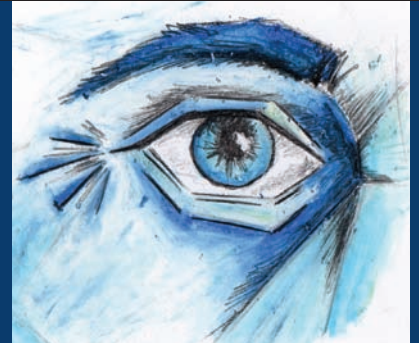
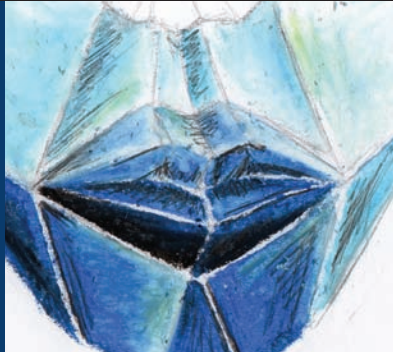


Enabling Everyone

The United Nations Convention on the Rights of Persons with Disabilities



JAMES FELAKOS

The entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or “the Convention”) on May 3, 2008, was 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. 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. This approach posits that the real barriers to full participation reside not in the individual,

but rather in their external environment, as evidenced by the language of Article 1 of the CRPD, which emphasizes that impairments in “interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.” In addition, the Convention unites the civil and political rights traditionally provided by anti-discrimination legislation (referred to as first generation rights) with the economic, social and cultural rights conferred through equality measures (second generation rights).

The CRPD was the first human rights treaty of the 21st Century and had record input from people with disabilities. Little more than one year after being opened for signature, the CRPD

was ratified by more than the requisite twenty nations and became a legally-enforceable treaty. One-hundred thirty-six countries (States Parties) have signed the Convention.

The United States—although it did participate in the negotiating sessions—has thus far chosen not to ratify the CRPD. The Convention has significant overlap with ADA and the other United States laws protecting disability rights). However, the Convention changes the framework around which disability is defined to be more positive and inclusive. It also addresses the problems individuals with disabilities encounter in society in a more holistic manner, accounting for past discrimination and current problems with the built environment, as opposed to the discrete manner in which the ADA typically addresses problems. Under the Convention, States Parties are obligated to prevent discrimination against, promote accessibility by, and work to achieve the full realization of economic, social, and cultural rights for persons with disabilities.

Notably, the Convention's authors were unable—due to philosophical differences—to agree on a definition of “disability.” 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. 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 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

as the flawed interaction between that impaired condition and society's lack of adaptation to it, departs radically from conventional thought and is a core con-

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cept of the Convention. “Disability” is then partially defined in Article 1:

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.

These two approaches combine to at least partly define who is to be protected by the Convention.

The Preamble identifies myriad factors derived primarily from principles articulated in the Universal Declaration of Human Rights that underscores the need for the Convention. These include: 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 fact that 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. Echoing the aspirational concepts

highlighted in the Preamble, eight core principles governing the Convention are identified in the text: 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.

A number of terms are given broad definitions in the Convention, 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 of “universal design” critical to the Convention (and absent from the ADA) is defined as the design of products, environments, programs and services which do not require additional adaptation for use by all persons. Finally, “discrimination on the basis of disability” is defined to include conduct which has the purpose *or effect* of denying equal rights and freedoms.

The CRPD flows from earlier human rights instruments and integrates them into its text. As stated in the Preamble to the CRPD,

Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all

the rights and freedoms set forth therein, without distinction of any kind.... Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.

The CRPD does not create new rights for persons with disabilities, but creates a framework which ensures that they have access to the human rights due to all. 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). This integration follows the United Nations "human right to development" theory, which posits that both sets of rights are integral for development and must be enforced at the same time. For example, civil rights laws prevent prejudicial harm while equality measures remedy inequities that already exist as a result of a history of discrimination.

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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC)—both of which the United States has failed to ratify. These articles do not stand on their own but, rather, correspond to other CRPD Articles and are meant to be integrated into the Convention.

The Convention creates a United Nations oversight committee to moni-

tor 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 individuals or groups. 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. The Convention does not create a private right of action on its own and it does not require

discrete manner in which the ADA and other domestic laws typically address problems only prospectively. For example, while the ADA and Fair Housing Act require a certain level of accessibility in new buildings and housing, they have much less stringent requirements on the majority of existing structures. Each building is analyzed individually or, if applicable, as part of a development, owner by owner. Unlike the ADA, the Convention requires that States Parties take "effective" action to ensure that resources are available to people with disabilities on an equal

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States 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 responses to complaints directed to the Committee by individuals or groups if the State Party has signed the Optional Protocol.

The Convention has significant overlap with the ADA and the other United States laws protecting disability rights. However, the Convention changes the framework around which disability is defined to be more positive and inclusive. It also addresses the problems individuals with disabilities encounter in society more comprehensively, accounting for past discrimination and problems with the current built environment, as opposed to the

basis. The Convention thus employs equality measures absent from current domestic law to remedy inequities that exist due to past practices. The Convention does not prescribe a particular manner of effective action but, in the realm of housing, for example, a State Party might require universal access for all new construction and dramatically expanded tax breaks for modifications to existing housing to ensure that people with disabilities can live independently on an equal basis with the general population.

If adopted by the United States, the CRPD's unique combination of first and second generation rights could inspire a more vigorous and comprehensive approach within the U.S. to the myriad injustices still suffered by

persons with disabilities. Of the major party presidential candidates in 2008, only Senator Obama indicated that he would sign the Convention.

Signature and ratification of the CRPD, which requires member states to share best practices and technical assistance, would signify a commitment by the U.S. to providing critical global leadership on disability rights issues. 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.

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The author would like to acknowledge the following articles that were useful in the development of his ideas for this essay:

Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, HUMAN RIGHTS BRIEF, Vol. 14, No. 2 (2007).

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. (2007).

Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Rights*, Hastings L.J. (2007).