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# The Disability Rights Treaty and Advocacy Strategies Using International Human Rights

BY DAVID T. HUTT

Over the past decade a new era of human rights for individuals with disabilities emerged with the entry into force of the Convention on the Rights of Persons with Disabilities.<sup>1</sup> This treaty, drafted in just five years, represented a watershed moment in the disability rights movement as the international community agreed to the principles of the inherent rights of persons with disabilities, the prevention of discrimination based on disability, and working to change societal attitudes and perceptions of disability.<sup>2</sup> With an estimated one billion adults and children living with disabilities worldwide, the convention brought hope that disability rights would take on greater significance at the international level and that nations would include disability rights into domestic laws.<sup>3</sup> Here I look at some key provisions of the Convention on the Rights of Persons with Disabilities, discuss implementation mechanisms and the status of the treaty in the United States, and offer ideas for how the convention can be a tool for advocates regardless of the status of the treaty under U.S. domestic law.<sup>4</sup>

1 [Convention on the Rights of Persons with Disabilities](#), 2515 U.N.T.S. 3 (adopted by the U.N. Dec. 13, 2007).

2 See Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 287 (2007).

3 [WORLD HEALTH ORGANIZATION, WORLD REPORT ON DISABILITY 29](#) (2011).

4 For a more detailed analysis of the treaty, see Janet E. Lord & Michael A. Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASHINGTON LAW REVIEW 449 (2008); see also United States Senate Foreign Relations Committee Report on the Convention on the Rights of Persons with Disabilities (Treaty Doc. 112-7), S. Exec. Doc. Rep. No. 112-6 (2012); [Message from the President Transmitting the Convention on the Rights of People with Disabilities to the Senate](#), Treaty Doc. 112-7 (May 17, 2012).

## Adoption of the Convention

After decades of advocacy by the disability community, the United Nations General Assembly in December 2001 established an ad hoc committee to draft a treaty on disability rights.<sup>5</sup> The committee completed the text of the treaty in 2006; the treaty opened for nations to sign and ratify in March 2007.<sup>6</sup> Just over a year later in May 2008 the Convention on the Rights of Persons with Disabilities entered into legal force for nations which had ratified the treaty.<sup>7</sup> At writing, 143 nations have ratified the convention and thus under international law agree to follow the rights and provisions of the treaty.

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## Many rights set forth in the convention are similar to those contained in other human rights treaties.

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## Treaty Provisions

The Convention on the Rights of Persons with Disabilities contains one article with a limited number of definitions, two articles outlining the general principles and obligations that nations adopting the treaty agree to fulfill, and twenty-six articles with specific substantive rights.<sup>8</sup> Among the general principles are the respect for the inherent dignity and independence of individuals with disabilities, nondiscrimination, equal opportunity, and the full participation in so-

5 Kanter, *supra* note 2, at 288.

6 Lord & Stein, *supra* note 4, at 450.

7 See *id.*; under Article 45 of the Convention on the Rights of Persons with Disabilities, the treaty entered into legal force following ratification by the 20th nation.

8 Article 2 of the convention contains definitions, Articles 3 and 4 outline the general principles and obligations, and Articles 5 to 30 describe specific rights.

ciety by individuals with disabilities. Under the general obligations, nations ratifying the treaty agree to take appropriate legislative, administrative, and other measures to implement the rights contained in the treaty, including eliminating discrimination against persons with disabilities. Under the general obligations, nations further agree to promote the research, development, and use of assistive technology for people with disabilities and to train those who work with individuals with disabilities.

The specific rights contained in the substantive articles of the convention include the right to be recognized as equal before the law and to have equal access

to justice; the right to life, liberty, and security of persons on an equal basis with others; the right to be free from torture, or other cruel and inhumane punishment, including medical experimentation; and legal protections against discrimination in employment.<sup>9</sup> Many rights set forth in the convention are similar to those contained in other human rights treaties, such as the International Covenant on Civil and Political Rights.<sup>10</sup> Perhaps the more significant articles of the Convention on the Rights of Persons with Disabilities are those which address specific barriers and problems

9 Convention on the Rights of Persons with Disabilities arts. 5, 12, 13, 15, 19, 27.

10 Cf. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976).

faced by individuals with disabilities. The provisions include, among others, that nations take appropriate steps to ensure that transportation, communications, public facilities, and other environments are accessible to individuals with disabilities; to “facilitate full enjoyment” of the right to live and participate in the community; and to “ensure personal mobility with the greatest possible independence for persons with disabilities.”<sup>11</sup> Other articles cover rights to an education, to the highest standard of health possible, and to an adequate standard of living without discrimination based on disability.<sup>12</sup>

Many rights set forth in the Convention on the Rights of Persons with Disabilities are similar to those contained in the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act (IDEA), in addition to other laws.<sup>13</sup> In fact the ADA was used as a model for the Convention on the Rights of Persons with Disabilities.<sup>14</sup> For example, under the convention the need to consider “necessary modifications and adjustments” as “reasonable accommodations” to provide an equal enjoyment of rights for persons with disabilities, but which does not require an entity to undertake a “disproportionate or undue burden,” harkens to the ADA definitions of “reasonable accommodation,” “undue hardship,” and “readily achievable”; the definitions take into account the feasibility of making a modification or

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## The Convention on the Rights of Persons with Disabilities offers advocates for individuals with disabilities new opportunities to utilize international standards to protect the rights of persons with disabilities.

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accommodation.<sup>15</sup> Similarly under Articles 5 and 9 of the Convention on the Rights of Persons with Disabilities the right to transportation, to public accommodations and services which are accessible, and to be free from discrimination based on disability in receiving services are similar to provisions in Title V of the Rehabilitation Act and Titles II and III of the ADA. Nations that adopt the Convention on the Rights of Persons with Disabilities also need to take measures to enable individuals with disabilities to “attain and maintain maximum independence” through providing habilitation and rehabilitation services and programs.<sup>16</sup> Under Titles I and VII of the Rehabilitation Act, the federal government funds vocational rehabilitation services provided by the states, as well as services which support independent living.<sup>17</sup>

### Status of the Convention in the United States

Representatives from both the U.S. Department of State and the disability community assisted in drafting the Convention on the Rights of Persons with Disabilities; however, the United States did not sign the treaty until July 30, 2009.<sup>18</sup> As a signatory, the United States is obligated under

international law to “refrain from acts that would defeat the object and purpose” of the convention, but the United States is not legally bound to other nations to fulfill the treaty until ratified by the Senate.<sup>19</sup> In December 2012 ratification of the treaty failed in the Senate by a vote of 61 in favor to 38 opposed; a two-thirds vote in favor by the senators present is required for ratification.<sup>20</sup> The Senate Foreign Relations Committee continues to consider the



11 Convention on the Rights of Persons with Disabilities arts. 9, 19, 20.

12 *Id.* arts. 24, 25, 28.

13 [Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213](#); [Rehabilitation Act § 504, 29 U.S.C. § 794\(a\)](#); [Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1409](#).

14 United States Senate Foreign Relations Committee Report on the Convention on the Rights of Persons with Disabilities, *supra* note 4, Annex 1: Hearing of July 12, 2012, at 65 (testimony of John Wodatch, Formerly Chief, Disability Rights Section, U.S. Department of Justice).

15 Compare Convention on the Rights of Persons with Disabilities art. 2 with 42 U.S.C. §§ 1211(9)–(10), 12181(9).

16 Convention on the Rights of Persons with Disabilities art. 26.

17 Rehabilitation Act of 1973, as amended, 29 U.S.C §§ 701–754, 796–796f-6.

18 Message from the President Transmitting the Convention on the Rights of Persons with Disabilities to the Senate, *supra* note 4, at v.

19 See RESTATEMENT (Third) of U.S. FOREIGN RELATIONS LAW (1987) § 312(3) & cmts. (i)–(j).

20 U.S. Const. art. II, § 2(2); [158 CONG. REC. S7365-02](#) (daily ed. Dec. 4, 2012). Sen. Mark Kirk, Republican of Illinois, was not present for the vote; thus at that time ratification required 66 votes. Ratification of a treaty does not require approval of the House of Representatives.

## Should the United States ratify the Convention on the Rights of Persons with Disabilities, it would be a “non-self-executing” treaty.

treaty and held two hearings in November 2013 in contemplation of again voting the convention out of the committee.

When the Obama administration submitted the Convention on the Rights of Persons with Disabilities to the Senate for ratification, the administration stated that the treaty is a nondiscrimination treaty, and, with appropriate reservations, understandings, and declarations, the United States could “implement its obligations under the convention using its vast existing networks of laws affording protection to persons with disabilities.”<sup>21</sup> Under international law, a nation can use reservations, understandings, and declarations when ratifying a treaty to limit or clarify an obligation under the treaty, assert how the nation will interpret a provision of the treaty, or state what it believes is the meaning of a provision in the treaty.

### Implementation of the Treaty

As with other human rights treaties, nations party to the Convention on the Rights of Persons with Disabilities agree to implement the provisions of the treaty at the domestic level, but there is no international mechanism for adjudicating violations and no legal means for one nation to compel another nation to adhere to the treaty. Article 34 of the convention establishes a Committee on the Rights of Persons with Disabilities.<sup>22</sup> This committee lacks any binding enforcement power. The committee receives public implementing reports from a country two years after ratification and then every four years or

upon request of the committee; solicits comments from civil society about the implementation of the convention by the country; and gives comments and recommendations back to the country.<sup>23</sup> The committee has no authority to force implementation of its recommendations.<sup>24</sup> An optional protocol to the convention allows the committee to receive complaints from individuals about violations of the treaty, but a country must separately ratify the optional protocol, and even then the committee lacks the power to ensure enactment of any recommendations.<sup>25</sup>

Should the United States ratify the Convention on the Rights of Persons with Disabilities, it would be a “non-self-executing” treaty, meaning the convention creates no rights enforceable in U.S. federal or state courts.<sup>26</sup> The United States would fulfill the treaty provisions through enforcement of current federal law. When the Obama administration transmitted the treaty to the Senate, it noted a number of mechanisms already in the United States to protect the rights of individuals with disabilities.<sup>27</sup>

At the governmental level, enforcement of federal disability laws by the U.S. Department of Justice, Department of Education,

Department of Transportation, and Equal Employment Opportunity Commission would ensure U.S. compliance with the treaty.<sup>28</sup> Closer to the state and local level, the federally funded, but independent, Protection and Advocacy System in every state and territory would play a role in the convention’s implementation as part of the “vast enforcement system that ensures compliance with [the United States’] wide-reaching disability rights protections.”<sup>29</sup> Specifically the Protection and Advocacy System organizations monitor and investigate possible abuse and neglect of individuals with disabilities in institutions and the community; advocate for individuals with disabilities to receive services, such as assistive technology and supports in the community; and take other steps, including legal representation, to rectify discrimination and other rights violations of individuals with disabilities.<sup>30</sup>

### Advocacy Strategies

With no enforcement provisions, no international adjudicative body, and in the United States no cause of action to recognize treaty rights beyond what is under U.S. domestic law, how is realization of the rights enumerated in the Convention on the Rights of Persons with Disabilities possible? Several advocacy techniques exist.

First, courts have shown a willingness to consider human rights treaties and foreign

21 Message from the President Transmitting the Convention on the Rights of Persons with Disabilities to the Senate, *supra* note 4, at 1.

22 Convention on the Rights of Persons with Disabilities art. 34.

23 *Id.* arts. 35–36; see also [United Nations Human Rights, Committee on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities 11th Session: Note on Civil Society Participation](#) (n.d.).

24 United States Senate Foreign Relations Committee Report on the Convention on the Rights of Persons with Disabilities, *supra* note 4, Majority Report 8–9.

25 See [Optional Protocol to the Convention on the Rights of Persons with Disabilities](#), U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

26 United States Senate Foreign Relations Committee Report on the Convention on the Rights of Persons with Disabilities, *supra* note 4, Majority Report 6; [Medellin v. Texas](#), 128 S. Ct. 1346, 1356–57 (2008).

27 Message from the President Transmitting the Convention on the Rights of Persons with Disabilities to the Senate, *supra* note 4, at 3.

28 *Id.* at 94–96.

29 *Id.* at 94, 97–98.

30 *Id.* at 10, 32, 42, 71, 92, 97–98; for an overview of the Protection and Advocacy System, see [Joan Magagna, The Protection and Advocacy Network—a Resource for Legal Aid Attorneys](#), 41 CLEARINGHOUSE REVIEW 334 (Sept.–Oct. 2007).

## Many rights set forth in the Convention on the Rights of Persons with Disabilities are similar to those contained in the Americans with Disabilities Act.

legal sources as persuasive arguments.<sup>31</sup> Although their decisions are certainly not binding authority, and subject to criticism by Congress and fellow jurists, some U.S. courts have considered human rights treaties both ratified and not ratified by the United States in reaching decisions.<sup>32</sup> In the disability context, while striking down the use of the death penalty on criminals with “mental retardation” (now referred to as developmental or intellectual disabilities) as cruel and unusual punishment, Justice Stevens noted that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>33</sup>

Second, through the public implementing report that each nation party to the Convention on the Rights of Persons with Disabilities is required to submit to the treaty committee, disabled people’s organizations and other nongovernmental organizations have the opportunity to critique the official government report either as part of the government’s development of the report or in separate

“parallel” or “shadow” reports.<sup>34</sup> Disability advocates in countries that are party to the convention have already engaged in such a process. For example, the disability community in Australia completed an extensive report discussing the situation and challenges faced by individuals with disabilities, as well as the progress made and the gaps that remain in Australia’s compliance with the convention.<sup>35</sup>

The United States is party to three human rights treaties and two protocols and has in the past submitted reports to treaty committees.<sup>36</sup> A number of U.S. advocacy organizations responded with comments and shadow reports to the U.S. government’s most recent report to the Human Rights Committee, the international body that receives and comments on reports submitted under the International Covenant on Civil and Political Rights.<sup>37</sup>

34 Message from the President Transmitting the Convention on the Rights of Persons with Disabilities to the Senate, *supra* note 4.

35 [DISABILITY REPRESENTATIVE ET AL., DISABILITY RIGHTS NOW: CIVIL SOCIETY REPORT TO THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES](#) (Aug. 2012) (on Australia).

36 In 1992 the U.S. ratified the International Covenant on Civil and Political Rights, *supra* note 10, and in 1994 both the Convention on the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195, art. 5(e) (entered into force Jan. 4, 1969), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 1464 U.N.T.S. 85 (adopted by the U.N. Dec. 10, 1984). In 2002 the U.S. ratified the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 U.N.T.S. 2222, and On the Sale of Children, Child Prostitution and Child Pornography, 2171 U.N.T.S. 227 (adopted by the U.N. May 25, 2000).

37 For shadow reports, see, e.g., [Columbia Law School Human Rights Clinic, Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases](#) (Aug. 2013); [Sarah Dávila-Ruhaak & Steven D. Schwinn, John Marshall Law School Human Rights Project, Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America](#) (2013); [Brennan Center for Justice, U.S. Surveillance: Unchecked and Unsupervised](#) (Sept. 2013).

Besides issuing shadow reports, advocates have contacted U.N. “special rapporteurs,” who report on potential violations of international human rights standards. For example, Disability Rights International informed the U.N. Special Rapporteur on Torture about the use of electric shock and other physical restraints on students with disabilities at the Judge Rothenberg Center in Massachusetts.<sup>38</sup> For years, disability advocates expressed significant concerns about the use of such practice by the center. The use of such aversive practices violates the “Convention Against Torture and other international standards,” the special rapporteur found.<sup>39</sup>

Perhaps the most important method of using the Convention on the Rights of Persons with Disabilities, however, is to advocate changes in state laws based on the practices of other countries. For example, spurred by Article 12 of the convention, advocates in other countries seek to change national legislation to establish “supported decision making” in place of plenary guardianships.<sup>40</sup> “Supported decision making” allows individuals with disabilities, through relationships, practices, and agreements, to “make and communicate to others decisions about the individual’s life.”<sup>41</sup> Advocates in the United States can point to changes in guardianship laws in other countries toward supported decision making as a result of the Convention on the Rights of Persons with Disabilities to push for changes in state guardianship laws. States would not be compelled to

38 Press Release, [Disability Rights International, The UN Special Rapporteur on Torture Calls on Obama Administration to Take Action to End Torture at Massachusetts School for Children with Disabilities](#) (March 5, 2013).

39 *Id.*

40 [Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making](#), HUMAN RIGHTS BRIEF, Winter 2012, at 8.

41 *Id.* at 10.

31 [Cathy Hollenberg Serrette, Invoking International Human Rights Law in Litigation: A Maryland Judge’s Perspective](#), 45 CLEARINGHOUSE REVIEW 238 (Sept.–Oct. 2011); [Martha F. Davis, Human Rights in the Trenches: Using International Human Rights Law in “Everyday” Legal Aid Cases](#), 41 CLEARINGHOUSE REVIEW 414 (Nov.–Dec. 2007).

32 For a discussion of these cases, see Serrette, *supra* note 31. For criticism on the use of foreign and international law by the courts, see [Roper v. Simmons](#), 543 U.S. 551, 628 (2005) (Justice Scalia dissenting); and [H.R. Res. 568](#), 108th Cong. (2004) (“expressing the sense of the House of Representatives that judicial determinations ... should not be based on judgment, laws, or pronouncements of foreign institutions unless ... [such materials] ... inform an understanding of the original meaning of the laws of the United States”).

33 [Atkins v. Virginia](#), 536 U.S. 304, 316 n.21 (2002).

comply, regardless of the status of the convention in the United States, but by using the convention as a persuasive tool and eventually pointing to examples of how supported decision making works in other countries, advocates can seek change in state guardianship legislation.<sup>42</sup>

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The Convention on the Rights of Persons with Disabilities offers advocates for individuals with disabilities new opportunities to utilize international standards to protect the rights of persons with disabilities. Through techniques common in working to protect international human rights in general, advocates both in the United States and abroad can achieve equitable treatment for individuals with disabilities.

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<sup>42</sup> See United States Senate Foreign Relations Committee Report on the Convention on the Rights of Persons with Disabilities, *supra* note 4, Majority Report, 6–7 (“ratification of the [convention] will not alter the balance of power between the federal government and the states”).

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