decision-making authority until the child reaches the age of majority.<sup>15</sup>

### **Article 12. Equal recognition before the law**

Much like Article 7 (Children’s Rights), Article 12 mandates a “supported decision-making” approach in place of the “substituted decision-making” approach that characterizes prevailing American law in the context of persons with disabilities who are unable to exercise full legal capacity. Were the Convention to gain the force of law in the United States, some commentators believe that Article 12 could alter dramatically the landscape of guardianship and other law concerning the representation of persons with disabilities, opining that the Article is “the most revolutionary of the new norms” reflecting a profound paradigm shift in society’s approach to such issues.<sup>16</sup>

Article 12 affirms that persons with disabilities shall enjoy legal capacity on an equal basis with others in all spheres of life, and requires that States Parties provide “the support they may require” in exercising their legal capacity. It is this phrase that some human rights activists have embraced as prohibiting mandatory guardianships, *i.e.*, the appointment of a guardian against one’s will who then is empowered to make critical decisions for the person with disabilities, and permitting instead only “support” to the person with disabilities. Under this interpretation, it has been argued that the concept of “therapeutic necessity” may no longer

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<sup>14</sup> 20 U.S.C. §§ 1414(d)(3)(A) &(B).

<sup>15</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). *See, also, Winkelman v. Parma City School District*, 127 S.Ct. 1994, 1996 (U.S. S.C. 2007).

<sup>16</sup> T. Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 *Syr. J. of Intnat’l Law & Commerce* 405, 408 (2007) (“Minkowitz”).

justify forced medication or other psychiatric treatment and prevent those interventions from being considered “torture”.<sup>17</sup>

The Article further requires safeguards to ensure that all measures relating to the exercise of legal capacity “respect the rights, will and preferences of the person,” “are free of conflict of interest and undue influence,” and are proportional to the particular circumstances, limited in duration, and subject to regular review by an independent entity.

Finally, Article 12 mandates the equal right of persons with disabilities to own, keep, and inherit property, control their own financial affairs, and have access to all forms of financial credit.

During the drafting of Article 12, vigorous debate ensued over a footnote that would have limited Article 12’s sweep by restricting the meaning of “legal capacity” in three of the six official U.N. languages to “capacity for rights,” thus excluding “capacity to act”; ultimately the footnote was omitted from the Convention.<sup>18</sup> (However, the countries favoring the footnote may try to achieve a similar result by adding Reservations to the Convention pursuant to Article 46.)

Notwithstanding Article 12’s potential impact on practices throughout the world, it does not appear to differ significantly from the laws concerning legal capacity and guardianship in the United States, at least as it has developed in New York (these areas being creatures of state law). In 1986, the New York Court of Appeals held that the due process clause of the State Constitution affords involuntarily committed mental patients the fundamental right to refuse antipsychotic medication, using language quite similar to that of CRPD’s Article 12:

In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who

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<sup>17</sup> Minkowitz.

<sup>18</sup> Minkowitz, at 411.

must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires. . . . This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness.<sup>19</sup>

Moreover, the Court, citing “the nearly unanimous modern trend in the courts,” rejected the notion that an involuntarily committed mental patient is presumptively incompetent to exercise his or her right to make treatment decisions.<sup>20</sup>

Since the overhaul of its laws in 1993, New York has taken a progressive approach to guardianship issues resembling that of Article 12, which stresses the fundamental importance of human autonomy, independence, and self-determination, the need for the least restrictive guardianship as possible, and the need for vigilant oversight.<sup>21</sup> That said however, the powers of a guardian (after appointment in accordance with due process) are sweeping. A guardian appointed to provide for “personal needs” may include the ability to consent to or refuse routine major medical or dental treatment, or choose a place of abode, *e.g.*, a nursing home.<sup>22</sup>

It is unclear how the “supported decision-making” paradigm of CRPD Article 12 will work in practice, particularly in cases where a mentally ill person is found to be unable to

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<sup>19</sup> *Rivers v. Katz*, 67 N.Y.2d 485, 493 (2d Cir. 1986) (cits. quoting Mass., Illinois, and Okla. State courts omitted).

<sup>20</sup> *Id.* at 494 (collecting cases so holding from Ohio, Arizona, Kentucky, Massachusetts, and Oklahoma).

<sup>21</sup> Article 81 of New York Mental Hygiene Law; see also, *e.g.*, [www.cqc.state.ny.us/counsels\\_corner/cc40htm](http://www.cqc.state.ny.us/counsels_corner/cc40htm).

<sup>22</sup> See <http://home.rochester.rr.com/rec/guardianship.htm>: “Depending on what the evidence shows about the likelihood of harm, the judge then appoints a ‘guardian for property management’ to administer the person’s finances, a ‘guardian for personal needs’ to make decisions about the individual’s personal life, or a ‘guardian of the person and property’ responsible for both finances and personal matters. At times, the court may appoint two separate guardians, one for finances and one for personal needs. Although the powers given by the court may be quite sweeping, the guardian must still allow the incapacitated person ‘the greatest amount of independence and self-determination’ in light of the individual’s “functional level,” and “personal wishes, preferences and desires.” Even if authorized to decide where the incapacitated person lives, the guardian cannot have the person transferred to a nursing home unless the court order specifically approved such a transfer. If the guardian concludes that the person should be in a nursing home, the guardian must go back to court for a separate order authorizing admission to a nursing home.”

make decisions regarding medication, treatment or other matters. As the CRPD is implemented, U.S. policymakers will study with interest the approaches taken by States Parties to resolve these issues.

### **Article 13. Access to Justice**

Article 13 of the Convention addresses access to justice for people with disabilities. It reads:

- 1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- 2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13's broad mandates differ in some respects from the piecemeal proscriptions contained in various United States statutes concerning access to justice, namely, the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act ("Section 504"), the Fair Housing Act, and the Architectural Barriers Act. For purposes of this report, Section 504 and the ADA are essentially interchangeable: Section 504 governs the federal government and grantees, while the ADA primarily added coverage to the States and state programs, private employers, and private places of public accommodation.

The ADA<sup>23</sup> protects people with disabilities from discrimination by governmental and private entities in many spheres of life, including access to justice. The ADA's language is mandatory, though competing financial pressures may excuse governments from redressing

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<sup>23</sup> 42 U.S.C. § 12101, *et seq.*

problematic situations. Title II of the ADA prohibits exclusion from state and local governmental programs, services, and activities. 42 U.S.C. § 12132 states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Under the ADA, a “public entity” includes any state or local government, any department, agency, or instrumentality of such government(s) (as well as AMTRAK and commuter rail agencies).<sup>24</sup>

The Architectural Barriers Act, passed in 1968, requires that new facilities built with federal funds (such as courthouses) be accessible to people with disabilities. The federal government and entities receiving federal financial assistance are also covered under nearly identical language in Section 504 of the Rehabilitation Act of 1973.<sup>25</sup> These provisions - - requiring “program” but not in all cases architectural accessibility - - effectively require a substantial degree of architectural accessibility in buildings built, renovated, purchased, leased, or otherwise used by local and state governments, and (under Section 504 and the Architectural Barriers Act) the federal government, as well as by entities receiving federal financial assistance (frequently schools and universities). A public entity is required to “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities”.<sup>26</sup> These provisions cover a wide array of programs requiring access for people with a broad range of

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<sup>24</sup> 42 U.S.C. § 12131.

<sup>25</sup> “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794.

<sup>26</sup> 28 C.F.R. § 35.133(a).

disabilities, including not only mobility impairments, but also hearing, vision and cognitive impairments, to all services provided and to public meetings.

The requirements of Titles I and II of the ADA, and of Section 504, extend throughout the judicial system, including employment, jury service, trial procedures and court room accessibility. Required modifications, in addition to curing obvious physical impediments, might include provision of sign language interpreters, use of microphones or modifications to acoustic environments for people with communication disabilities, and readers and facilitators for people with visual disabilities. “Implicit and paramount to accessibility is training staff in effective communication styles and disability awareness and on the correct use and maintenance of equipment.”<sup>27</sup>

Two recent Supreme Court decisions have rejected Eleventh Amendment sovereign immunity defenses asserted by States, upholding the ADA’s application to state conduct related to access to justice. In *Tennessee v. Lane*, the Court held that Congress had gathered sufficient evidence of fundamental rights violations against people with disabilities, including denial of access to a court, to warrant abrogation of Tennessee’s sovereign immunity.<sup>28</sup> Further, the remedy Congress enacted was held “congruent and proportional,” because the “reasonable accommodations” mandated by the ADA were not unduly burdensome and disproportionate to the harm. *Id.* In *Goodman v. Georgia*, the Court held that prisoners’ claims brought under Title II of the ADA for damages against a State for conduct actually violative of the Eighth and Fourteenth Amendments are not barred by state sovereign

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<sup>27</sup> Jo Williams, *Communication Accessibility in the Courts* at 2, National Center for State Courts, 2002. Available at [http://www.ncsconline.org/WC/Publications/CS\\_ADAAccFairnessPub.pdf](http://www.ncsconline.org/WC/Publications/CS_ADAAccFairnessPub.pdf).

<sup>28</sup> 541 U.S. 509 (2004).

immunity.<sup>29</sup> Thus, although sovereign immunity remains a viable defense to ADA claims challenging other state and municipal conduct under the current Court's approach,<sup>30</sup> as to injunctive relief for core governmental functions such as providing access to court, public hearings, and corrections, the ADA is on stronger footing.

Falling within the definition of "government programs," police activity is also covered by the ADA. "The ADA requires law enforcement agencies to make reasonable modifications in their policies, practices, and procedures that are necessary to ensure accessibility for individuals with disabilities, unless making such modifications would fundamentally alter the program or service involved."<sup>31</sup> The DOJ provides materials for police departments to use in their training of officers so that they understand their obligations to people with disabilities. Compliance levels are unknown. Similar requirements apply to prisons. It remains to be seen how effective *Goodman, supra*, will be in spurring changes in state prisons.

Even if the U.S. were to ratify the CRPD, sovereign immunity would remain an important limitation on its power and that of any implementing legislation, with regard to state conduct. Congress is not authorized under the Treaty Power to abrogate sovereign immunity. Were the United States to enter into the Convention, to fully implement its requirements within each state would require Congress to pass legislation under the Fourteenth Amendment, with the rigorous findings required by the current Supreme Court, to

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<sup>29</sup> 544 U.S. 1031 (2005). Addressing the inmates' allegations of lack of access to various facilities and services, the Court rejected the state's claim of sovereign immunity as to claims deserving of constitutional protection, but remanded to determine what those were.

<sup>30</sup> The Court has rejected the ADA's reach to protect state employment under the Equal Protection Clause. *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Title I of the ADA was unconstitutional insofar as it allowed states to be sued by private citizens for money damages in employment cases.) *Garrett* held that Congress had not met the congruent-and-proportional test—*i.e.*, that it had not amassed enough evidence of discrimination on the basis of disability to justify the abrogation of sovereign immunity.

<sup>31</sup> See *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*. U.S. Department of Justice. Available at [http://www.usdoj.gov/crt/ada/q&a\\_law.htm](http://www.usdoj.gov/crt/ada/q&a_law.htm).



enable effective private enforcement - - an unlikely prospect. Instead, in all likelihood, the constraints of sovereign immunity would be noted in the reservations should the United States sign and ratify the treaty.

That said, and notwithstanding the above-described U.S. statutory scheme requiring access to justice, the CRPD would nonetheless strengthen enforcement of these rights. Lax enforcement in general, and the absence of effective retroactive relief under the ADA in particular, have been factors in preventing greater improvements in physical and program accessibility by the states. According to the National Council on Disability, “despite broad protective mandates [in current US domestic law], there are reasons to be concerned about the extent to which individuals with disabilities receive full and meaningful access to justice in practice.”<sup>32</sup> The Convention’s requirement that “States Parties shall ensure effective access to justice” might compel the federal government to exercise more proactively its power to require state compliance than it has under the ADA. Advocates could use these Convention requirements to press for needed changes in state legislatures and Congress, as well as within the federal Department of Justice. The Convention’s reporting requirements could also serve to highlight existing problems. For example, while the federal courts have undertaken reviews of accessibility of federal courts and their procedures,<sup>33</sup> only a minority of states have undertaken such reviews. Efforts to improve accessibility in courts have therefore been haphazard; while one county may undertake such a review, its neighboring county may not. More muscular federal enforcement - - spurred on by the CRPD - - could redress this problem.

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<sup>32</sup> NCD Report at 13.

<sup>33</sup> The Access Board, a federal agency which is responsible for formulating standards and guidance on accessibility, has produced a report documenting accessibility design and procedures for courthouses. See Report of Courthouse Access Advisory Committee, November, 2006. Available at <http://www.access-board.gov/caac/report.htm>.

## **Article 19. Living independently and being included in the community**

Article 19 provides a strong, positive enunciation of the right of people with disabilities to live independently within the community. It reads:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs

The holistic approach of Article 19 contrasts dramatically with the piecemeal efforts of the U.S. to encourage inclusion in the community of people with disabilities.

In 1999, the United States Supreme Court held in *Olmstead v. L.C.*,<sup>34</sup> that the unnecessary segregation of individuals with disabilities in institutions may constitute discrimination based on disability. The Court ruled that the ADA requires - - with some caveats - - states to provide community-based services rather than institutional placements for individuals with disabilities.

The ADA and its implementing regulations generally require services to be provided “in the most integrated setting appropriate to the needs of qualified individuals with disabilities,”<sup>35</sup> and undue institutionalization qualifies as discrimination “by reason of ...

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<sup>34</sup> 527 U.S. 581 (1999).

<sup>35</sup> 28 CFR § 35.130(d).

disability.”<sup>36</sup> The *Olmstead* Court therefore required states to provide community-based services where medically appropriate, subject to a “fundamental alteration” defense relating to financial constraints. After *Olmstead*, states are generally required to provide in community-based settings all services available in institutional settings. These might include medical, psychiatric, vocational, and other services, in addition to housing.

Despite the great promise of *Olmstead*, few states have made substantial progress in providing more community-based options. Financial policy in the area is complicated, but in short, too frequently federal and state funding remains geared to institutional care.<sup>37</sup> Health and Human Services (HHS) has recently begun providing states with funding that “follows the person” rather than paying institutions, an initiative intended to enable states to develop community-based services; the program’s size, however, is limited. “Despite much talk about state and federal efforts to promote community integration after *Olmstead*, many individuals with disabilities have found that the only means of securing an opportunity to move to more integrated settings in the foreseeable future is through litigation.”<sup>38</sup>

As recognized by Article 19, community- integrated housing for people with disabilities is equally essential to achieving their full inclusion into society. Governmental involvement in this area is vital, because affordable accessible private housing is scarce or non-existent. The Fair Housing Act, as amended in 1988, prohibits housing discrimination against persons with disabilities and other protected groups, and covers housing that is privately-owned,

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<sup>36</sup> 42 U.S.C. § 12132.

<sup>37</sup> Also see New York City Bar Association’s Committee on Legal Issues Affecting Persons with Disabilities *Legislative Memorandum on Medicare’s In-the-Home Restriction*. February, 2008. [www.nycbar.org](http://www.nycbar.org).

<sup>38</sup> Jennifer Mathis, *Olmstead: Where Are We After Five Years?*, Judge David L. Bazelon Center for Mental Health Law (2005). Available at: [http://www.bazelon.org/issues/disabilityrights/incourt/olmstead/olmstead\\_after\\_five\\_years.html](http://www.bazelon.org/issues/disabilityrights/incourt/olmstead/olmstead_after_five_years.html). Indeed, such litigation is pending in the Eastern District of New York. *Joseph S. v. Hogan*, \_\_F.Supp.2d \_\_, 2008 WL 2403698 (E.D.N.Y. 2008, Mag. J. Gold), 6/2/08 NYLJ, p. 24 (sustaining claims by individuals with mental illness that their placement in nursing homes rather than community-based treatment programs violates the “integration mandates” of the ADA and Section 504 as interpreted by *Olmstead*).

receives Federal financial assistance, or is provided by State and local governments. The Fair Housing Act requires owners to make reasonable exceptions in their policies and operations to afford people with disabilities equal housing opportunities. It also requires landlords to allow tenants with disabilities to make reasonable access-related modifications to their private living space, as well as to common use spaces. The landlord is typically not required to pay for reasonable modifications, though federal funding may be available for modifications to common areas. Minimal accessibility requirements apply to new (or otherwise covered) multi-family housing so that it is “usable” by people with disabilities. The Fair Housing Act and the ADA have also been held to bar discriminatory governmental policies and zoning regulations restricting group homes for people with disabilities to certain limited areas.<sup>39</sup>

Prohibitive housing costs compound the difficulties created by inaccessibility for people with disabilities. The national average rent for a one-bedroom unit climbed to \$715 per month and the studio/efficiency unit rent to \$633 per month in 2006 – both higher than the entire monthly income of people with disabilities who rely on the federal Supplemental Security Income (SSI) program.<sup>40</sup> In many communities, even where states augment the amount, local rents still exceed these supports. Because of the absence of affordable private housing, people with disabilities may be forced to live in supportive housing, and thus too frequently in isolation.

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<sup>39</sup> See, e.g., *Jeffrey O. v. City of Boca Raton*, 511 F.Supp.2d 1339 (S.D. Fla. 2007) (City ordinance that prohibits sober living residences for people recovering from drug or alcohol addiction from being located / residing in any residential neighborhoods impermissibly discriminated against people with disabilities under the Fair Housing Act and ADA); *First Step, Inc v. City of New London*, No. 3:02 CV 1748 (D. Conn. 2003) (City’s denial of a zoning permit for a group home was “a thinly veiled adoption of the community’s prejudice against the mentally ill.”).

<sup>40</sup> Ann O’Hara, Emily Cooper, Andrew Zovistoski, and Jonathan Buttrick, *Priced Out in 2006*, Consortium for Citizens with Disabilities, Housing Task Force (2007). Available at <http://www.tacinc.org/Docs/HH/PricedOut2006/POin2006.htm>.

While domestic laws do provide tools for addressing the harms caused by exclusion, the CRPD goes further. As expressed by the National Council on Disability, “[u]nlike the CRPD mandate that states [must] ‘take effective and appropriate measures’ to ensure that persons with disabilities live independently and in the community, the right as enunciated in *Olmstead* is not as strong.”<sup>41</sup> First, the CRPD does not appear to countenance the “fundamental alteration” defense available to U.S. public entities under *Olmstead*, which allows courts fashioning remedies to consider the costs of converting institutional housing to community-based housing and the conversion’s impact on other state programs. Moreover, *Olmstead*’s mandate does not extend to every individual with a disability but rather depends on such factors as type of disability, income level and other assets, availability of support from family members, and the individual’s domicile. Additionally, *Olmstead* arguably requires states to provide in community-based settings only those services already being provided in institutions. In this context, as currently treated by the courts, the “fundamental alteration” defense offers States an “escape hatch” missing from the CRPD mandate to “take effective and appropriate measures.”

Second, and more importantly, by requiring that States “take effective and appropriate measures,” the CRPD’s positive model of disability embraces a more holistic approach to removing the barriers to integration than the piecemeal measures available under *Olmstead*, the ADA and related statutes. “This is because civil rights laws [like the ADA] can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices.”<sup>42</sup> Because the domestic non-discrimination laws are relatively recent and limited in scope, they cannot address the multitude of impediments -

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<sup>41</sup> NCD Report at 18.

<sup>42</sup> Stein Overview.

- built up over the years and not correctible in the near term - - which make living in the community difficult, if not impossible, for people with disabilities. Each of the anti-discrimination laws discussed above takes a discrete approach to a particular problem, and does so only prospectively.

A case in point is the ADA's and Fair Housing Act's approach to buildings. Both statutes require current structures to meet certain standards for accessibility, and impose more stringent standards on new structures. The availability of other accessible structures in the same city or neighborhood, however, is simply not a relevant consideration under these statutes, even though the accessible housing stock in the neighborhood or city as a whole is highly relevant to the practical options for people with disabilities. For example, if a city has developed in ways that impede independence, its few physically accessible buildings are likely to be newer, and more expensive. As a result, people with disabilities will likely have a far narrower choice of housing available and be less able to find equivalent housing as cheaply as those without disabilities -- yet this global inequality is not addressed by U.S. disability laws.

The lack of accessible transportation, another serious impediment to independent living for people with disabilities, is similarly ignored; the ADA and Fair Housing Act do not consider transportation (or other factors) in determining whether discrimination in housing is occurring, and do not look at "the big picture" necessary to enabling people with disabilities to live independently. Finally, in the context of living independently, the CRPD requirement to provide "personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community" goes farther than *Olmstead*, which applies only to particular individuals with particular disabilities and mandates

community-based settings only for those services formerly provided in institutions. In sum, the Convention's positive mandate would require States to seek broader, more comprehensive solutions than are currently applied to the interrelated problems preventing many people with disabilities from living independently in an integrated manner in the community.

### **Article 27. Employment.**

The CRPD offers several critical provisions that are broader than U.S. federal law regarding employment rights of people with disabilities.

Article 27 of the CRPD contains two sections. The second, shorter section requires States to ensure that persons with disabilities are not held in slavery or servitude and are protected from "forced or compulsory labour" on an equal basis with others. Under U.S. law, the Thirteenth Amendment, ratified on December 18, 1865, as part of the post-Civil War Reconstruction era, prohibits slavery in the United States. Forced or compulsory labor is prohibited in the United States primarily by the Fair Labor Standards Act, 29 U.S.C. Ch. 8, and corollary state laws that require payment of minimum wages, mandatory overtime for non-excluded workers and often mandatory rest and meal breaks. There is therefore a very close overlap between the second section of the CRPD and U.S. law.

The first section of Article 27 lists clear obligations of States to protect and enhance the employment rights of persons with disabilities which exceed the protections offered by U.S. law, especially because the CRPD's definition of "disability," as noted *supra*, at pp. 3 – 4, is so expansive. As described by the CRPD's authors, by "dismantling attitudinal and environmental barriers -- as opposed to treating persons with disabilities as problems to be

fixed -- those persons can participate as active members of society and enjoy the full range of their rights.”<sup>43</sup>

The parallel employment protections in the U.S. are found principally in the ADA. Heralded at the time of its passage as the “Emancipation Proclamation” intended to dismantle barriers to full participation in the workforce by persons with disabilities, the ADA’s multi-step definition of a “person with a disability,” and the cramped construction of that definition by the Supreme Court, has severely constricted the statute’s reach. To be a “protected person” under the ADA, one must have a “physical or mental impairment” that “substantially impairs one or more major life activities,” and must also be “qualified” to perform the essential functions of a position either with or without an accommodation.” 42 U.S.C. § 12101. The ADA also borrows from Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, to include within its definition those who are “regarded as” disabled or have a “record of” disability.

In a series of decisions, the Supreme Court has virtually defined out of existence a “qualified individual with a disability”. In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court held that the determination of whether one was “substantially impaired in one or more major life activities” must take into account whether corrective devices such as eyeglasses mitigate the impairment. (As the dissent pointed out, a person without one or more limbs would not be disabled under the majority’s opinion, since a prosthetic device could mitigate the impairment.) In *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), the Court held that the petitioner was not “disabled” since he could function normally with blood pressure medicine and work as a mechanic, the job he was hired to perform. Although he was unable to work as a commercial driver, he was not “disabled” because he could

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<sup>43</sup> See FAQ Regarding the Convention on the Rights of Persons with Disabilities. [www.un.org/disabilities](http://www.un.org/disabilities).



perform one task (mechanic) - - and to be designated “disabled” an employee must be unable to perform more than one task. And in *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court held that an individual claiming to be disabled under the ADA must show that the alleged disability (monocular vision) substantially impairs a major life activity and cannot be compensated for by artificial aids such as technical devices or medicine.

Following its narrow interpretation of the ADA in *Sutton*, *Murphy*, and *Albertson’s, Inc.*, the Court defined “major life activities” as only those activities that are “of central importance to most people’s daily lives,” and held that an impairment must be permanent or long-term. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002):

We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term. See 29 CFR §§1630.2(j)(2)(ii)—(iii) (2001).

As a result of these decisions, persons with disabilities found themselves in a perfect “Catch 22:” if they are sufficiently impaired to be considered “disabled,” they may not be “qualified” to perform the essential functions of the job. The ADA’s goal of removing barriers to full participation in the workplace was consequently benefiting fewer and fewer people.

Fortunately, Congress’ response to the Supreme Court’s narrow construction of the terms “disability” and “significantly limits a major life activity” in ways that stripped the ADA of its original intent was to enact the ADA Amendments Act (“ADAAA”) of 2008. The ADAAA was signed into law on September 25, 2008, with an effective date of January 1, 2009. The ADAAA makes several significant changes to the 1990 law. Except in the cases of ordinary eye glasses or contact lenses, it rejects the *Sutton* holding that mitigating

measures must be considered in determining whether an individual has a disability within the meaning of the ADA, by providing that impairments that are episodic (such as seizure disorder) or in remission (such as cancer) are covered disabilities if they “substantially limit[] a major life activity.” In the “rules of construction” section, the ADAAA clarifies that the Act must be “construed in favor of broad coverage of individuals under the Act, to the maximum extent permitted by the terms of this Act,” 42 U.S.C.A. § 12102 (4)(A), and explicitly rejects the overly-restrictive decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Although the ADAAA does include, as a concession to the business community, a provision that reasonable accommodations need not be provided to persons “regarded as” disabled, for the most part the new statute is a substantial victory for disability and civil rights communities, which will be watching closely its interpretation by the courts. If enforced in accordance with Congress’ clear intent, the ADAAA will bring the U.S. statutory prohibitions against discrimination in the workplace closer in line with the original intent of the 1990 Act, to dismantle barriers to full participation in the workplace by persons with disabilities.

In addition to the ADA, other federal statutes also protect persons with disabilities from employment discrimination. The Rehabilitation Act, *supra*, prohibits federal agencies, federal contractors (with contracts in excess of \$10,000), and federal funding recipients from discriminating in employment against persons with disabilities; Section 503 of the Rehabilitation Act imposes a limited affirmative obligation for subcontractors to hire qualified persons with disabilities. 29 U.S.C. § 793 (1993). The Workforce Investment Act, 29 U.S.C. § 794 (“WIA”), prohibits discrimination against persons with disabilities who

participate in federal job training and employment programs, and welfare to work programs. The Vietnam Era Victims Readjustment Assistance Act., 38 U.S.C. § 4212 (“VEVRRA”) requires federal contract employers to provide equal employment opportunities for disabled veterans. And finally, the Civil Service Reform Act of 1978, U.S.C. Title 5 (“CSRA”), applicable to most federal agencies, prohibits discrimination against persons with disabilities.

The above-described anti-discrimination laws, and particularly the ADA, do resemble the CRPD in some important respects. First, they prohibit discrimination (in the sense of preventing prejudicial harm, as opposed to remedying inequities). Second, at least the ADA if not all of the cited statutes, prohibits retaliation (via case law and the EEOC Compliance Manual, Section 8 (1998)). Third, the ADA and the Rehabilitation Act embrace the concept of “reasonable accommodation,” requiring employers to take reasonable steps to modify the workplace so that employees with disabilities can perform their duties. The concept of “reasonable accommodation” has been fleshed out by case law decided under these statutes, and by the EEOC Enforcement Guidance, to include such things as flexible work shifts, barrier-lifting accommodations such as large print, and appropriately-sized desks that do not present an “undue hardship” for employers.

Notwithstanding these similarities, the CRPD differs fundamentally from the U.S. statutory scheme. Above all, the CRPD’s holistic concept of disability would implement the right to employment in practical ways (barrier-less transportation and rights to accessible housing and education) which the ADA - - even as amended - - and related statutes simply do not adequately address.

In addition to its broad interpretation of disability, the CRPD also confers three tangible employment rights which are absent from U.S. law:

1) The Convention envisions “promot[ing] the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.” (Emphasis added). There is no comparable federal provision in the U.S. except for some minor requirements applicable to federal contractors set forth in the Rehabilitation Act, despite the impressive successes achieved by using affirmative action in the sphere of race discrimination (whether perjoratively labelled “quotas” or lauded as “goals”), to bring minorities long-excluded from certain positions, into the workforce. Incentives in the form of federal subsidies or tax incentives to employers to train and hire persons with disabilities could also be a valuable technique for improving the dismal employment statistics for this group.<sup>44</sup>

2) The interrelated nature of the rights specified in the CRPD makes it more likely that the otherwise merely inspirational right to free and open inclusion in the workplace will be realized. For example, a workplace equipped for wheelchair access is of little use to someone facing insurmountable transportation barriers to get there. While Titles II and III of the ADA do require access in public places, the fully integrated concept of “access” under the CRPD (ranging from childhood recreation to education, transportation, and community venues) fills in the interstices that necessarily occur from piecemeal legislation.

3) A critical benefit of the CRPD is that it will connect members of the international community to pursue a common goal, often the first step toward a best practices solution. Given the increasingly global nature of the workforce (and more commuting to work by air carrier), persons with disabilities need uniform laws to protect them in worksites throughout

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<sup>44</sup> Stein Overview, fn. 43, citing *Cornell University Rehabilitation and Research Training Center on Disability Demographics and Statistics, 2005 Disability Status Reports*, indicating 38% unemployment rate for working age people with disabilities, available at: [ilr.cornell.edu/ped/disability/statistics/StatusReports/2005-pdf/2005](http://ilr.cornell.edu/ped/disability/statistics/StatusReports/2005-pdf/2005), and fn. 44, citing, *The Decline in Employment of People with Disabilities: A Policy Puzzle*, (David C. Stapleton & Richard V. Burkhauser eds. 2003).

the world. For example, although the ADA applies to American citizens working abroad for U.S. or U.S.-controlled companies, it is limited by the “foreign law defense.” Thus, if a particular accommodation is not permitted in the country where the employer is actually situated, the employer is excused from compliance. Such inconsistency was demonstrated when the U.S. Department of Transportation issued a Notice of Proposed Rulemaking to Implement the Air Carrier Access Act, 49 U.S.C.A. § 41705 designed to dismantle barriers for air travel experienced by persons with disabilities: more than 100 filings by airlines and international airline organizations were made opposing the international sweep of the proposed regulations. U.S. Department of Transportation (Docket OST-2004-19482, 69 Fed. Reg. 64364).

In summary, the failure of Title I of the ADA to bring people with disabilities into the workforce in significant numbers demonstrates that despite its admirable intentions, more is needed to wash away long-held prejudices and tear down long-standing barriers - - including judicial interpretation consistent with the statutory intent and more energetic enforcement by government. When enforcement depends on the largely voluntary efforts of employers without any real threat of sanctions, little real progress will be achieved. The moral imprimatur bestowed by an international standard is essential to transforming “reasonable accommodations” in the workplace from theory to reality.

#### **IV. Conclusion/Recommendations**

##### *a. U.S. response to the Convention*

As I sat in the observers' area on the floor of the UN's General Assembly Hall, delegates from 80 nations and the European Community took their turn at the official signing table to commit their country to the human and civil rights of people with disabilities. At several points, my eyes welled with tears. They should have been tears of joy and pride as an American, as a citizen in the country that had

created this world-wide movement for the rights and empowerment of people with disabilities. Instead, they were tears of shame and embarrassment...

John Lancaster, Executive Director of the National Council on Independent Living (NCIL) and President of the United States International Council on Disability (USCID)<sup>45</sup>

The U.S. response to the CRPD has been one of selective involvement and ultimate disengagement. Although it participated intermittently throughout the drafting and negotiating process, the U.S. testified early on that it would not sign or ratify the CRPD.<sup>46</sup> From the third through the sixth Ad Hoc Committee sessions, the United States was nominally present at the negotiations, and offered sparse technical assistance to the States' delegations.<sup>47</sup> The United States did assign a State Department representative to the negotiations for the seventh through ninth Ad Hoc Committee sessions.<sup>48</sup> However, U.S. commentary remained focused on two controversial draft provisions unrelated to disability rights, which sparked discussion because of their political nature.<sup>49</sup>

The primary justification offered by the U.S. government for its refusal to ratify the Convention has been that given the progressive history of disability rights laws and policies

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<sup>45</sup> Quote from John Lancaster's letter to NCIL members describing his first-hand experience of being present at the UNCRPD signing ceremony, "U.S. Must Come Back to the Table on Disability Treaty, American Association of People with Disabilities (AAPD)," Talking Justice Blog (April 12, 2007).

<sup>46</sup> Stein Overview; Tracy R. Justesen & Troy R. Justesen, 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, 14 No. 2 Hum. Rts. Brief 36, 39 (2007) ("Justesen"), citing 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>.

<sup>47</sup> Stein Overview.

<sup>48</sup> Stein Overview at 680, citing, Press Release, United States Mission to the United Nations, Statement by Steven Hill, Office of the Legal Advisor, U.S. Department of State, Head of Delegation to the Eighth Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Aug. 14, 2006).

<sup>49</sup> Press Release, United States Mission to the United Nations, Explanation of Position by Ambassador Richard T. Miller, U.S. Representative to the UN Economic and Social Council, on the Convention on the Rights of Persons with Disabilities, Agenda Item 67(b), in the General Assembly (Dec. 13, 2006), *available at*: [http://www.un.int/usa/press\\_releases/20061213\\_396.html](http://www.un.int/usa/press_releases/20061213_396.html); Anna Lawson, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: NEW ERA OR FALSE DAWN?, 34 Syracuse J. Int'l. L. & Com. 563, 610-11 (2007).

in the United States, signing an international convention would offer no added protections and would intrude upon the U.S.'s exclusive realm of national policy and law.<sup>50</sup> In response to an inquiry from a disability rights organization, the U.S. State Department claimed that given the complexity of regulations and enforcement mechanisms needed to ensure equal opportunity for those with disabilities, it would be more productive for nations to pursue reforms at home rather than negotiate a new United Nations convention. For this reason, the U.S. stated that it did not intend to become party to the Convention.<sup>51</sup>

A U.S. Department of Justice attorney who served as an advisor to the U.S. delegation to the UN ad hoc committee claimed that consenting to this international Convention may “potentially conflict with domestic laws” and “could potentially cause havoc within its sovereign borders.”<sup>52</sup> Interestingly, this author also notes the U.S. practice of incorporating reservations that “clarify” its position with respect to various provisions when signing or ratifying international treaties, and claims that this method would be “entirely unworkable in this situation.”<sup>53</sup> However, no explanation is offered for a potential conflict between the treaty and domestic law, and an explanation for the impossibility of reservations with respect to this treaty are similarly absent.<sup>54</sup>

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<sup>50</sup> Justesen, citing 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>; Explanation of Position by Ambassador Richard T. Miller, U.S. Representative to the UN Economic and Social Council, on the Convention on the Rights of Persons with Disabilities, Agenda Item 67(b), in the General Assembly, December 13, 2006.

<sup>51</sup> April 5, 2007 Email Response of the U.S. State Department to Disability Advocate's Request for Explanation "USUN, Public Affairs" <USUNPublicAffairs@state.gov> 4/5/2007 11:31 AM.

<sup>52</sup> Justesen.

<sup>53</sup> Justesen at footnote 71 (2007).

<sup>54</sup> In fact, according to the convention and international law, if a State's domestic laws surpass and extend beyond the protections of the CRPD, the domestic law will trump the treaty. CRPD, Article 4(4) (“Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities...contained in the law of a State Party...”). In other words, the protection found in the treaty is a floor, not a ceiling.

The United States' attitude towards the Convention will be reversed under an Obama administration: Obama has pledged to urge speedy ratification of the Convention.<sup>55</sup>

*b. Importance of the Convention*

The CRPD is the first human rights treaty to be adopted in the 21st Century and the most rapidly negotiated human rights treaty in the history of international law.<sup>56</sup> However, the CRPD is most unique, as noted in Part III of this report, in its holistic and comprehensive approach to disability rights, specifically the integration of other relevant existing human rights instruments into its text. The CRPD combines the anti-discrimination rights found in the International Covenant on Civil and Political Rights (ICCPR) with rights related to an adequate standard of living and equality found in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>57</sup> This integration follows the United Nations "human right to development" theory, which posits that both sets of rights are necessary to development and must be enforced in tandem.<sup>58</sup> For example, civil rights laws prevent prejudicial harm while equality measures remedy inequities that are already in existence as a result of a history of discrimination.<sup>59</sup>

In addition to these international documents which comprise the International Bill of Rights, the CRPD also specifically includes articles related to the rights of women with disabilities and children with disabilities, the core principles of which are found respectively in the UN Convention on the Elimination of All Forms of Discrimination Against Women

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<sup>55</sup> [www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf](http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf).

<sup>56</sup> Judy Aita, *U.S. Hails Convention on The Rights of the Disabled*, Usinfo (Dec 14, 2006), available at: <http://news.findlaw.com/wash/s/20061214/20061214142719.html>.

<sup>57</sup> Civil and Political Rights are usually termed first-generation or negative rights, whereas Social, Economic and Cultural Rights are termed positive or second-generation rights. Stein Overview.

<sup>58</sup> Stein OVERVIEW.

<sup>59</sup> *Id.*



(CEDAW) and the Convention on the Rights of the Child (CRC).<sup>60</sup> These articles do not stand on their own, but rather interrelate to all other CRPD Articles and are meant to be horizontally integrated into the Convention.<sup>61</sup>

Also critical to the CRPD's progressive nature is the replacement of the traditional medical-social welfare model of disability that focuses on the *inability* of individuals, with the social-human rights model that focuses on *capability* and inclusion.<sup>62</sup> This approach posits that the real barriers to full participation reside not in the individual, but rather in the "social, attitudinal, architectural, medical, economic, and political environment,"<sup>63</sup> most clearly evidenced by the language of Article 1, which emphasizes that impairments in "interaction with various barriers may hinder...full and effective participation in society on an equal basis with others."<sup>64</sup>

Finally, the process by which this human rights convention was negotiated was the first of its kind. In place of the traditional state-centric model of treaty negotiation, this process involved a participatory approach targeting the involvement and input of persons with disabilities from across the globe.<sup>65</sup> Prior to the drafting process, in its White Paper on the UNCRPD the National Council on Disability identified the following significant advantages to the adoption of an international convention:

- (i) providing an immediate statement of international legal accountability regarding disability rights; (ii) clarifying the content of human rights principles and their application to people with disabilities; (iii) providing mechanisms for more effective

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<sup>60</sup> The United States has failed to ratify the CRC or CEDAW.

<sup>61</sup> Stein Overview.

<sup>62</sup> Tara Melish, "The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify" ("Melish"), p. 37.

<sup>63</sup> National Council on Disability, A White Paper: Understanding the Role of an International Convention on the Human Rights of People with Disabilities 5-16, (2002)("White Paper"), p. 28, available at: [http://www.ncd.gov/newsroom/publications/2002/unwhitepaper\\_05-23-02.htm](http://www.ncd.gov/newsroom/publications/2002/unwhitepaper_05-23-02.htm).

<sup>64</sup> Convention on the Rights of Persons with Disabilities, Article 1.

<sup>65</sup> Melish.

monitoring, including reporting on the enforcement of the convention by governments and non-governmental organizations, supervision by a body of experts mandated by the convention, and possibly the consideration of individual or group complaints under a mechanism to be created by the convention; (v) establishing a useful framework for international cooperation; (vi) providing a fair and common standard assessment and achievement across cultures and levels of economic development; and (vii) providing transformative educative benefits for all participants engaged in the preparatory and formal negotiation phases, and for the public as countries consider ratification of the convention.<sup>66</sup>

### *c. Domestic Use of International Law*

The U.S. legal framework recognizes the value of an international perspective in legal analysis, and this perspective has grown as our world has become increasingly more globalized. International consensus on legal issues, *i.e.*, customary international law or the “law of nations,” is part of the “laws” of the United States as understood by Article III, section 2, clause 1.<sup>67</sup> American courts have looked to international law for guidance on how to interpret constitutional standards, particularly in the realm of criminal justice.<sup>68</sup> For example, international laws and norms have been instructive in construing the statutory requirements for raising claims of mistreatment in U.S. prisons.<sup>69</sup> As explicitly mentioned in the Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987),

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<sup>66</sup> White Paper, cited in Sally Chafin, CHALLENGING THE UNITED STATES POSITION ON A UNITED NATIONS CONVENTION ON DISABILITY, 15 Temp. Pol. & Civ. Rts. L. Rev. 121 (2005).

<sup>67</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”). *See also*, Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law,”) *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (U.S. is responsible to other countries for the “conduct of each State, relative to the laws of nations. . .”).

<sup>68</sup> *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575 (2005) (referring “to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’”). *See also, Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002), (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); *Thompson v. Oklahoma*, 487 U.S. 815, 830-831 and n. 31 (1998) (plurality opinion) (observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual”).

<sup>69</sup> *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *The Charming Betsy*, 2 Cranch 64, 118 (1804)) (“[i]t has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy* [t]hat an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”).

“[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”

*d. Recommendation: U.S. Should Sign & Ratify UNCRPD*

Compelling considerations tilt the scales in favor of signature and ratification by the United States of this groundbreaking human rights treaty. Although the U.S. has historically led the world in its disability rights policies, practices and laws, there is no question that significant gaps remain and there is much room for improvement on the domestic level.<sup>70</sup> As outlined in prior sections, the CRPD conceptually and substantively exceeds protections found under the ADA and other relevant domestic anti-discrimination laws, including, *inter alia*, in the areas of employment, education, independent living and community integration, and spheres of justice and legal representation. Furthermore, the social-development model of disability found in the Convention would be of assistance to U.S. law. The absence of this perspective can be most clearly seen in the ADA’s definition of disability, notwithstanding its recent amendment, which continues to focus on the limitations on major life activities faced by the individual rather than the societal barriers that disable the individual.<sup>71</sup>

Critical provisions found in the CRPD – such as the national monitoring and periodic reporting procedures – would provide the oversight and introspection necessary to constantly re-evaluate domestic human rights protections. Ratification would simultaneously mark our

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<sup>70</sup> Melish, p. 46. *See also*, Stein, Overview. The recent passage of the Restoration Act, which seeks to restore “the intent and protections of the Americans with Disabilities Act of 1990,” is itself evidence of the shortcomings of the ADA. The Restoration Act seeks to restore the broad scope of protection under the ADA, specifically with respect to the limited definition of disability which has only been narrowed by recent Supreme Court decisions. *Id.*

<sup>71</sup> Arlene Kanter, remarks made at American University Washington College of Law conference entitled: *The New UN Disability Rights Convention: Building Support in the United States for Ratification and Implementation*, April 9, 2007.

long-standing commitment to disability rights advancement while ensuring that the commitment continues into the future.<sup>72</sup>

Additionally, as the National Council on Disability (NCD) identified in its comprehensive white paper released prior to the drafting process, there are “active forms of discrimination, as well as ‘neutral barriers,’ that inhibit disabled people’s enjoyment of their human rights.”<sup>73</sup> Drafters of the CRPD have sought to establish affirmative obligations on the part of States that move beyond mere non-discrimination in order to more effectively combat the myriad levels of injustice in society. For example, Article 24 obligates States to adopt “immediate, effective and appropriate measures” that are designed to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities,” recognizing the importance of awareness-raising in combating discrimination.<sup>74</sup> On a macro-level, advocates in the field have also noted the importance of reinvigorating the disability rights movement, particularly given the steady dilution of the ADA’s core principles.<sup>75</sup>

If adopted, the CRPD’s unique combination of first and second generation rights and holistic approach to equality would inspire a more comprehensive approach within the U.S. to the myriad injustices still suffered by persons with disabilities. Moreover, if the U.S. were to commit to the CRPD, the human rights of other socially excluded groups, such as ethnic and racial minorities, women and people living in poverty would undoubtedly also be advanced.<sup>76</sup>

Signature and ratification of the CRPD, which would require member States to share best practices and technical assistance, would also signify the commitment of the U.S. to

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<sup>72</sup> Melish, p. 46.

<sup>73</sup> White Paper, p. 6.

<sup>74</sup> See, e.g., UNCRPD, Article 8.

<sup>75</sup> White Paper, p.6.

<sup>76</sup> STEIN, BEYOND DISABILITY. These groups will also benefit from the rights protections found within the Convention because the category of persons with disabilities intersects significantly with other socially marginalized groups. In addition, measures taken to ensure the full breadth of rights located within the UNCRPD will also benefit these other groups. *Id.*

providing critical global leadership on disability rights issues.<sup>77</sup> It would ensure that the United States promotes disability-inclusive development practices at home and abroad, helping to increase equality for persons with disabilities throughout the world, not just within our own country.<sup>78</sup>

The U.S. disability rights community was invaluable in formulating the CRPD, and domestic grassroots efforts have continued to encourage the U.S. to sign and ratify the Convention.<sup>79</sup> In light of the Convention's recognition that this community, comprised of persons with disabilities and their advocates, deserves a central role in shaping policy, its voice should also be heeded on the question of whether ratifying the Convention would be beneficial to its struggle for equality. In the words that have come to represent the spirit of the new UN Convention on the Rights of Persons with Disabilities: "Nothing about us without us."<sup>80</sup>

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<sup>77</sup> Stein Overview.

<sup>78</sup> Stein, BEYOND DISABILITY.

<sup>79</sup> See, e.g., Ratify Now!, a U.S.-based global grassroots organization that was started by, for, and about people with disabilities in an effort to encourage ratification of the CRPD, including by the U.S. Available at: <http://ratifynow.org/us/>.

<sup>80</sup> This was the campaign slogan of the International Disability Caucus (IDC) during the CRPD negotiation process. See, also, Melish, Footnote 9, p. 45.