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THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLICATIONS FOR THE RIGHTS OF ELDERLY PEOPLE UNDER INTERNATIONAL LAW

Arlene S. Kanter*

INTRODUCTION

On December 13, 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities. This Convention is the first binding international document addressing the rights of persons with disabilities worldwide. The core principles of the Convention include the right of all persons with disabilities to “full and effective participation and inclusion in society.”¹ To implement this goal, education, employment, health care, social service systems, transportation, technology, and society generally must be adapted to ensure that they are all accessible and appropriate for people with disabilities, of all ages. Prior to the adoption of the Convention on the Rights of Persons with Disabilities (CRPD), many countries had enacted their own disability-related domestic laws. Regions also had applied their regional human rights instruments and treaties to the rights of persons with disabilities. Despite these worldwide initiatives, however, many people with disabilities throughout the world—young and old—have been denied basic civil and human rights, such as their right to vote, to live in the community rather than in institutions, and to access employment, health care, and an adequate standard of living. This Article will discuss why the new Convention on the Rights of Persons with

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¹ CRPD Article 3(c).

Disabilities marks an important step towards equality, dignity and access to society for elderly people, with and without disabilities.

It is beyond dispute that the world population is aging. People throughout the world are living longer, and, the longer people live, the more likely they will become disabled.² In 1980, it was estimated that 370 million people were over the age of 60;³ today one in ten people is now 60 years of age or older.⁴ In Italy, Germany, and Japan, more than 20 percent of their respective population is now over 65.⁵ By 2025, there will be 1.1 billion elderly people worldwide; 70 percent of whom will live in developing countries.⁶

It had been thought that countries in the developing world would be immune from the challenges faced by other countries because of the relatively higher birthrates and steady supply of younger workers in developing countries. A recent study by the French National Institute on Demographic Studies, however, refutes this view, and concludes that developing countries also will face societal challenges posed by aging populations, although not quite as soon as other parts of the world.⁷ This study found that while populations in countries in Asia and Africa are younger now, they too will start to experience the same combination of declining mortality and falling birthrates, and at a much faster pace. According to this study, it took 114 years for France to double its over 65 population from 7 to 14 percent; and in the United States, it has taken over 70 years to double our over 65 population. By contrast, in Iran and Tunisia, their elderly population

2. Sarah Moses, *A Just Society for the Elderly: The Importance of Justice as Participation*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 336–38 (2007). See generally Aimee R. Fagan, *An Analysis of the Convention on the International Protection of Adults*, 10 ELDER L.J. 329 (2002).

3. Lung-chu Chen, *Aging: A New Human Rights Concern—A Policy-Oriented Perspective*, 81 AM. SOC'Y INT'L L. PROC. 169, 175 (1987) (remarks by Philip Alston).

4. Fagan, *supra* note 2, at 331 (citing *The Aging of the World's Population*, Population Div. of the Dep't of Econ. & Soc. Affairs of the United Nations, <http://www.un.org/esa/socdev/ageing/popageing.html> (last updated June 11, 2002)).

5. Tracy McNicoll, *The Developing World's Gray Future*, NEWSWEEK, Sept. 14, 2009 at p. 8.

6. Chen, *supra* note 3, at 175.

7. Gilles Pison, *Population and Societies*, French National Institute of Demographic Studies, July/August 2009, available at http://www.ined.fr/en/resources_documentation/publications/pop_soc/bdd/publication/1475/ (last visited Sept. 8, 2009).

will likely double in 20 years, and in Vietnam and Syria, it is estimated that their elderly population will double in only 17 years.⁸

In addition, the oldest among the elderly (those eighty years or older) constitute the fastest growing segment of the population in most countries throughout the world.⁹ Moreover, people who are born with disabilities as well as those who become disabled later in life (due to illness or injury) are not only living longer,¹⁰ but, unlike in the past, are now expected to live approximately as long as the rest of the non-disabled population.¹¹

One explanation for the increased lifespan of people with disabilities is that fewer of them are sent away to live and often die in institutions.¹² Many people with disabilities today, including those who have spent the greater parts of their adult lives in institutions, now reside in the community, with or without supports. Once they leave institutions and live the community, they are expected to live just as long as the rest of the population.¹³ In addition to the greater integration of people with disabilities in society, improvements in modern medicine, and enhanced standards of living, have resulted in the emergence of a new group of people with disabilities who now live to old age in many countries throughout the world.¹⁴ “This trend is evident not only in the developed countries of Europe and North America, where there are high absolute numbers of elderly people, but also in developing countries.”¹⁵ Although problems related to aging may differ in their manifestation, magnitude, and severity from country to country, city to city, or even neighborhood to neighborhood, aging is undoubtedly a shared human experience.

8. *Id.*

9. Fagan, *supra* note 2, at 332.

10. STANLEY S. HERR & GERMAIN WEBER, *AGING, RIGHTS, AND QUALITY OF LIFE: PROSPECTS FOR OLDER PEOPLE WITH DEVELOPMENTAL DISABILITIES* (Stanley S. Herr & Germain Weber eds., 1999).

11. Edward Hoffman, *Life Expectancy in Severe Disability*, <http://www.dbpeds.org/articles/detail.cfm?TextID=15> (last viewed Mar. 1, 2009).

12. *Id.*

13. *Id.*

14. *Id.* at 48.

15. Israel Doron, *From National to International Elder Law*, 1 J. INT'L AGING, L. & POL'Y 43, 48 (2005).

Given the fact that people with and without disabilities are living longer, to what extent does and should international human rights laws protect their rights? Specifically, how does the newly adopted Convention on the Rights of Persons with Disabilities affect the rights of elderly people under international law? This Article presents the view that the new Convention on the Rights of Persons with Disabilities has much to offer people who are elderly, both in terms of its substantive provisions as well as an example of what can be accomplished through advocacy efforts to codify human rights protections under international law.

This Article begins with a brief discussion of the existing international human rights protections for people who are elderly. The second section of the Article reviews the newly adopted UN Convention on the Rights of Persons with Disabilities, including why it was needed and what it provides. The third section of the Article discusses the potential of the Convention to protect and expand the rights of elderly people under international law. The fourth section of the Article discusses the United States position on the Convention and its potential to affect the rights of elderly people in the United States. Finally, the Article concludes with a recommendation for the consideration of a new UN Convention on the Rights of Elderly People.

I. THE RIGHTS OF ELDERLY PEOPLE UNDER INTERNATIONAL LAW

Today no separate binding international treaty exists to protect the rights of people who are elderly.¹⁶ That is not to say, however, that people over 65 or older are entirely without legal protections under international law. Several existing treaties refer specifically to certain rights of elderly people and other treaties apply to “other” groups which have been interpreted to include the elderly.¹⁷

16. See Diego Rodríguez-Pinzón, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT’L L. REV. 915, 917 (2003).

17. The following are examples of elderly-specific provisions included in human rights treaties: (1) Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of

As early as 1948, the American Declaration of Rights and Duties of Man included a reference to the rights of elderly persons in Article XVI, which provides that “Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.”¹⁸ In addition, the 1948 Universal Declaration of

Economic, Social and Cultural Rights (“Protocol of San Salvador”). See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” Nov. 17, 1988, not in force, art. 17, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989), corrections at O.A.S.T.S. No. 69, 28 I.L.M. 156, 573, 1341 (1989) [hereinafter Protocol of San Salvador] (stating that every person has a right to certain protections in old age); (2) Article 23 of the Revised European Social Charter. See European Social Charter (Revised), entered into force Jan. 7, 1999, E.T.S. No. 163, 36 I.L.M. 31 (1997), *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> [hereinafter Revised European Social Charter] (providing that signatory nations will adopt public or private services designed to allow elderly persons to remain active members of society for as long as possible); (3) Article 18 of the African [Banjul] Charter on Human and Peoples’ Rights. See African Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58, 62 (1982) (guaranteeing that the elderly will have the rights to special protection consistent with their own needs); (4) Article 25 of the Charter of Fundamental Rights of the European Union. See Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 40 I.L.M. 266, 271 (2001) (entered into force Dec. 7, 2000) (recognizing that the elderly have a right to dignity and independence); (5) Articles 46 and 47 of the Andean Charter for the Promotion and Protection of Human Rights. See Andean Charter for the Promotion and Protection of Human Rights, July 26, 2002, *available at* http://www.comunidadandina.org/ingles/documentos/documents/andean_charter.htm (reiterating that Andean nations will be committed to protecting the human rights of adults, including access to social security). Other provisions of international treaties make reference to issues that affect the protection of the elderly, such as the right to social security, which is ensured in Article 9 of the Protocol of San Salvador. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” Nov. 17, 1988, not in force, art. 9, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989), corrections at O.A.S.T.S. No. 69, 28 I.L.M. 156, 573, 1341 (1989) (stating that every person has a right to certain protections in old age); Article 12 of the Revised European Social Charter. See European Social Charter (Revised), art. 12, entered into force Jan. 7, 1999, E.T.S. 163, 36 I.L.M. 31, 39 (1997) (agreeing that parties will establish social security systems) *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>; Article 9 of the International Covenant on Economic, Social and Cultural Rights. See International Covenant on Economic, Social and Cultural Rights, art. 9, Dec. 16, 1966, 993 U.N.T.S. 3, 7 (1976) [hereinafter ICESCR] (recognizing that every person should be granted access to social security). The International Labor Organization (“ILO”) Convention (C102) Concerning Minimum Standards of Social Security also addresses this topic. See International Labor Organization, Convention (C102) Concerning Minimum Standards of Social Security, *opened for signature* June 28, 1952, 210 U.N.T.S. 131, [hereinafter ILO Minimum Standards] (discussing minimum social security standards that governments should provide for their citizens), *available at* <http://www.ilo.org>.

18. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

Human Rights, the model for all subsequent international human rights instruments, includes reference to the rights of elderly people in Article 25(1) which states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”¹⁹

The International Covenant on Civil and Political Rights (“ICCPR”)²⁰ and the International Covenant on Economic Social and Cultural Rights (“ICESCR”)²¹ also refer to rights that are of particular interest to elderly people worldwide. Similarly, other international treaties and documents as well as regional instruments refer to groups of people, which may include elderly people as well.²² However, none of these treaties have afforded elderly people comprehensive and binding human rights protection.

Proposals for an elderly-specific treaty have circulated for decades, beginning with a draft resolution presented to the UN General Assembly by Argentina in 1948. This resolution remained on the agenda for many years, but it was not until 1969, when Malta requested that the General Assembly consider an agenda item entitled “The Question of the Elderly and the Aged.” This item was adopted on December 14, 1973 by the General Assembly of the United

19. Universal Declaration of Human Rights, G.A. Res. 217A, at art. 25(1), U.N. Doc. A/810 (1948) [hereinafter UDHR].

20. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR] (explaining that all free human beings have a right to civil and political freedoms).

21. ICESCR, *supra* note 17 (recognizing that all human beings have a right to enjoy economic, social, cultural, civil, and political rights).

22. *See* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD]. *See also* Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, June 7, 1999, AG/RES. 1608 (XXIX-O/99); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention No. 169, 72 ILO Official Bull. 59 (1991) (entered into force Sept. 5, 1991), available at <http://www.unhchr.ch/html/menu3/b/62.htm>; International Convention on the Elimination of All Forms of Racial Discrimination, art 2(d), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 212; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, Optional Protocol, G.A. Res. 54/4, annex (Oct. 6, 1999) (entered into force Dec. 22, 2000).

Nations. In this document, “[t]he General Assembly urged member states to ‘enhance the contribution of the elderly to social and economic development’ and to ‘discourage, wherever and whenever the overall situation allows, discriminatory attitudes, policies and measures in employment practices based exclusively on age.’”²³ More specifically, in its separate resolution on Social Security for the Aged, which was adopted on the same date, “the General Assembly urged member governments to provide the aged ‘adequate social security payments,’ ‘sufficient institutions for the care of aged persons requiring medical treatment,’ and adequate ‘architectural facilities’ and ‘housing.’”²⁴

Perhaps the most significant action by the United Nations regarding the status of elderly people under international law began in 1978 when the United Nations scheduled the World Assembly on Aging for 1982. The 1982 World Assembly was held in Vienna and was attended by 124 nations. This Assembly established, for the first time, the “right to age” as a human right. The Assembly produced a Report, including a forty-page declaration affirming that the fundamental and inalienable rights included in the Universal Declaration of Human Rights apply fully to elderly people, as the Preamble of its International Plan of Action on Aging begins:

The countries gathered in the World Assembly on Aging, (1) Do solemnly reaffirm their belief that the fundamental and inalienable rights enshrined in the Universal Declaration of Human Rights apply fully and undiminishedly to the aging.²⁵

The content of the Vienna International Plan of Action on Aging goes beyond a recognition of the equal rights of elderly people in

23. Chen, *supra* note 3, at 172 (citing Question of the Elderly and the Aged, G.A. Res. 3137 (XXVIII), ¶ 3(c)–(d), U.N. GAOR, 28th Sess., Dec. 14, 1973).

24. *Id.* (citing Social Security for the Aged, G.A. Res. 3138 (XXVIII), ¶ (a), (d), (g), U.N. GAOR, 28th Sess., Dec. 14, 1973).

25. Vienna International Plan of Action on Aging, GAOR 37/51, 1982, *available at* http://www.monitoringris.org/documents/norm_glob/vipa.pdf.

such areas as health and nutrition, housing and environment, social welfare, income security and employment and education, and includes “many useful and innovative recommendations to assist and protect the elderly, to enhance their sense of well-being, and to increase their productivity in society.”²⁶

Further, a central theme of the Vienna Conference was that the experience of aging “is a cross-cultural one in which similarities outweigh differences.”²⁷ Accordingly, a major goal of the Assembly “was to encourage nation-states to take the special needs of the elderly into account in all aspects of policy development and implementation and to facilitate participation by the aged in society to the greatest possible extent.”²⁸

Among the major specific recommendations made in the Assembly’s Plan of Action are the following:

- The segregation of the elderly is to be avoided. In particular, housing arrangements for the aged must “assist in securing their social integration.”
- Home care for elderly persons with health problems must be made available whenever feasible. More drastic and isolative measures such as hospitalization are to be avoided as much as possible. Health care alternatives must be developed that will enable the elderly to live as independently as possible.
- Steps should be taken to smooth the way for transition from a full working life to retirement.
- Government policies should reject stereotypical concepts concerning the capabilities and needs of the aged, especially the notion that advanced age equals incapacity.

26. Luke T. Lee, *Aging: A New Human Rights Concern*, 81 AM. SOC’Y INT’L L. PROC. 165, 167–68 (1987).

27. Chen, *supra* note 3, at 173.

28. *Id.*

- The recognition of aging as a shared human experience must be reaffirmed, as must be general awareness of the aging process.
- Recognition of the value of old age in its own right as a time for reflection must be increased.²⁹

Not only is the Vienna Plan not binding on State Parties, but noticeably absent from the Plan, is any obligation on the States to review and revise their own domestic laws to better protect the rights of elderly people within their borders.³⁰

In 2000, the much-awaited Hague Convention on the International Protection of Adults was adopted.³¹ The purpose of the Hague Convention is to avoid or resolve international legal disputes over the care and custody of people “suffering an incapacity or insufficiency of their personal faculties” and their property.³² This Convention ensures that legal planning tools, such as advance medical directives executed in one’s home country, are legally valid and enforceable.³³ Such directives are considered especially important today as more and more older people travel internationally.

Additional international documents exist to protect the rights of elderly people in other contexts as well. For example, elderly people are mentioned specifically as one of the “other groups” in such treaties as the Convention on the Elimination of All Forms of Discrimination Against Women, which says that State Parties shall extend social security to elderly women on a nondiscriminatory basis, “particularly in cases of retirement, unemployment, sickness, invalidity and old age.”³⁴ Similarly, Article 5 of the ILO Convention Concerning Discrimination in Respect of Employment and Occupation provides that State Parties may adopt “special measures

29. *Id.*

30. *See Lee, supra* note 26, at 168.

31. Fagan, *supra* note 2, at 331.

32. *Id.*

33. *Id.*

34. *Id.* at 335.

designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance”³⁵ Although this treaty’s main concern is the prevention of discrimination in the field of employment, it provides support for special measures of international legal protection on the basis of age.

Other international instruments confer specific rights exclusively on the basis of age. For example, imposing the death penalty on persons over 70 years of age is prohibited under Article 4(5) of the American Convention on Human Rights.³⁶ The prohibition against torture and cruel punishment as well as the prohibition on performing medical or scientific experiments on persons not capable of giving consent (including people with age-related dementia) and on elderly people who do not give their informed consent is prohibited in Article 7 of the ICCPR.³⁷

Moreover, even before 2006 and the adoption of the Convention on the Rights of Persons with Disabilities, the United Nations Committee on Economic, Social and Cultural Rights affirmed its position, in General Comment 5, that people with disabilities—young and old alike—are to be included as part of “other groups” when it stated:

35. Convention Concerning Discrimination in Respect of Employment and Occupation art 5, June 25, 1958, 362 U.N.T.S. 31, 36, *available at* http://www.unhchr.ch/html/menu3/b/d_ilo111.htm.

36. *See* American Convention on Human Rights “Pact of San Jose, Costa Rica,” art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 123, 146 (1969) (stating that “[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age”). Interestingly, the ICCPR, the European Convention on Human Rights, and the African Charter do not restrict capital punishment with respect to the elderly. ICCPR, *supra* note 20; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 005; African Charter on Human and Peoples’ Rights, *supra* note 17.

37. ICCPR, *supra* note 20, at art. 7 (commenting that individuals should not be subjected to torture or cruel punishment.) The U.N. Human Rights Committee has stated that: “[i]t takes the view that at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent.” Hum. Rts. Comm., General Comment 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.1 (16th Sess. 1994).

The obligation of States Parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.³⁸

In addition to persons with disabilities, the Committee identified other groups, including elderly people, who are considered particularly vulnerable and for whom States should adopt special measures to discharge their obligations under the ICESCR.³⁹ In addition, with respect to General Comment 6, the Committee recognized that there are many older persons “who do not have adequate means of support . . . and who feature prominently among the most vulnerable, marginal and unprotected groups.”⁴⁰

Action also has been taken on the regional level to address the rights of elderly people. Article 18(4) of the African Charter on Human and Peoples’ Rights stipulates that the “aged and the disabled shall . . . have the right to special measures of protection in keeping with their physical or moral needs.”⁴¹ Similarly, Article 17 of the

38. Committee on Economic, Cultural, and Social Rights, General Comment 5: Persons with disabilities, ¶ 9, U.N. Doc. E/C.12/1994/13 (11th Sess. 1994).

39. See Concluding Observations of the Comm. on Econ., Soc. & Cultural Rts.: Finland, U.N. ESCOR, 51st mtg. ¶ 21, U.N. Doc. E/C.12/1/Add.8 (1996), available at <http://www.unhchr.ch/>.

40. Committee on Economic, Cultural, and Social Rights, General Comment 6: Economic, Social and Cultural Rights of Older Persons, ¶ 17, UN Doc. E/C.12/1995/16/Rev.1 (13th Sess. 1995) [hereinafter General Comment 6].

41. African Charter on Human and Peoples’ Rights, *supra* note 17, at art. 18(4); Andean Charter for the Promotion and Protection of Human Rights, *supra* note 17, at arts. 46–47 (identifying “older adults” as a group deserving special protection).

Protocol of San Salvador, states that “[e]veryone has the right to special protection in old age”⁴² as does Article 25 of the Charter of Fundamental Rights of the European Union which “recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”⁴³

Yet as we review the international and regional instruments that have been enacted to enhance the rights of elderly people, as a group, the majority seem to perpetuate the view of older people as in need of protection, not as rights-holders. In fact, a cursory search of the terms “elderly” or “aging” under international law, reveals an array of law review articles on such topics as guardianship, the right to die, social security, and state-provided medical care. Generally, such articles (with some exceptions⁴⁴) do not discuss the rights of older people to work, to earn a livelihood, to be integrated into the life of a community, to freedom, dignity, and autonomy, or the general human right to age.

That is not to say that the rights and dignity of elderly people is not an issue worthy of scholarly attention or that rights-based international and regional instruments do not exist with respect to elderly people. For instance, in 1991, the General Assembly issued the United Nations Principles for Older Persons, which are grouped into five categories— independence, participation, care, self-fulfillment, and dignity—and correspond to the rights listed in the International Convention on Economic, Social and Cultural Rights (ICESCR).⁴⁵ But this document, like others before it, is not binding.⁴⁶

Moreover, even with the UN Principles for Older Persons and the Universal Declaration on Human Rights, elderly people have fared far worse than other groups in terms of international human rights protections. They have been mostly ignored by the international

42. Protocol of San Salvador, *supra* note 17, at art. 17.

43. Charter of Fundamental Rights of the European Union, *supra* note 17, art. 25 (recognizing that the elderly have a right to dignity and independence).

44. See generally e.g., Israel Doron, *Elder Guardianship Kaleidoscope—A Comparative Perspective*, 16 INT’L J.L. POL’Y & FAM. 368 (2002).

45. Rodríguez-Pinzón, *supra* note 16, at 948.

46. *Id.*

community, and, as a result, have encountered a myriad of physical and social obstacles that have deprived them of rights and dignity under international law.

II. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A. *Background of the Convention*

Elderly people, as a group, share a common history of neglect under international law with people with disabilities. Until recently, people with disabilities had been totally ignored by the international community. It was not until this decade that the history of exclusion, discrimination, and isolation of people with disabilities began to be addressed under international law.⁴⁷

The turning point came on December 19, 2001, when the United Nations General Assembly adopted Resolution 56/168 establishing an Ad Hoc Committee to consider “proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities”⁴⁸ The Ad Hoc Committee included representatives of over 40 countries, and over 400 different NGOs and Disabled Peoples’ Organizations (DPOs).⁴⁹ Five years later, nearly to the day, on December 13, 2006, the United Nations General Assembly adopted by consensus a landmark treaty on the Rights of Persons with Disabilities and an Optional Protocol.⁵⁰

47. In 2003, the UN Office of the UN High Commissioner for Human Rights reported that individuals with disabilities are “united in one common experience -- being exposed to various forms of discrimination and social exclusion.” Office of the High Commissioner for Human Rights, Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/convention/unsystem.shtml>.

48. Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L. L. & COM. 287, 288 (2007) (citing Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. Doc. A/56/583/Add.2 (Dec. 21, 2001), available at <http://www.icrpd.net/ratification/documents/en/Extras/General%20Assembly%20Res%2056%20168.pdf>).

49. Kanter, *supra* note 48, at 289 (Distinguished from organizations without persons with disabilities as leaders).

50. U.N. Enable website, Convention on the Rights of Persons with Disabilities, available at <http://www.un.org/disabilities/default.asp?navid=12&pid=150>. The optional protocol gives individuals and

On March 30, 2007, the Convention opened for signatures, and on that day, 82 countries signed the Convention, with 44 countries also signing the Optional Protocol.⁵¹ According to the United Nations, this number of signatories on an opening day is the highest number in the history of the United Nations.⁵² The United States was noticeably absent from the list of signatories at the opening day ceremony, but on July 30, 2009, the U.S. finally joined the list of at least 142 other countries that have now signed the Convention.⁵³

B. Why the Convention on the Rights of Persons with Disabilities Is Needed.

The Convention on the Rights of Persons with Disabilities was needed because for decades people with disabilities had been ignored by the international community as well as by their own countries.⁵⁴ That situation began to change in the past two decades. Since 1990, when the United States enacted the Americans with Disabilities Act, many other countries throughout the world also began to enact their own domestic laws to protect people with disabilities in their respective countries.⁵⁵ The United States, Canada, and Spain were among the first countries in the world to enact such disability

groups the right to seek redress for violations of rights under the Convention directly to the monitoring body, after exhaustion. U.N. Enable website, Option Protocol to the Convention on the Rights of Persons with Disabilities, *available at* <http://www.un.org/disabilities/default.asp?id=311#ar1>

51. U.N. Enable website, Convention on the Rights of Persons with Disabilities, *available at* <http://www.un.org/disabilities/default.asp?navid=12&pid=150>. After signing the Convention and protocol, Jamaica became the first country to also ratify the Convention.

52. *Id.*

53. UN Enable website, Countries and Regional Integration Organizations, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Sept. 5, 2009). As of September 5, 2009, 142 countries have signed the Convention; 85 have signed the Optional Protocol; 66 countries have ratified the Convention, and 44 countries have ratified the Optional Protocol. *Id.*

54. Kanter, *supra* note 48, at 294-95.

55. Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, DREDF.org, http://www.dredf.org/international/degener_quinn.html (last visited Feb. 12, 2008) (comparing anti-discrimination laws abroad); GLADNET, *UN Convention on the Rights of Persons with Disabilities*, http://www.ilr.cornell.edu/edi/gladnet/unconvention_resources.cfm (last visited Mar. 2, 2009) (comparing various articles of the CRPD with domestic laws from countries throughout the world).

discrimination laws.⁵⁶ The United Kingdom, Sweden, Israel, and Australia also enacted comprehensive disability laws in the 1990's, all of which are designed to promote the integration of people with disabilities into their respective societies.⁵⁷

The various countries' domestic disability discrimination laws differ in their structure, scope, and coverage. Some laws outlaw discrimination in their criminal codes,⁵⁸ while others prohibit discrimination in their constitutions.⁵⁹ Countries which address discrimination against people with disabilities in their constitutions generally include disability on a list of protected groups, together with race, religion, and political beliefs.⁶⁰ Some countries' disability laws appear to be civil rights laws, modeled specifically after the ADA, while others are social welfare laws focusing more on the delivery of services and benefits, than on the protection of individual rights.⁶¹

56. See Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12101, et seq (2005); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); and Canadian Human Rights Act, R.S.C. ch. H-6 § 1 (1998); see also Jerome E. Bickenbach, Jerome E., *The ADA v. the Canadian Charter of Rights*, in Francis & Silvers (eds.): AMERICANS WITH DISABILITIES (2000).

57. See Equal Rights for People with Disabilities Law, 5758-1998 (1999) (Isr.), available at http://www.justice.gov.il/structure/foreign/files_eng.htm. The author assisted Bizchut, Israel's disability rights advocacy organization in the drafting of the original version of the Israeli law. The intent of the original drafters was to incorporate the "best" elements of the ADA, Canada's Charter, and Sweden's law that created a commission on disability into Israel's new disability law. See Arlene Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L J. L. & COMM. 243, n.35 (2003); see also Stanley Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 36 U. MICH. J.L. REFORM 305, 319-322 (2002)

58. See e.g., Act No.8, To Promulgate a Worker's Charter (B.O.E., 1980, 64) (Spain).

59. See e.g., Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

60. See e.g., Bundes-Verfassungsgesetz [B-VG] [Constitution] art. 7, ¶ 1 (Austria); Constituicao Federal (Brazil); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution federal de la Confederation Suisse [Cst] [Constitution] Apr. 18, 1999, art. 8, ¶ 2 (Switz.); CONSTITUTION, Art. 16 (1995) (Uganda).

61. See Law of the People's Republic of China on the Protection of Disabled Persons, (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991), 14 P.R.C. LAWS & REGS V-03-00-101; Japan, Human Resources Development and Promotion Law, Japan Fundamental Law for Disabled Persons, Law No. 84 of 1970 (Major revision in 1993, amended in 2004) available at <http://www.dinf.ne.jp/doc/english/law/japan/selected38/chapter2.html> (last visited Mar. 3, 2009); Bundes-Verfassungsgesetz [B-VG] [Constitution] art. 7, ¶ 1.

The vast majority of domestic disability laws do not define which individuals are considered disabled and therefore protected by their countries' laws.⁶² Further, only a few countries, relying on the ADA's broad definition of disability, define disability to include people who are, in fact, not disabled themselves, but are "regarded" by others as disabled, as well as those with drug and/or alcohol addiction.⁶³ One of the more restrictive definitions of disability may be found in Ethiopia's 1994 law, which specifically excludes all persons with mental illness as well as those with alcoholism and drug addiction.⁶⁴

In addition to the variation in the laws' definitions of disability, the domestic disability laws differ in their scope and coverage. Some countries limit their respective laws' coverage to only one area, such as employment, education, or access to public services, but not more than one area.⁶⁵ Other countries include general statements against discrimination, but without specifying the setting in which such discrimination is prohibited. While other countries have enacted comprehensive laws which seek to protect people with disabilities against direct and indirect discrimination, and in a wide range of daily life activities including housing, access to goods and services, and transportation.⁶⁶ Canada, for example, includes equal rights for

62. See e.g. Bundes-Verfassungsgesetz [B-VG] [Constitution] (Austria); C.F. (Constituicao Federal) (Brazil); CONSTITUTION, § 38(2) (Fiji); CONSTITUTION, (2000) (Finland) (2000); GG (Grundgesetz der Bundesrepublik Deutschland (federal constitution)); CONSTITUTION (1993) (Ghana).

63. See e.g., Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); Canadian Human Rights Act, R.S.C. ch. H-6 § 25; Disability Discrimination Ordinance, (1990) ch. 478. (H.K.); Magna Carta for Disabled Persons, Rep. Act. No. 7277, titl 1, § 4, 88:18 O.G. 2537-56, (May 4, 1992) (Phil.).

64. A Proclamation Concerning the Rights of Disabled Persons to Employment, Proclamation No. 101 (1994) (Ethiopia).

65. See e.g., *Id.*; Swedish Act Concerning Support & Service for Persons with Certain Functional Impairments, SFS 1993:387; Korea, Act Relating to Employment Promotion, Etc. of the Handicapped, Law No. 4219 (1990); CONSTITUTION, § 38(2) (Fiji).

66. See e.g., Equal Rights for People with Disabilities Law, 5758-1998 (1999) (Isr.), available at http://www.justice.gov.il/structure/foreign/files_eng.htm; Ministry of Justice, State of Israel, Implementation of Human Rights Council Resolution 7-7/9, 1 (2008) available at <http://www2.ohchr.org/english/issues/disability/docs/consultation/statesinputs/israel.doc>; Disability Discrimination Act, 1992 (Austl.); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); and Canadian Human Rights Act, R.S.C. ch. H-6 § 1 (1998); Disability Discrimination Ordinance, (1990) ch. 478 (1990) (H.K.); Magna Carta for Disabled Persons. 1995 Rep.

persons with disabilities in its Constitution as well as in comprehensive legislation that defines the requirements of the constitutional provision. A number of other countries have enacted constitutional provisions prohibiting discrimination through the use of employment quotas.⁶⁷

Further, many countries' domestic disability laws do not rely on the civil rights model at all. These countries rely on the social welfare model or the medical model of disability. As such, these laws portray the person with a disability as an object to whom benefits, treatment, and rehabilitation is provided, rather than a subject of the law's protections. The Chinese disability law is one such example. The Chinese law seems to focus on the individual's need to correct his/her own attitude about disability, rather than on society's need to change its attitude about people with disabilities. As the law states, "Chinese disabled persons should display an optimistic and enterprising spirit."⁶⁸

Another approach some countries have taken to address the rights of people with disabilities in their respective societies is to impose criminal penalties for discriminatory practices. For example, Spain makes it illegal for an employer to refuse to hire a worker with a disability who is capable of doing the job.⁶⁹ The Spanish law imposes varying degrees of criminal sanctions on an employer, depending on the seriousness of the offense.⁷⁰ Turkey's relatively new Disability Law, enacted in 2002, also imposes criminal penalties on violators of its anti-discrimination provisions. In fact, in Turkey, one case has

Act. No. 7277, titl 1, § 4, 88:18 O.G. 2537-56 (May 4, 1992) (Phil.); and the Americans with Disabilities Act (ADA), Pub. L. No.101-336, 104 Stat. 327 (July 26, 1990).

67. See e.g., Bundes-Verfassungsgesetz [B-VG] [Constitution] (1983) (Austria); C.F. (Constituicao Federal) (1988) (Brazil); GG (Grundgesetz der Bundesrepublik Deutschland (federal constitution)) (1996); CONSTITUTION, §20 (1994) (Malawi); S. AFR. CONST., §9(3) (1996); Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution federal de la Confederation Suisse [Cst] [Constitution] Apr. 18, 1999 (Switz.); CONSTITUTION, Art. 21 (1995) (Uganda).

68. See Law of the People's Republic of China on the Protection of Disabled Persons, (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991), 14 P.R.C. LAWS & REGS V-03-00-101.

69. See Act No.8, To Promulgate a Worker's Charter (B.O.E., 1980, 64) (Spain) available at <http://www.dredf.org/international/spain.html>.

70. *Id.*

been brought and won in court against a bus driver who admitted not wanting to stop to pick up a disabled patron. The driver was subjected to criminal penalties.⁷¹

Some countries' laws also recognize the importance of providing specific civil remedies and enforcement mechanisms. For example, several countries' laws include specific requirements for reasonable accommodations in their disability discrimination laws.⁷² But only a few countries appear to provide a private right of action for violations of the anti-discrimination provisions of their laws.⁷³ Most countries fail to specify any remedies whatsoever in their laws.⁷⁴ In Ghana, for example, the law states that there should be no differential treatment of people with disabilities, but the law includes no enforcement mechanism.⁷⁵ The most comprehensive laws, however, include specific injunctive, declaratory, and/or judicial remedies, including money damages to victims of disability discrimination.⁷⁶ And, unlike the ADA in the U.S., most countries' laws seek change through a variety of formal and informal alternative dispute strategies, often

71. Republic of Turkey, Law on Disabled People, Law No. 5378 of 2005 (adopted Jan. 7, 2005), available at http://www.law.syr.edu/media/documents/2009/9/Turkish_Disability_Law.pdf; Interview with Idil Isil Gul, Professor of Law, Bigli University, in Istanbul, Turkey, Sept. 4, 2009.

72. See e.g. Disability Discrimination Act, 1992 (Austl.). See also Submission to the Senate's review of the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, http://www.hrlrc.org.au/files/DYXBYIQY8F/Disability_Discrimination_Amendments_FINAL.pdf (last visited Mar. 3, 2009); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); Canadian Human Rights Act, R.S.C. ch. H-6 § 25; Disability Discrimination Ordinance, (1990) ch. 478. (H.K.); Magna Carta for Disabled Persons, Rep. Act. No. 7277, titl 1, § 4, 88:18 O.G. 2537-56, (May 4, 1992) (Phil.); Swedish Act Concerning Support & Service for Persons with Certain Functional Impairments, SFS 1993:387; The Disability Discrimination Act, 1995, c. 50 (Eng.); and Americans with Disabilities Act (ADA), Pub. L. No.101-336, 104 Stat. 327 (July 26, 1990).

73. They are Austria, the Republic of Malawi, Switzerland, and Uganda. Bundes-Verfassungsgesetz [B-VG] [Constitution] (1983) (Austria); CONSTITUTION, §20 (1994) (Malawi); Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution federal de la Confederation Suisse [Cst] [Constitution] Apr. 18, 1999 (Switz.); CONSTITUTION, Art. 21 (1995) (Uganda).

74. See e.g., Law N° 1678 of Persons with Disabilities (1995) (Bolivia); C.F. (Constituicao Federal) (1988) (Brazil).

75. See CONSTITUTION (1993) (Ghana); The Disabled Persons Act, Art. 29 (1993) (Ghana).

76. See e.g., Disability Discrimination Act, 1992 (Austl.). See also Submission to the Senate's review of the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, http://www.hrlrc.org.au/files/DYXBYIQY8F/Disability_Discrimination_Amendments_FINAL.pdf (last visited March 3, 2009); Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); Canadian Human Rights Act, R.S.C. ch. H-6 § 25; Disability Discrimination Ordinance, (1990) ch. 478 (H.K.).

with the involvement of a high-profile government commission convened to review complaints of disability discrimination.⁷⁷

Throughout the 1990's, in order to promote the adoption of such domestic disability legislation, the international community took notice of the absence of protections for people with disabilities under international law.⁷⁸ In 1993, following the Decade of the Disabled, the UN adopted the Standard Rules on the Equalization of Opportunities for Disabled Persons, which provides policy guidelines promoting the same opportunities to persons with disabilities that others enjoy.⁷⁹ Although the Standard Rules have served as model legislation for a number of countries and represent the first comprehensive international document affirming the equal rights of people with disabilities, they do not cover all aspects of life and are not legally binding.⁸⁰

On a regional level, laws to benefit people with disabilities also began to emerge in the 1990's. These regional laws applied existing human rights instruments to people with disabilities as a way to address the lack of binding international disability law. For example, the first region to adopt a binding treaty prohibiting discrimination against people with disabilities was the Americas, which, in 1992, adopted the American Convention on Human Rights.⁸¹ This Convention was established to reaffirm the essential rights outlined in other international human rights documents. In 1999, the Americas adopted the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, which

77. See Herr, *supra* note 57, at 319-322.

78. See generally Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241 (2003).

79. Aaron Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181, 187 (2005).

80. *Id.*

81. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L. V/II.82 doc.6 rev.1 at 25 (1992)) [hereinafter American Convention on Human Rights].

was created specifically to eliminate discrimination based on disability, and to promote equality for people with disabilities.⁸²

Moreover, the American Convention on Human Rights provided the basis for a precedent setting case. In *The Case of Victor Rosario Congo*, a man from Ecuador with a mental disability died of “dehydration” while in pretrial detention.⁸³ Mr. Congo had been beaten by a guard, left in isolation, and denied proper medical care while he was being detained. The Inter-American Commission of Human Rights found that Mr. Congo’s mental state deteriorated while being held in isolation.⁸⁴ The Commission also found that the detention of Mr. Congo constituted inhumane and degrading treatment, and therefore amounted to a violation of Article 5 of the American Convention.⁸⁵

In Europe, a specific regional instrument addressing the right of people with disabilities was not adopted until 2003. Although the Council of Europe had adopted the European Convention on Human Rights and Fundamental Freedoms in 1953, it does not include people with disabilities as a protected group.⁸⁶ The European Convention was created to secure universal and effective recognition of the rights mentioned within the document, and was amended numerous times since its conception.⁸⁷ But it never directly addressed the rights of people with disabilities.⁸⁸ However, in 2003, the Council of Europe adopted Recommendation 1592, entitled “Towards Full Social Inclusion of Persons with Disabilities.” This document “calls on the Committee of Ministers to undertake a series of measures to promote full citizenship and participation of people with disabilities

82. Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, A.G. Res. 1608, 19th Sess., O.E.A. Doc. OEA/Ser. AG/doc. 3826/99 (1999).

83. *The Case of Victor Rosario Congo*, Case 11.427, Inter-Am. C.H.R., Report No. 63/99, OEA/Ser.L/V/II.102, doc. 6 rev. (1999) (Ecuador).

84. *Id.*

85. *Id.* ¶ 101.

86. European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953).

87. *Id.*

88. *Id.*

in the community. It also recommends the Committee of Ministers to mainstream disability issues in all areas of the Council of Europe's work and to establish an in-house code of good practice."⁸⁹

A recent case in Bulgaria illustrates the potential impact of regional human rights conventions on the rights of older persons, especially those who live in institutions. On August 24, 2007, the Mental Disability Action Center filed an application to the European Court of Human Rights seeking redress for the death of an elderly resident of a social care institution. The elderly woman died showing signs of poor hygiene, inadequate nutrition, and consistent abuse, as evidenced by extensive bruising, and broken bones. Although administrative inquiries into the conditions at the institution uncovered serious legal and procedural violations, no proper investigation or formal criminal or civil action was brought against the institution and no remedies were provided.⁹⁰

The African region also has acted to protect the human rights of people with disabilities, by applying the rights recognized in the African Charter of Human and Peoples' Rights to people with disabilities. In the case of *Purohit and Moore v. Gambia*,⁹¹ two mental health advocates brought suit representing the interests of current and future mental health patients in Gambia.⁹² The complainants argued the main law governing mental health in Gambia was outdated.⁹³ They alleged violations of Articles 2, 3, 5, 7 (1)(a), 13 (1), 16, and 18(4) of the African Charter on Human and Peoples' Rights (ACHPR), and the Commission agreed.⁹⁴ In its

89. *Id.*

90. Barbara Bukovská, Legal Director of Mental Disability Action Center wrote, in a press release available at <http://www.mdac.info/en/MEDIA+RELEASE+24.08.2007> (last visited Sept. 12, 2009). MDAC will have its first hearing before the European Court of Human Rights on November 10, 2009. Cases *Stanev v. Buglaria* and *Mitev v. Bulgaria*, lodged together with the Bulgarian Helsinki Committee, will be jointly heard by the fifth section of the Court. Both cases address human rights violations related to guardianship and institutionalization. *Id.*

91. *Purohit and Moore v. Gambia*, 11 IHRR 257 (Afr. Comm'n on Human and Peoples' Rights 2003).

92. *Id.* ¶ 1.

93. *Id.* ¶ 3.

94. *Id.* ¶ 9.

landmark decision, the African Commission found the Republic of Gambia in violation of Articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16, and 18(4) of the ACHPR.⁹⁵ The decision marked the first time the African Commission had interpreted the ACHPR as well as the first time it found a country's domestic law to be in violation of the regional human rights treaty.

As these domestic and regional efforts continued throughout the world in the 1990's, the movement for a separate disability-related convention gained momentum. In 2000, the NGAO Summit on Disability in Beijing resulted in the Beijing Declaration of Rights for People with Disabilities. This Summit called for the creation of a disability-specific convention. And, in 2001, the UN General Assembly Committee adopted a resolution calling for the development of an "Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities." Five years later, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities.

Despite the existence of such laws, discrimination, segregation, and even abuse against people with disabilities continues in most, if not all, countries of the world.⁹⁶

C. What the Convention on the Rights of Persons with Disabilities Provides

Arguably, there should be no need for treaties which seek to protect specific groups, such as people with disabilities or elderly people. The Universal Declaration of Human Rights was adopted in 1948 to protect *all* people.⁹⁷ Arguably, if the Declaration of Human Rights was intended to protect the rights of all people, including the young and old, and those with and without disabilities, why are

95. *Id.* ¶ 85.

96. Sally Chaffin, *Challenging the United States Position On a United Nations Convention On Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121, 122 (2005).

97. UDHR, *supra* note 19.

additional treaties needed?⁹⁸ The answer seems obvious: because the Universal Declaration of Human Rights has not provided adequate protection for certain groups, including people with disabilities and the elderly.⁹⁹

The Convention on the Rights of Persons with Disabilities became the first binding international treaty of the twenty-first century and the first to specifically protect the rights of at least 650 million or 10 percent of the world's population of people with disabilities.¹⁰⁰ Following its adoption by the United Nations in 2006, the Convention was hailed as the "Declaration of Independence" for persons with disabilities throughout the world.¹⁰¹ The Convention has become significant not only for what it says, but also for what it does not say since it includes no definition of disability.

The Convention represents a paradigm shift from a medical model of disability to a human rights model. This shift is perhaps most noticeable in Article 1 of the Convention, which states that "[t]he purpose of the Convention is 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."¹⁰²

98. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287 (1996).

99. As Louise Arbour, the United Nations High Commissioner for Human Rights stated, "[T]he existing human rights system was meant to promote and protect the rights of persons with disabilities. . . . [But] the existing standards and mechanisms have in fact, failed to provide adequate protection in the specific cases of persons with disabilities. It is clearly time for the United Nations to remedy this shortcoming." She also emphasized that "attitudes, rather than resource constraints, [often] create the strongest barriers to the enjoyment of rights by persons with disabilities," and that States "bear the primary responsibility for ensuring equality and eliminating discrimination. . . ." Therefore, she concluded, "[I]nternational cooperation must also play a role in ensuring that progress is made everywhere" since "[e]mpowering persons with disabilities to claim their human rights is our collective obligation." Louise Arbour, High Commissioner for Human Rights, United Nations, Statement Before the General Assembly Ad Hoc Committee (Jan. 27, 2006), available at <http://www2.ohchr.org/English/issues/disability/docs/speakingnoteshcjan.doc>.

100. *Id.*

101. Gerard Quinn, *Closing: Next Steps—Towards a United Nations Treaty on the Rights of Persons with Disabilities*, in *DISABILITY RIGHTS* 519, 541 (Peter Blanck ed., 2005).

102. CRPD, *supra* note 22, at art. 1. The drafters of this Convention were clear that disability should be seen as the result of the interaction between a person and his or her environment. Disability is not something that resides in the individual as the result of some impairment. Instead, disability is an

Article 1 also includes a statement that “[p]ersons 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.”¹⁰³

The reason that this second statement is included in Article 1 is that there was no agreement regarding whether or not the Convention should include a definition of disability. Some DPOs and delegates feared that without including a specific definition of disability in the Convention itself, States would feel free to exclude people with certain disabilities from their laws’ protections, thereby putting at risk the entire purpose of the Convention. In fact, the Seventh Ad Hoc meeting was devoted nearly exclusively to a discussion of proposed definitions of disability.¹⁰⁴

However, those who argued against including a specific definition of disability, including the Chair, ultimately prevailed.¹⁰⁵ They reasoned that the Convention should not include a definition of

evolving concept. This approach to disability marks a shift in thinking about disability from a social welfare concern, to a human rights issue, which acknowledges that societal barriers and prejudices are themselves disabling. The Convention, therefore, marks a “paradigm shift” in attitudes and approaches to persons with disabilities.

Unlike the medical model that views disability as a problem of the person, the Convention adopts the human rights model which sees the disability in society, *not* the person, and views people with disabilities as rights holders and members of our respective societies who are often more disabled by the physical and attitudinal barriers societies erect to exclude and stigmatize them, than by their own physical or mental condition. For example, a person in a wheelchair might have difficulty voting not because of her condition or a lack of opinions about the candidates, but because the polling place, the polling machines or even the bus that would take her to the polling place are not accessible.

Kofi Annan, in a message delivered by Deputy Secretary-General, Mark Malloch Brown, referred to the adoption of the Convention as “the dawn of a new era.” He stated, “[T]oday promises to be the dawn of a new era—an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long. This Convention is a remarkable and forward-looking document. While it focuses on the rights and development of people with disabilities, it also speaks about our societies as a whole—and about the need to enable *every person* to contribute to the best of their abilities and potential.” Speech on the Adoption of Landmark Convention on Rights of Persons with Disabilities (Dec. 13, 2006) (emphasis added), available at <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>.

103. CRPD, *supra* note 22, at art. 1.

104. U.N. Ad Hoc Comm., 7th Sess. on a Comprehensive and Integral Int’l Convention on Prot. and Promotion of the Rights and Dignity of Persons with Disabilities, U.N. Doc. A/AC.265/2006/2 (Feb. 13, 2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc7.htm>.

105. Kanter, *supra* note 48, at 292.

disability since any definition would necessarily include some people and not others, and that over time, the definition may change in a way that would exclude people who may not now be considered as members of the group of people with disabilities.¹⁰⁶ Moreover, by not including a specific definition of disability, the Convention recognizes that a person may be considered as having a disability in one society or setting, but not in another, depending on the role that the person is assumed to take in his or her community and the barriers that disable the individual from participating in a given society.¹⁰⁷

For example, in a society where eyeglasses are available for someone who is somewhat nearsighted, this person would likely not be considered to be a person with a disability.¹⁰⁸ However, someone with the same condition in another society where eyeglasses or corrective surgery are not available would be considered to be a person with a disability, especially if the person lived in an agrarian society and the level of vision prevented the person from working in the fields.

Another reason for the omission of a definition of disability in the Convention is that to include a definition would undermine the Convention's commitment to the social model of disability that places responsibility for eradicating unequal treatment of people with disabilities on society, not on the person with a disability. It was seen as less important to decide who is and is not considered a person a disability than it was to include language requiring actions by the state to alter its practices to become more inclusive of people with different abilities.

Although there is no definition of disability included in the Convention itself, there is much that the Convention does say. Indeed, the scope and coverage of the Convention is unprecedented.

106. *Id.* at 292.

107. *Id.*

108. Indeed in the new ADAA, signed by President Bush on September 25, 2008, Congress has made clear that people who use corrective lenses are not considered disabled under the ADA. *See* Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, § 3(4)(e)(2) (2008).

It covers a number of key areas such as accessibility, personal mobility, health, education, employment, habilitation, rehabilitation, participation in political, social and cultural life, and perhaps most significantly, equality and non-discrimination.

The articles of the Convention are based on the following eight guiding principles:¹⁰⁹

1. Respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons.
2. Non-discrimination.
3. Full and effective participation and inclusion in society.
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
5. Equality of opportunity.
6. Accessibility.
7. Equality between men and women.
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

As these principles indicate, the Convention recognizes unequivocally the right of people with disabilities to dignity, to live in the community, to exercise their legal capacity, and to ensure their full and equal enjoyment of the rights recognized in the Convention. The Convention also establishes the right of people with disabilities to enjoy the inherent right to live life on an equal basis with others, to access justice, to enjoy the right to liberty and security, and not to be deprived of their freedom either unlawfully or arbitrarily (issue of institutionalization).¹¹⁰ The Convention prohibits all forms of discrimination against persons with disabilities, including both direct

109. CRPD, *supra* note 22, at art. 3.

110. *Id.* at art. 1.

and indirect discrimination,¹¹¹ and ensures equality for people with disabilities. In this context, as a member of the Ad Hoc Committee recognized, equality “does *not* mean simply treating everyone in exactly the same way. Indeed, accommodating people’s differences is the essence of substantive equality, and this understanding is especially key to eliminating discrimination against persons with disabilities.”¹¹²

As to the important issue of access, the Convention establishes a right to access and requires State Parties to affirmatively identify and eliminate obstacles and barriers, in order to ensure that persons with disabilities may access their environment, transportation, public facilities, services, information, and communications.¹¹³

The Convention also requires State Parties to protect the right of people with disabilities to an adequate standard of living and social protection, and to equal participation in public and cultural life.¹¹⁴ The Convention also imposes on States the obligation to provide people with disabilities with rehabilitation, vocational education, and healthcare at the same range, quality, and standard of free or affordable health services provided to other persons.¹¹⁵

Another significant aspect of the Convention is the fact that it combines human rights and civil, political, social, and economic rights within the same document. All previous United Nations treaties

111. *Id.* at art. 5.

112. Henri-Paul Normandin, Ambassador of Canada, Statement to the General Assembly on the Convention on the Rights of Persons with Disabilities, (Dec. 13, 2006) (emphasis added), *available at* http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/general_assembly-assemblee-generale/8377.aspx?lang=eng. The CRPD covers most of the aspects of daily life of children and adults with disabilities, such as the right of children with disabilities to attend school and to an inclusive education, and the right of adults with disabilities to privacy and to own and inherit property. CRPD, *supra* note 22, at arts. 22 & 24.

113. CRPD, *supra* note 22, at art. 9.

114. *Id.* at arts. 28–30.

115. *Id.* at art. 23. The CRPD also protects people with disabilities from discrimination in marriage and parenthood, by ensuring that men and women with disabilities have equal opportunities to experience parenthood, marry, establish a family, decide on the number and spacing of children, have access to reproductive and family planning education and means, and to enjoy equal rights and responsibilities regarding the adoption of children. *Id.* at art. 25. (I would note that this provision was the one about which the US delegation was most strident, to make sure, based on the President’s policy, that nothing in the Convention was to be interpreted to condone abortion). *See* Kanter, *supra* note 48, at 305.

protect *either* civil and political rights *or* social, economic, and cultural rights, but not both.¹¹⁶ As such, the CRPD provides a new model of human rights protections.

Although it may seem obvious that economic and political rights on one hand are complimentary and mutually reinforcing of social and cultural rights, all prior UN documents retained this dichotomy. The Convention on the Rights of Persons with Disabilities, therefore, rejects the existing dichotomy and challenges the international community to rethink its approach. For example, the right not to be tortured is considered a political right under the International Convention on Civil and Political Rights; but why isn't the freedom from torture itself also an economic right, since torture takes away one's ability to work and make a living to survive? The new Convention shows by example the inter-relationship among various rights, and specifically, that subsistence rights should be considered one of the fundamental rights of all human beings—a basic human right.

In short, the Convention on the Rights of Persons with Disabilities recognizes not only the equal importance of all rights—civil, cultural, economic, political, and social—but it also affirms the notion that these rights cannot be separated.¹¹⁷ As authors of a recent article

116. As we know, the Covenant on Civil and Political Rights details the basic civil and political rights of individuals and nations. Among the rights of nations are: the right to self-determination; the right to own, trade, and dispose of their property freely, and not be deprived of their means of subsistence; the right to legal recourse when their rights have been violated; the right to life, to liberty and freedom of movement; the right to equality before the law; the right to presumption of innocence until proven guilty; the right to appeal a conviction; the right to be recognized as a person before the law; the right to privacy and protection of that privacy by law; freedom of thought, conscience, and religion; freedom of opinion and expression; and freedom of assembly and association. ICCPR, *supra* note 20. Also the Covenant on Economic, Social, and Cultural Rights describes the basic economic, social, and cultural rights of individuals and nations, including the right to: self-determination; wages sufficient to support a minimum standard of living; equal pay for equal work; equal opportunity for advancement; form trade unions; strike; paid or otherwise compensated maternity leave; free primary education, accessible education at all levels; and copyright, patent, and trademark protection for intellectual property. ICESCR, *supra* note 17.

117. Specific rights covered in the Convention include equal protection before the law; liberty and security of the person; freedom from torture; protection of the integrity of the person; liberty of movement and nationality; freedom of expression; respect for privacy; right to participation in public life; freedom from exploitation; respect for home and the family; right to live in the community; right to education; right to life; right to health; habilitation and rehabilitation; right to work; right to an adequate

observe, “[T]o be effective, both domestic and international disability rights must adopt a disability human rights paradigm. Such a framework combines the type of civil and political rights provided by antidiscrimination legislation . . . with the full spectrum of social, cultural, and economic measures . . . bestowed by many human rights treaties.”¹¹⁸ For people who are elderly, this marriage of political and economic and social rights is particularly significant.

III. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS POTENTIAL TO PROTECT AND EXPAND THE RIGHTS OF ELDERLY PEOPLE UNDER INTERNATIONAL LAW

The Convention on the Rights of Persons with Disabilities does not single out elderly people for special protections. However, several provisions of the Convention are of particular relevance to elderly people, with and without disabilities. It is these provisions that hold the most promise for elderly people and their advocates who are searching for international legal protections.¹¹⁹

Article 1 of the CRPD states clearly and succinctly that the purpose of the “Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms

standard of living; and the right to participate in cultural life. CRPD, *supra* note 18.

118. Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1204, 1205–06 (2007).

119. A recent case illustrates the potential impact of the CRPD on the lives of people who are elderly, particularly those in institutions. On August 24, 2007, the Mental Disability Action Center filed an application to the European Court of Human Rights seeking redress for the death of an elderly resident of a social care institution. The elderly woman died showing signs of poor hygiene, inadequate nutrition, and consistent abuse, as evidenced by extensive bruising, and broken bones, including her collar bone. Although administrative enquiries into her treatment and the conditions at the institution uncovered serious legal and procedural violations, no formal criminal or civil action, or adequate investigation, was carried out by the authorities and no remedies were made available. Barbora Bukovská, Legal Director of MDAC wrote, “In the absence of appropriate services in the community, the applicant, elderly and with disabilities, had no option but to enter an institution. Like many in Bulgaria it was under funded, understaffed and failed to provide her with the care she needed. MDAC calls upon Bulgaria to fulfill its human rights obligations towards people with disabilities by committing to the closure of such institutions and to the provision of adequate services in the community.” *See* Mental Disability Advocacy Center, *Bulgaria: No Investigation of Inhuman Treatment of People with Disabilities*, Aug. 24, 2007, <http://www.mdac.info/en/MEDIA+RELEASE+24.08.2007>.

by all persons with disabilities, and to promote respect for their inherent dignity.”¹²⁰ This language alone will help to ensure the right to equal rights of people who are elderly and who have a mental or physical disability, particularly in those societies in which being elderly has become synonymous with no longer being in need of rights protections.

Article 3 of the CRPD includes the principles that guide the rest of the Convention.¹²¹ These principles apply equally to elderly people, including (a) respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons; (b) non-discrimination; (c) full and effective participation and inclusion in society; (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) equality of opportunity; (f) accessibility; and (g) equality between men and women.¹²² Each of these principles applies to elderly people, particularly those who with mental or physical disabilities, and on that basis are denied their rights and dignity.

In the recent case of *Glor v. Switzerland*, the European Court of Human Rights found a violation of the right to non-discrimination on the basis of the applicant’s disability and cited the new United Nations Convention on the Rights of Persons with Disabilities, including the concept of “reasonable accommodation” in support of its decision for the very first time.¹²³

However, one of the more interesting issues related to the principle of equality of opportunity relates to the question of whether distinctions based on age are considered discrimination under human rights law.¹²⁴ In the United States, for example, the Supreme Court has refused to consider age-based distinctions as a “suspect class,” appropriate for heightened level review under the equal protection

120. CRPD, *supra* note 22, at art. 1.

121. CRPD, *supra* note 22, at art. 3.

122. *Id.*

123. *Glor v. Switzerland*, European Court of Human Rights, <http://www.mdac.info/en/node/187> (last visited Sept. 12, 2009).

124. See Chen et al., *supra* note 3, at 167 (discussing the United Nation’s treatment of aging as a human rights concern).

clause, and has consistently applied the rationality test to uphold challenged legislation.¹²⁵ Similarly, General Comment 6 of the ICESCR expresses concern regarding possible discrimination on the basis of age, and recognizes lack of clarity regarding age as a basis for discrimination.¹²⁶ Further, some international instruments even allow for distinctions based on age, which may or may not be considered discriminatory.¹²⁷ For example, the American Convention on Human Rights acknowledges the rights of all citizens to take part in public affairs, and to vote, but limits that right on the basis of age, among other characteristics.¹²⁸

Another Article of the CRPD, which relates to one segment of the elderly population, is Article 6 which refers to women with disabilities. Initially, proposals for a separate article on women with disabilities were rejected in favor of mainstreaming gender issues since issues of relevance to women with disabilities are addressed throughout the various articles of the CRPD. However, after the compelling testimony by women with disabilities, the Ad Hoc Committee became convinced that a separate article was needed to highlight the unique needs of women and the discrimination they face because of their gender. Accordingly, the drafters of the Convention came to believe that a separate article dedicated to women with

125. In *Mass. Bd of Ret v. Murgia*, the Supreme Court was asked to decide whether a man who involuntarily retired from the Massachusetts state police force in accordance with a statute that set a mandatory retirement age of fifty should be upheld. 427 U.S. 307 (1976). Similarly, in *Vance v. Bradley*, the Court was asked to decide if the decision to force a foreign service officer to retire at the age of sixty should be upheld. 440 U.S. 93 (1979). In each of these cases, mandatory retirement was upheld because of the nature of the positions at issue. See generally Chen et al., *supra* note 3.

126. See General Comment 6, *supra* note 40, ¶¶ 11–12 (indicating concern regarding possible discrimination on the basis of age, but also recognizing the lack of clarity regarding age as a basis for discrimination).

127. See American Convention on Human Rights, *supra* note 81, at art. 23 (ensuring the right to participate in government).

128. Article 23 of the American Convention on Human Rights provides that “(1) Every citizen shall enjoy the following rights and opportunities: (a.) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b.) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c.) to have access, under general conditions of equality, to the public service of his country. (2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.” *Id.* at art. 23.

disabilities was warranted to draw attention to the needs of women with disabilities who not only comprise such a sizeable group, but who also are subjected to multiple discrimination on the basis of disability and gender.¹²⁹

Article 9 of the CRPD, which addresses issues of accessibility, is also of paramount importance to many elderly people with mobility and other challenges but who are not considered disabled under most domestic laws' definitions. Article 9 requires accessibility, both through the removal of existing barriers as well as the prevention of new barriers. Moreover, Article 9 addresses not only physical accessibility but also accessibility of information and communication access. Article 9 highlights the need for accessibility issues to be considered early on, for example, in the development of information and communications technologies, so that accessible technologies can be made available at minimum cost. In addition, Article 9 applies to both public and private actors by requiring them to make their products or services "open or available to the public." Although some delegations expressed concern about their countries' capacity to uphold their obligations under Article 9, by the end of the negotiations of the Ad Hoc Committee, there was general agreement that omitting the article on accessibility "would likely lead to accessibility issues being forgotten about in many planning activities, resulting in the inadvertent creation of further societal barriers for persons with disabilities."¹³⁰ Given that it is generally more cost-effective for architectural and communication barriers to be included in the initial designs and construction rather than retrofitted or removed at a later juncture, "Article 9 came to be seen as a useful reminder to public and private actors of the need to address

129. Discussions of the Ad Hoc Committee on the issue of women with disabilities and the desirability of including a separate article make clear that the rights of women with disabilities should not be interpreted as being limited to those outlined in Article 6. Rather, Article 6 should be read in concert with all other articles within the CRPD, as well as any other human rights conventions to which a client country is a State Party, in order to better highlight the specific needs of women with disabilities and the manner in which those needs should be met. *See Kanter, supra* note 48, at 313.

130. PAOLO MEFALOPULOS, DEVELOPMENT COMMUNICATION SOURCEBOOK: BROADENING THE BOUNDARIES OF COMMUNICATION 201 (2008).

accessibility issues in an inclusive manner and early in planning processes.”¹³¹

Article 12, the next article which affects the rights of elderly people, is perhaps the most significant with respect to the expansion of rights of elderly people under international law.¹³² Article 12, entitled, “Equal recognition before the law,” challenges parentalistic policies relating to people who lack “capacity.”¹³³ Specifically, Article 12 clarifies that persons with disabilities not only have the “right to recognition everywhere as persons before the law,”¹³⁴ but that they also “enjoy legal capacity on an equal basis with others in all aspects of life.”¹³⁵ Moreover, Article 12 requires “States Parties [to] take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”¹³⁶ Article 12 calls on States Parties to cease the practice of denying people their legal capacity, and instead to provide supports,

131. *Id.*

132. Article 12 of the CRPD provides, “Equal recognition before the law: (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that 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, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.” CRPD, *supra* note 22, at art. 12.

133. These proposals emanated by reason of GA Resolution 57/229, where the General Assembly “encourage[d] States to hold meetings or seminars to contribute to the work of the Ad Hoc Committee, . . . [and] invite[d] the regional commissions and inter-governmental organizations, non-governmental organizations, and human rights institutions and independent experts with interest in the matter” to suggest possible elements to be considered in the proposals for a Convention. G.A. Res. 57/229, ¶¶ 4, 7, U.N. Doc. A/RES/57/229 (Dec. 18, 2002).

134. CRPD, *supra* note 22, at art. 12(1).

135. *Id.* at art. 12(2).

136. *Id.* at art. 12(3).

where necessary, to enable individuals to exercise their legal capacity. One of the reasons for this change is to encourage people who are considered incapacitated to seek assistance, which they often don't do for fear of being subjected to guardianship or worse—neglect, physical abuse or institutionalization. As such, Article 12, marks an important paradigm shift from the practice of depriving people of their rights simply on the basis of their perceived lack of capacity to the promotion of national policies and laws which comport to the goals and principles of the CRPD, including autonomy, dignity, and independence.

For decades in the United States and elsewhere, the doctrine of *parens patriae* has been used to justify the State's intervention on behalf of people whom the State considers unable to take care of themselves.¹³⁷ The most common use of this doctrine has been the adoption of guardianship laws. Guardianship laws authorize courts to appoint an individual as a guardian for someone who is found to be unable to care for him or herself because of "incapacity" or diminished capacity. Guardians are charged with making decisions for individuals who may have become forgetful, or in need of help in organizing their finances, or at risk of making decisions against their own self-interest, or who are in need of protection from others who would take advantage of them.¹³⁸ For many people throughout the

137. For a comprehensive discussion of guardianship which argues against substituted decisionmaking as a violation of the integration mandate of Olmstead, see Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decisionmaking as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. (forthcoming). See Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 343-44 (1997); Nora von Stange & Gary von Stange, Note, *Guardianship Reform in New York: The Evolution of Article 81*, 21 HOFSTRA L. REV. 755, 757 (1993). While the *parens patriae* power was initially exercised to protect the property interests of the crown or heirs of the person deemed to be "mentally incompetent," over time the power was exercised as a general power to act as guardian of those individuals deemed legally incapable of acting for themselves. See *Heller v. Doe*, 509 U.S. 312, 326 (1993) (citing to distinction at English common law regarding the King's obligations to persons with intellectual disabilities ("idiots") and persons with mental illness ("lunatics"), whereby the King could benefit from the former but not the latter wardship). In the United States, the *parens patriae* function was assumed by the state. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972).

138. See Leslie Salzman, *supra*, note 137. The label of "incapacity" implies the individual's inability to make decisions or to act on his or her own behalf. As such, this label has negative consequences for an individual's well-being. See, e.g., Amita Dhanda, *Legal Capacity in the Disability Rights*

world, however, guardianship has not operated to assist people who have become unable to care for themselves; instead, it has become a legal process that unnecessarily strips individuals of their legal capacity, which deprives them of their ability to make decisions about some or all aspects of their own lives.¹³⁹ Once an individual becomes subjected to a court-ordered guardianship, the individual may lose his or her right to make such decisions as where to live and with whom, what to eat or buy, whether or where to work, for whom to vote, or whom to befriend, have sex with, or marry. Indeed, a guardianship may remove from the individual his or her right to be treated as an equal human being worthy of respect and dignity. Accordingly, to the extent that guardianship laws may severely limit the right to equality and dignity, they should be subjected to close scrutiny.¹⁴⁰

The use of a guardian also may result in a self-fulfilling prophecy. Once an individual is deemed incompetent, the person may begin to doubt himself or herself and believe that he or she is no longer able to make decisions and that the events of her life are beyond her control.¹⁴¹ Accordingly, some now refer to guardianship as “civil death.”¹⁴²

Convention: Stranglehold of the Past or Lodestar for the Future?, 34 SYRACUSE J. INT'L L. & COM. 429, 437 n.30 (2007) (discussing psychological needs of competence, autonomy, and relatedness); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 16–17, 20–22, 42 (1995) (discussing experiments with learned helplessness in animals and the self-fulfilling consequences of the incapacity determination).

139. See the following reports prepared by the Mental Disability Advocacy Center (MDAC): GUARDIANSHIP AND HUMAN RIGHTS IN BULGARIA 5 (2007), available at http://www.mdac.info/documents/Bulgaria%20report_comprehensive_English.pdf; HUMAN RIGHTS AND GUARDIANSHIP IN THE CZECH REPUBLIC 5 (2007), available at http://www.mdac.info/documents/Czech_report_English.pdf; HUMAN RIGHTS AND GUARDIANSHIP IN GEORGIA 6 (2007), available at http://www.mdac.info/images/page_image/Georgia%20report_stage%201_English.pdf; HUMAN RIGHTS AND GUARDIANSHIP IN RUSSIA 6 (2007), available at http://www.mdac.info/documents/Russia%20report_comprehensive_English.pdf; HUMAN RIGHTS AND GUARDIANSHIP IN SERBIA 20 (2006), available at http://www.mdac.info/documents/Serbia_report_stage1_English.pdf.

140. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 199, 273 (1978) (arguing that equality is the most fundamental of rights).

141. See Winick, *supra* note 138, at 42; see also Dhanda, *supra* note 131, at 436.

142. Matthew Brunwasser, *In Eastern Europe, Lives Languish in Mental Facilities*, N.Y. TIMES, Jan. 5, 2009. Mental Disability Advocacy Center in Bulgaria recently won a case in the Bulgarian Supreme Court on behalf of an elderly woman who was under a guardianship order and subjected to abuse. See

Over the last two decades, some countries, including the United States, have responded to such criticism and enacted reforms to their guardianship laws in an effort to balance more appropriately the autonomy and self-determination of persons with “diminished mental capacity” against a state’s legitimate concerns about the welfare of its citizens. These reforms have generally shifted the guardianship paradigm from a medical model focusing only on a diagnosis of “incapacity” to a model that seeks to assess the individual’s functional abilities.¹⁴³ The Uniform Guardianship and Protective Proceedings Act (UGPPA) provides a model for this paradigm shift. As such, the UGPPA calls for stricter procedural protections as well as changes to substantive provisions.¹⁴⁴

Mental Disability Advocacy Center, Bulgaria, <http://www.mdac.info/en/bulgaria> (last visited Mar. 22, 2009); *see also* MDAC Reports, *supra* note 139.

143. *See* N.Y. MENTAL HYG. LAW § 81.02 (Mckinney 1992) (defining “incapacity” as the inability to care for self or manage property and an inability to adequately understand the risks and consequences of that inability with a likelihood of resulting harm); Uniform Guardianship and Protective Proceedings Act § 102(5) (1997) (defining “incapacitated person” as a person unable “to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.”).

144. *See* Leslie Salzman, *supra* note 137. The UGPPA and many state guardianship laws impose a heightened burden of proof of “incapacity.” *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.12 (requiring clear and convincing evidence of “incapacity”); Uniform Guardianship and Protective Proceedings Act §§ 311, 401 (same). The UGPPA also requires the exploration of less restrictive alternatives prior to appointment. *See, e.g.*, Uniform Guardianship and Protective Proceedings Act § 311(a)(1)(B) (stating a court may not appoint a guardian unless it is clear that the respondent’s identified needs cannot be met by any less restrictive means). The UGPPA also requires the guardianship order to be narrowly tailored to meet the needs of the individual. *See Id.* at §§ 311(b), 401 (guardianship order should remove only those rights that the “incapacitated” person can no longer exercise on his or her own). Some states, such as New York, also have implemented requirements for comprehensive, comprehensible, and meaningful notice and pleadings and have enhanced the service requirements. *See, e.g.*, N.Y. MENTAL HYG. LAW §§ 81.07, 81.08; *see also* Uniform Guardianship and Protective Proceedings Act § 304. In addition, the UGPPA also includes provisions for appointment of counsel. Uniform Guardianship and Protective Proceedings Act §§ 305(b), 406(b) (sets out alternative provisions regarding appointment of counsel); *see also* N.Y. MENTAL HYG. LAW § 81.10 (requires appointment of counsel under certain specified circumstances). The UGPPA also imposes stricter requirements for the presence of the alleged incapacitated individual at a hearing to determine incapacity. Uniform Guardianship and Protective Proceedings Act § 308(a) (presence required unless excused by court). The UGPPA also requires the guardian to present a report to the court within thirty days of appointment and annually thereafter. Uniform Guardianship and Protective Proceedings Act § 317. The conservator is required to file a plan and an inventory with the court within sixty days of appointment and annual reports thereafter. Uniform Guardianship and Protective Proceedings Act §§ 418(c), 419, 420. The annual reports must now include a recommendation as to whether the guardianship should be continued or modified. *Id.* The UGPPA also

The UN Convention on the Rights of Persons with Disabilities takes such reforms one step further and proposes the abolition of guardianship as we know it in the U.S. today. Under Article 12 of the Convention, the process by which a guardian's right to make decisions as a substitute for the individual and is replaced with an alternative to guardianship known as supportive decision-making. Drafters of the Convention acknowledged the tendency of governments to address the needs of people who are incapacitated with guardianship laws and decided, albeit at the insistence of DPOs, that in light of the risks of guardianship laws to human dignity, the Convention would propose a different model.¹⁴⁵ Article 12 of the Convention, therefore, seeks to address the needs of people who are considered "lacking capacity." Instead of parentalistic guardianship laws which substitute a guardian's decision for the decision of the individual, the CRPD's supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives. It then acknowledges that because everyone, at times, may seek and need help from family and friends, so too should people who are considered "lacking in capacity" have the same right to such supports under Article 12.

The Convention recognizes that some persons with disabilities (as do some people without disabilities) require assistance to exercise their legal capacity. Accordingly, States must do what they can to support those individuals and introduce safeguards against abuse of such support. Support could take the form of one trusted person or a network of people; it might be necessary on one occasion or always. As such, Article 12's supportive decision-making model has the potential to radically change how governments throughout the world address not only the issue of people who are born with mental

requires the court to establish a monitoring system. Uniform Guardianship and Protective Proceedings Act §§ 317, 420. For a discussion of the effectiveness of various monitoring systems, see SALLY BALCH HURME, *STEPS TO ENHANCE GUARDIANSHIP MENTORING* (1991); Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 *STETSON L. REV.* 143, 151-55 (2007).

145. For a discussion of the controversy surrounding the adoption of Article 12, see Kanter, *supra* note 48, at 301.

disabilities, but also the issue of elderly people who are considered “incompetent” or unable to take care of themselves as they age. In fact, some countries have begun to change their guardianship laws based on the CRPD. British Columbia is at the forefront of this effort with the adoption of its supported decision-making process and voluntary representation agreements that take the place of court-ordered guardianship orders.¹⁴⁶

Another article of the new Convention that is especially relevant to elderly people is Article 19, which relates to the rights of people with disabilities to live independently and in the community.¹⁴⁷ In many countries throughout the world, elderly people remain in institutions—some since childhood. Others enter institutions, such as nursing homes, later in life. The Convention recognizes that institutionalization deprives individuals of their freedom, dignity, and at times, even their lives. As such, the CRPD recognizes that if its goal is to create a new body of laws enforcing the right of people with disabilities to dignity, freedom, and independence, with supports as necessary, it would have to limit the scope of a State’s use of institutionalization.

146. See Nidus Personal Planning Resource Centre, <http://www.rarc.ca/textual/news.htm> (last visited Sept. 12, 2009). Nidus Personal Planning Resource Centre is a non-government, charitable society that has worked successfully to introduce supported decision making and voluntary Representation Agreements and Enduring Powers of Attorney to avoid guardianship and loss of rights in that country. These legally-binding planning tools allows individuals to appoint people whom they trust to have the legal authority to act on their behalf if they cannot speak for themselves. According to the Nidus website, “Having a legal plan in place eases the burden on loved ones and ensures your wishes are known and respected. It also means *you* stay in control and avoid the involvement of government or other authorities in your personal and private affairs. Given B.C.’s aging population, personal planning must become a priority.” *Id.*

147. Article 19 of the Convention, entitled, “Living independently and being included in the community,” provides: “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.” CRPD, *supra* note 22, at art. 19.

For many, the Convention did not go far enough in this area since it does not ban institutionalization all together.¹⁴⁸ However, this Convention is stronger than any previous UN treaty or instrument in its view of institutionalization only as a last resort. To the extent that States may have policies in place that opt for institutionalization of elderly people rather than providing supports in the community, the CRPD provides a basis to challenge such practices as violative of the human rights of individuals confined in institutions.

Articles 25¹⁴⁹ and 26¹⁵⁰ also are important to the expansion of the rights of elderly people under international law. Both of these articles

148. See generally Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT'L L. & COM. 406, 410 (2007).

149. Article 25 of the CRPD, "Health," provides: "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: (a) provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes; (b) provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons; (c) provide these health services as close as possible to people's own communities, including in rural areas; (d) require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care; (e) prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner; (f) prevent discriminatory denial of health care or health services or food and fluids on the basis of disability." CRPD, *supra* note 22, at art. 25.

150. Article 26 of the CRPD, "Habilitation and rehabilitation," provides: "(1) States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

- (a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
 - (b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.
- (2) States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

on Health, and Habilitation and Rehabilitation, respectively, affect the lives of elderly people worldwide as they move from a professional-centered approach to one in which the person becomes the primary decision-maker in establishing one's own habilitation and rehabilitation goals and objectives. Article 25, for example, does not guarantee disability-specific segregated health services, but instead ensures that persons with disabilities have access "to the same range, quality and standard of free or affordable health care programs as provided to other persons,"¹⁵¹ and that such services be "gender-sensitive."¹⁵² Articles 25 and 26 also refer to the need to ensure access to such services "as close as possible to [people's] own communities, including in rural areas."¹⁵³ In those countries which ratify the Convention, these Articles, have the potential to change how infrastructure projects are developed, particularly in rural areas, where many elderly people live throughout the world.

Like Articles 25 and 26, which seek to bring people with disabilities—including elderly people—into mainstream health services, so too does Article 28 address the needs of elderly people who are caught in a vicious cycle of poverty and disability, each of which is both a cause and consequence of the other.¹⁵⁴

Article 28 focuses on ensuring equal access by persons with disabilities to adequate food, clothing, housing (including public housing), clean water, retirement benefits, and social protection and poverty reduction programs, particularly designed for older persons with disabilities. Not only does the Convention call for equal access of persons with disabilities to such programs, but together with Article 4(3) (General Obligations), the Convention calls for State Parties to "closely consult with and actively involve persons with

(3) States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation." CRPD, *supra* note 22, at art. 26.

151. CRPD, *supra* note 22, at art. 25(a).

152. *Id.* at art. 25 (chapeau).

153. *Id.* at arts. 25(c), 26(1)(b).

154. This relationship is explored in more depth in the publication *Disability, Poverty and Development*. UK DEP'T FOR INT'L DEV., DISABILITY, POVERTY, AND DEVELOPMENT 2–3 (2000).

disabilities . . . through their representative organizations,” in “the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities.”¹⁵⁵ Thus, not only does the Convention on the Rights of Persons with Disabilities require that the policies and programs themselves be inclusive of persons with disabilities, but Article 28 also calls for the decision-making processes used by State Parties to formulate those policies and programs to be inclusive of persons with disabilities and their representative organizations.

IV. THE UNITED STATES’ POSITION ON THE CONVENTION: WHERE DOES IT LEAVE ELDERLY PEOPLE?

Throughout the five year drafting process, the United States did not take a position on the Convention, nor on any of the specific articles. However, during the 2003 Ad Hoc Committee meeting, representatives from the United States Justice Department clarified once and for all that the U.S. would not sign or ratify the Convention. The primary reason cited by the attorneys for the Bush Administration was that the U.S. believes national legislation (as opposed to international law) is the most effective way to ensure non-discrimination. In the United States, treaties stand on par with Acts of Congress and the Constitution.¹⁵⁶ Therefore, once signed and ratified, the Convention on the Rights of Persons with Disabilities would forever bind the United States government and its citizens.¹⁵⁷ The Bush Administration was unwilling to support the CRP|D for that reason alone. As one noted international law scholar observed, with a treaty’s acceptance “comes observance, then the habit and inertia of continued observance.”¹⁵⁸

155. CRPD, *supra* note 22, at art. 4(3).

156. John B. Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 *FORDHAM INT’L L.J.* 552, 552 (2006).

157. *Id.*

158. LOUIS L. HENKIN, *HOW NATIONS BEHAVE* 60 (2d ed. 1979).

The United State's position with respect to the CRPD was not unusual. Although the United States has prided itself as a champion of human rights throughout the world, the United States has been reluctant to sign many international human rights treaties. One of the most common arguments against ratifying human rights treaties has been that ratification of human rights treaties will "jeopardize basic rights rooted in the U.S. Constitution and will erode the American legal system at large."¹⁵⁹ This argument was used, for example, to support the United States' refusal to ratify the Convention on the Rights of the Child (CRC). The CRC was adopted in 1989 to promote the rights of children worldwide and has been ratified by 192 countries, which is the most number of countries to ratify any treaty to date. The only two countries that have not ratified the Convention on the Rights of the Child are the United States and Somalia, which is a country with no formal process for ratifying UN treaties.

The United States also refused to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW was adopted in 1979 to promote the advancement of women worldwide.¹⁶⁰ The United States is currently the only industrialized nation not to ratify CEDAW.¹⁶¹

The United States also has signed but not ratified the International Covenant on Economic, Cultural, and Social Rights (ICESCR).

159. Paula Donnolo & Kim K. Azzarelli, *Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203, 209 (1996).

160. Feminist Majority Foundation, *United States Failure to Ratify Key International Conventions, Treaties and Laws*, http://www.feministcampus.org/fmla/printable-materials/global_project/ratify_factsheet.pdf (last visited Feb. 5, 2009).

161. Other nations that have not ratified CEDAW include: Sudan, Iran, and Somalia. *Id.* In *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?* Ann Mayer states, "[P]eople both inside and outside the United States seem disinclined to suspect that a stated preference for resolving sex discrimination issues under the Equal Protection Clause might merely be a tactic for disguising a preference to stand by the status quo in U.S. law, a status quo that denies women the rights that they enjoy under international human rights law." Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 730 (1996). Mayer argues the underlying motive for not ratifying CEDAW is to block new domestic laws in the U.S. that ensure women's equality.

President Carter signed the ICESCR, but did not push for the Senate to review it, which is a necessary precondition for ratification.¹⁶² The Reagan and Bush administrations believed economic, cultural, and social rights were “not really rights, but merely desirable social goals and therefore should not be the object of binding treaties.”¹⁶³ The Clinton Administration did not deny the nature of these rights, but did not find it “politically expedient to engage in a battle with Congress over the Covenant.”¹⁶⁴ It is not clear if the Obama Administration will reintroduce this treaty and seek ratification of it from Congress.

One recent human rights treaty that the United States has ratified is the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The U.S. ratified the CERD in 1994, but with many reservations that arguably “limit the extent to which it complies with the treaty.”¹⁶⁵ CERD was signed by President Johnson in 1966, but it was not until 1978 that the ratification process began. President Carter submitted CERD to the Senate for review with a list of reservations, understandings, and declarations (RUDs) attached. Commentators have argued that the U.S. ratified the CERD merely to be able to scrutinize other countries for violating the CERD.¹⁶⁶ As one commentator observed, “These RUDs were intended to severely limit U.S. obligations under CERD by exempting the United States from all treaty requirements that did not conform to existing U.S. law.”¹⁶⁷ After the Carter administration, the CERD was not touched for over ten years. The Clinton Administration reintroduced the treaty in 1994 with similar RUDs to those which President Carter had proposed.¹⁶⁸

162. David Shiman, University of Minnesota, Human Rights Resource Center, *Which Economic, Social, and Cultural Rights are Guaranteed in International Human Rights Documents?*, <http://www1.umn.edu/humanrts/edumat/hreduseries/tb1b/Section1/tb1-3.htm> (last visited Mar. 23, 2009).

163. *Id.*

164. *Id.*

165. Terry D. Johnson, *Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System*, 56 RUTGERS L. REV. 231, 243 (2003).

166. *Id.* at 244.

167. *Id.*

168. *Id.* In conducting research on the CERD and other human rights conventions it is interesting to

In the area of labor, the United States has ratified only fourteen of the 187 active International Labor Organization (ILO) Conventions.¹⁶⁹ Further, the United States has signed only two out of eight conventions that the ILO describes as “fundamental to the human rights of workers.”¹⁷⁰ In fact, by all accounts, the U.S. has one of the lowest ILO ratification rates in the world.¹⁷¹

The Obama Administration has indicated its intention to change our nation’s course with respect to ratification of human rights treaties.¹⁷² In its *Plan to Empower Americans with Disabilities*, for example, the Obama Administration commits to affirm America’s global leadership “by making the United States a signatory to the UN Convention on the Rights of Persons with Disabilities—the first human rights treaty approved by the UN in the 21st century and a vital foundation for respecting the rights of people disabilities worldwide. . . . [and to] urge the U.S. Senate to ratify the Convention expeditiously.”¹⁷³ Thus far, President Obama has followed through on his commitment. On July 24, 2009, the President announced his intention to sign the Convention, and on July 30, 2009, U.S. Ambassador to the United Nations, Susan Rice, signed the

consider historical reasons underlying the United States’ lack of treaty ratification. Terry Johnson’s article about the CERD has an interesting mention of the “Bricker Amendment.”

The United States’ use of limiting measures when ratifying CERD reflects a deep-rooted distrust of international human rights treaty-making, which arose in the 1950s. From 1951 to 1957, the United States Senate debated various proposed constitutional amendments, known as “Bricker Amendments” because many of them were sponsored by Senator John Bricker (R-OH), that would have severely curtailed the domestic legal effect of ratified treaties and restricted the President’s power to make treaties. These proposed amendments came about due to fears “that international human rights law might creep unwittingly into U.S. courts, thereby afford[] litigants an opportunity to challenge segregationist laws and policies that were still firmly entrenched at that time.” *Id.* at 245.

169. ROGER BLANPAIN, ET. AL., *THE GLOBAL WORKPLACE* 60 (2007).

170. Feminist Majority Foundation, *supra* note 160.

171. *Id.*

172. Chaffin, *supra* note 96, at 129 (citing Letter from Kim R. Holmes, Assistant Secretary of State for International Organization Affairs, United States Department of State, to Lex Frieden, Chairperson, National Council on Disability (June 3, 2004) (indicating that the United States has chosen disability experts to participate in the Ad Hoc deliberations before the United Nations)), *available at* http://www.usicd.org/StateDept_Letter_to_NCD.pdf.

173. Barack Obama for President, Barack Obama and Joe Biden’s Plan to Empower Americans with Disabilities, <http://www.barackobama.com/issues/disabilities/> (last visited Feb. 25, 2009).

Convention at UN Headquarters.¹⁷⁴ If the Convention is now ratified by the United States Congress, people with disabilities will benefit, particularly to the extent that at least in some areas, the Convention provides greater protections for people with disabilities—young and old—than do our own domestic federal disability laws.¹⁷⁵

CONCLUSION

The rights of elderly people have been the subject of numerous international instruments, but are not contained in any one binding treaty. Elderly people who become disabled or are in need of increased access or accommodations can now find additional protections in the newly adopted Convention on the Rights of Persons with Disabilities. The CRPD affords additional protections to elderly people, not currently enshrined in international law, particularly their right not to be discriminated against on the basis of impairments that may accompany the aging process and interfere with their ability to care for themselves or to make decisions for themselves. In addition to the substantive provisions of the CRPD which will arguable expand the repertoire of rights available to people who are elderly worldwide, the new Convention holds promise for elderly people in other significant ways as well.

First, the Convention on the Rights of Persons with Disabilities provides a model for those working on behalf of a Convention on the Rights of Elderly People. The process as well as the language of the Convention itself is a blueprint for how an elderly-specific treaty could be developed and what issues it could address.

Second, the Convention was completed in nearly record time using the most inclusive drafting process in the history of the United

174. See Office of the Press Secretary, White House, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing/. See also UN News Center at <http://www.un.org/apps/news/story.asp?NewsID=31646&Cr=disab&Cr1=>

175. For a comparison of the CRPD and US domestic disability law, see National Council on Disability, *FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* (May 12, 2008). Available at <http://www.ncd.gov/newsroom/publications/2008/CRPD.html> (last visited Sept. 12, 2009).

Nations. It was written by representatives from civil society, governments, NGOs, human rights institutions, international organizations, and most significantly, organizations of people with disabilities (DPOs) from every region of the world, and is intended to benefit all children and adults, men and women, young and old, who continue to face disability discrimination, abuse, mistreatment, and exclusion. By involving DPOs, the very people the Convention is designed to benefit, the CRPD represents a historic break from the state-focused model of closed-door treaty negotiations. As such, it provides a new model of inclusion for any upcoming elderly-specific treaty process in which elderly people from around the world should be supported in presenting their views and their proposals directly to the UN drafting body.

Perhaps most importantly to the development of a treaty on the rights of elderly people, however, is that fact that the Convention on the Rights of Persons with Disabilities, represents a new model which invokes the inclusion of human, civil, and political rights together with social, economic, and cultural rights. It also represents a dramatic paradigm shift from the medical or social welfare model of disability that focuses on diagnosis and inability to the human rights model that focuses on capability and inclusion and ways to prevent and remove the attitudinal and structural barriers that prevent people with disabilities, young and old, from becoming members of our communities. Accordingly, the Convention goes beyond former UN treaties as well as traditional anti-discrimination laws, and addresses not only political and civil rights, but also social, cultural, and economic rights.

For elderly people, this change is significant. In the United States, as in other countries, domestic laws which focus on access to health care or housing, for example, do not include a right to health care, or a right to housing or shelter. The new Convention moves a step towards acknowledging such new rights. For people who are elderly and may have physical or mental impairments, the right to health means nothing if the individual does not have the means to purchase necessary health care, or if the person is elderly and has limited

mobility and the doctor is located up a flight of stairs in an inaccessible office. The right to political participation means nothing to an elderly person with limited vision who wishes to vote but is unable to see the ballot.¹⁷⁶ The right to participate in public life means nothing to an elderly person who is hard of hearing if there is no sign language interpreter available at her local bank. And, the right to life means nothing if an elderly individual is considered unable to make decisions about his or her own life through the use of overbroad guardianship laws.

As such, from a human rights perspective, the Convention on the Rights of Persons with Disabilities has enormous potential for the protection and expansion of the rights of elderly people under international law. The Convention includes worldwide standards by which national communities will be measured. As one writer has observed, “Human rights are just too important to be left to government alone.”¹⁷⁷ The new Convention gives elderly people, their allies and advocates a tool to require governments to accept certain formal obligations within the human rights rubric, and to hold such governments accountable through the enforcement and monitoring provisions of the Convention and its Optional Protocol. As such, the new Convention on the Rights of Persons with Disabilities provides a viable model for a new and separate binding convention on the rights of elderly people.

176. For a comprehensive discussion of the Help America Vote Act and its impact on people with disabilities see Arlene S. Kanter and Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote Under The Help America Vote Act*, 30 MENTAL AND PHYSICAL DISABILITY LAW REPORTER 852 (2006). See also Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065, 1072 (2007).

177. Chen et al., *supra* note 3, at 179.

