THE GLOBALIZATION OF DISABILITY RIGHTS LAW

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I. INTRODUCTION

The past thirty years have marked a turning point in the worldwide recognition of human rights for people with disabilities. Within the past decade alone, approximately 40 countries have enacted domestic disability discrimination laws, some of which adopt a human rights model of disability. As such, these disability discrimination laws promote the human rights, dignity, and equality of people with disabilities.

On the international front, within the past three decades, the United Nations General Assembly has adopted international human rights instruments that protect and advance the human rights of people with disabilities. Further, the UN has appointed an Ad Hoc Committee of the General Assembly to draft a proposed covenant on the rights of people with disabilities, which will reinforce the view of disability rights as a human rights issue. On the regional level, the Organization of American States ("OAS") and the Council of Europe have both passed legislation on disability.¹ The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted by the OAS in 1999, is the first treaty adopted by an inter-governmental organization.² More recently, in January 2003,

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the Parliamentary Assembly of the Council of Europe adopted a recommendation entitled "towards full social inclusion of persons with disabilities." At no time in history has the confluence of domestic and international efforts challenged lawmakers, scholars, and activists to work together for the creation of binding international, regional, and domestic laws to protect the basic human right of people with disabilities to dignity and equality.

The purpose of this Article is to present the development of the globalization of disability rights law. Just as globalization has changed the way such areas as corporate, criminal, and environmental law are thought about and practiced, so too has disability rights entered the era of globalization. This Article is divided into four sections. Part I of this Article provides an overview of the development of the human rights model of disability that is now reflected in some countries’ domestic disability laws, as well as in international instruments. Part II of this Article documents the development of domestic disability rights laws throughout the world. While the enactment of domestic disability laws in various countries has been influenced by the passage of the Americans with Disabilities Act, these laws vary widely in structure, coverage, and approach. Part III of the Article presents an analysis of international and regional treaties and binding rules of customary law that have been used to enforce rights of people with disabilities. The final section of this Article includes a discussion of current efforts by the United Nations to enact a treaty on the rights of people with disabilities.

II. BACKGROUND ON THE EMERGENCE OF THE HUMAN RIGHTS MODEL OF DISABILITY

It is estimated that over 600 million people, or more than 10% of the world’s population, has a disability. Nearly 400 million people with disabilities live in developing countries, with at least 43 million in the
As the world population grows, so too does the number of people with disabilities. The disability population also has grown in recent decades due to war and other forms of violence, inadequate medical care, and natural and other disasters.

A 1991 UN Report found that people with disabilities live in "deplorable conditions, owing to the presence of physical and social barriers which prevent their integration and full participation in the community. As a result, millions of children and adults throughout the world are segregated and deprived of virtually all their rights and lead a wretched, marginal life." Human rights abuses against people with disabilities, especially in institutions in which they are exposed to life threatening conditions and inhuman and degrading treatment, is prevalent even today in some countries of the world.

5. Second Annual Report on the Implementation of US Aid Disability Policy, available at http://www.usaid.gov/about/disability/2ar_imp_policy.html#background (last visited Apr. 4, 2003). See also generally World Bank Website, at http://www.worldbank.org (last visited Apr. 4, 2003). See also GAO Report to Congressional Requesters, Foreign Assistance: Assistance to Disabled Person in Developing Countries, Feb. 1991. Of course, the actual numbers of people with disabilities in various countries differ depending on a given country's definition of disability and how such data is collected. See United Nations - Department of Economics and Social Affairs, Statistics Division, available at http://unstats.un.org/unsd/disability/default.asp (last visited Apr. 4, 2003) (listing percentages of persons with disability is different countries. Examples, in percentages are: United States 1994 Survey - 15.0; Canada 1991 Survey - 15.5; China 1987 Survey - 5.0; New Zealand 1996 Survey - 20.0; Germany 1992 Survey - 8.4; Sweden 1988 Survey - 12.1; United Kingdom 1991 Census - 12.2; Zambia 1990 Census - 0.9; Uganda 1991 Census - 1.2; Bangladesh 1982 Survey - 0.8; India 1981 Census - 0.2. It seems that the percentage of people with disabilities raises the more developed the country is and the more recent the survey is. This is probably due to higher levels of awareness of disabilities and what constitutes disability. For the questions used in the surveys, see Department of Economic and Social Affairs, Disability Statistics - Questions Used to Identify Persons with Disabilities, United Nations, at http://unstats.un.org/unsd/disability/allquest.htm (last visited Apr. 4, 2003).


The connection between poverty and disability is also well documented. One recent study by the World Bank estimates that people with disabilities may account for nearly one out of every five of the world’s poorest people.9 Further, not only does disability add to the risk of poverty, but conditions of poverty add to the risk of disability. Disability can lead to poverty as individuals with disabilities are often excluded from school or the workplace, and others may depend on their family members for care, which may then diminish the family’s earning capacity. As a World Bank study concludes:

People with disabilities in the developing world are among the poorest of the poor... With disabled people invisible in development initiatives, hundreds of thousands of people who see themselves as potential and willing contributors to family and national economic activity are instead relegated to the margins of society where they are a perceived an actual burden. The result can be devastating, both to the individual and to the economy.10

Based on this study, the World Bank maintains that increasing the participation and opportunities for persons with disabilities will result in economic and social benefits for the entire society.11

Even in the United States, where people with disabilities have received greater legal protections than in many other countries, there remain significant gaps in their levels of employment, health, and quality of life.12 People with disabilities in the United States are more


12. National Organization of Disability Website, at http://www.nod.org/cont/dsp_cont_item_view.cfm?contentId=14 (last visited Apr. 4, 2003) (stating the following employment Facts about People with Disabilities in the United States (June 28, 2001): Among adults with disabilities of working age (18 to 64), three out of ten (32%) work full or part-time, compared to eight out of ten (81%) of those without disabilities, a gap of forty-nine percentage points (N.O.D./Harris, 2000). The more severe the disability, the less likely a person is to be employed. People with slight disabilities are 8 times more likely to be employed than people with very severe disabilities (64% versus 8% respectively (N.O.D./Harris, 2000)). See also Patricia Thornton & Neil Lunt, Employment Policies for Disabled People in Eighteen Countries: A Review, Social Policy Research Unit,
than twice as likely as their peers without disabilities to be poor and unemployed.\textsuperscript{13} With unemployment, comes isolation and fewer opportunities to participate in the life of a community or in recreational and social activities.\textsuperscript{14} In addition, for people with disabilities who do work, they generally earn substantially less than their co-workers who do not have disabilities.\textsuperscript{15} In short, people with disabilities throughout the world have less education, lower income levels, and are more likely to live below the poverty line than the rest of the population in any given country, including in the United States.\textsuperscript{16}

Although it may be legally and morally unacceptable to relegate people to conditions of poverty and unemployment on the basis of their disability, it is not surprising either. Throughout the world and throughout history, people with disabilities have been isolated, stigmatized, mistreated, and marginalized.\textsuperscript{17} People with disabilities have been viewed as subjects of pity, in need of a medical cure or charity, but not as individuals capable and willing to contribute to society through work.

Mistreatment of people with disabilities has been documented by
the United Nations and other international bodies. For example, as part of the Decade for Disabled Persons from 1983 to 1992, the UN Human Rights Commission appointed two Special Rapporteurs, Leandro Despouy and Erica-Irene Daes, who documented a worldwide pattern of abuse against people with disabilities. Their reports found that individuals with disabilities experience discrimination in voting, employment, housing, health services, public accommodations, education, transportation, communication, recreation, and opportunities for political participation on every continent.  

Most recently, on January 29, 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1592 (2003), entitled “Towards Full Social Inclusion of Persons with Disabilities.” This document reports that people with disabilities are:

Denied full and meaningful enjoyment of rights which other people take for granted: the right to education; the right to work; the right to private and family life; the right to protection of health and social security; the right to protection against poverty and social exclusion; the right to adequate housing, etc.

Discrimination against people with disabilities and their exclusion from society leads to economic hardship and a loss of their productive capacity to society. It also leads to the perpetuation of stereotypes of people with disabilities as objects of pity and charity, but not as human beings entitled to political, social, and civil rights. These stereotypes are based on the medical model of disability that views disability as a defect in the person that must be cured or treated. As one scholar observes:

Society, in agreeing to assign medical meaning to disability, colludes to keep the issue within the purview of the medial establishment, to keep it a personal matter and ‘treat’ the condition and the person with the condition rather than ‘treating’ the social processes and policies that construct disabled people’s lives.

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20. Stienstra, supra note 10, at X.

Over time, this medical model of disability is being replaced.\textsuperscript{22} A new model is emerging, known as the human rights model.\textsuperscript{23} The human rights model focuses less on the functional impairments of the individual with a disability, and more on the limitations of a society that categorizes who is normal and who is not. According to the human rights model, disability itself is a social construct.\textsuperscript{24} As such, it is the disabling environment, the attitudes of others as well as institutional structures that need to be changed, not the person’s disability.\textsuperscript{25}

In recent years, this human rights model of disability has gradually been adopted by the international community.\textsuperscript{26} This model recognizes the inherent equality of all people, regardless of disabilities or differences. It also recognizes society’s obligation to support the freedom and equality of all individuals, including those who may need appropriate social supports. As one scholar recently observed:

The disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, without discrimination, by people with disabilities. . . The debate about the rights of the disabled is therefore connected to a larger debate about the place of difference in society.\textsuperscript{27}

\textsuperscript{22} This view of disability is based on the Medical Model of Disability which assumes that the person with an impairment or condition is the problem and what is called for in response is care or a cure. See The Center for an Accessible Society, \textit{The Definition of Disability}, at http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm (last visited Apr. 4, 2003). See also Gerard Quinn & Theresia Degener, \textit{Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability}, Office of High Commissioner for Human Rights HR/PUB/02/1 2002 [hereinafter Quinn & Degener, \textit{Human Rights}].


\textsuperscript{24} See e.g., LINTON, \textit{supra} note 21; \textit{STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT} (1997); MICHAEL OLIVER, \textit{UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE} (1996); JENNY MORRIS, \textit{PRIDE AGAINST PREJUDICE, TRANSFORMING ATTITUDES TO DISABILITY} (1991).


The United States has begun to address the place of difference in society with the passage of the Americans with Disabilities Act in 1990 ("ADA"). As a civil rights law, the ADA seeks to ensure equality of opportunities for all people with disabilities. The law prohibits discrimination in a range of areas including employment, telecommunications, transportation, and access to public services and places of public accommodations.\(^28\)

The ADA was enacted to address the attitudinal and physical barriers preventing Americans with disabilities from exercising their right to participate as equal citizens in society. As Congress declared in the introduction to the ADA, "despite some improvements,... discrimination against individuals with disabilities continues to be a serious and pervasive social problem."\(^29\) Accordingly, the ADA is a powerful statement of the United State's commitment to equality of opportunity, full inclusion, and economic self-sufficiency for people with disabilities.\(^30\) Its impact throughout the world is now recognized as well. As the National Council on Disability has observed:

The unparalleled legal protection given Americans through the Rehabilitation Act, ADA, and other disability rights laws won the admiration of people with disabilities, human rights activists, and people of goodwill around the world. These laws underscored the authority of the United States to speak not only as a rich and powerful nation but also as a good and moral one. By demonstrating its strong commitment to the equality of all people, including those with disabilities, the United States strengthened its global position.\(^31\)

III. THE DEVELOPMENT OF DOMESTIC DISABILITY RIGHTS LEGISLATION

The success of the ADA in achieving its goal of equality for Americans with disabilities remains debatable.\(^32\) However, it is beyond

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Ignoring such differences, as the scholar Martha Minow observes, may address stereotyping, but it fails to provide equality of opportunities, which requires an appreciation of difference and, when necessary, an accommodation of such differences as well. \textit{Id.}

28. 42 U.S.C. § 12101, et seq. (2001). The ADA protects individuals who meet the definition of disability, which is a qualified individual with a disability who is substantially limited in a major life activity, has a record of such impairment or is regarded as having such an impairment. The ADA also protects individuals who are "associated" with persons with disabilities. The ADA also provides reasonable accommodations to qualified individuals as well as defenses for those charged with discrimination under the ADA. \textit{See} 42 U.S.C. 12112 et seq. (2001).


31. \textsc{National Council on Disability, Foreign Policy and Disability I} (1996).

32. \textit{Compare} \textsc{Richard Epstein, Forbidden Grounds: The Case Against}
dispute that the ADA has had an enormous impact worldwide. Since the passage of the ADA in 1990, approximately 40 countries have enacted their own disability discrimination laws, some of which reflect a shift in approach from a welfare model to a civil rights law, as the ADA exemplifies. 33

The United States, Canada, and Spain were the first countries in the world to enact laws prohibiting discrimination against people with disabilities. 34 The United Kingdom, Sweden, Israel, and Australia have also enacted comprehensive anti-discrimination laws designed to promote the integration of people with disabilities into all aspects of their respective societies. 35

The various disability discrimination laws that have been enacted throughout the world in the past decade differ greatly in structure, scope, and coverage. Some laws outlaw discrimination in their criminal codes, while others prohibit discrimination in their constitutions. 36 Countries that 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. 37 Some countries’ laws appear to be civil rights laws modeled specifically after

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37. See, e.g., AUS. CONST. (Constitution Act, 1983); BRAZ. CONST. (Constitution Act, 1988); CAN. CONST. (Constitution Act of 1982) pt. 1; SWITZ. CONST. (Constitution Act, 2000); UGANDA CONST. (Constitution Act, 1995), art. 21.
the ADA, while others are social welfare laws focusing more on the delivery of services and benefits rather than rights protection.

Not only does the legal structure differ in these various laws, but the definition of disability varies from country to country as well. Considering that disability, as discussed above, may be seen as a social construct dependent upon the environment in which it arises, it is not surprising that there is no worldwide consensus regarding who is considered disabled and entitled to a law’s protections—and who is not. Different countries will and do have different views as to which human conditions qualify within the definition of disability. The vast majority of countries do not even define the categories of individuals covered by their countries’ laws. Further, a few countries, relying on the ADA’s broad definition of disability, define disability broadly to include people who are “regarded” as disabled, as well as those with drug and/or alcohol addiction. The narrowest definition of disability is found in Ethiopia’s law, which specifically excludes all persons with mental illness as well as those with alcoholism and drug addiction.

In addition to variation in the law’s definitions of disability, these laws also differ in their scope and coverage. Four countries limit their respective laws’ coverage to one area, such as employment, education, or access to public services. At least five other countries, however, provide comprehensive protections in many spheres of life, including employment, public accommodations, education and access to government services. Other countries choose instead to include only general statements against discrimination without specifying the setting in which such discrimination is prohibited. However, the most comprehensive disability discrimination laws seek to protect people with disabilities in a wide range of daily life activities including

38. See, e.g., AUS. CONST. (Constitution Act, 1983); BRAZ. CONST. (Constitution Act, 1988); FJI CONST. (Constitution Act, 2000), §38(2); FIN. CONST. (Constitution Act, 2000); F.R.G. CONST. (Constitution Act, 1996); GHANA CONST. (Constitution Act, 1993) (The Disabled Persons Act of 1993), art. 29.


housing, access to goods and services, and transportation.\textsuperscript{42} Canada, for example, includes equal rights for 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.\textsuperscript{43}

Several countries’ laws do not rely on the civil rights model at all. These countries’ have adopted instead social welfare laws that are based on the medical model of disability. As such, they view a 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 focuses on the individual’s need to correct his/her own attitude about disability, rather than society’s need to change its attitude about the person with a disability. As the law states, “Chinese disabled persons should display an optimistic and enterprising spirit.”\textsuperscript{44}

Another approach countries have taken to address the rights of people with disabilities in their respective societies is by imposing 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.\textsuperscript{45} This law imposes varying degrees of criminal sanctions on an employer, depending on the seriousness of the offense.\textsuperscript{46}

Some countries’ laws also recognize the importance of providing specific civil remedies and enforcement mechanisms. Twelve countries, for example, include specific requirements for reasonable accommodations in their disability discrimination laws.\textsuperscript{47} However,
only four countries appear to provide a private right of action for violations of the anti-discrimination provisions of their laws.\(^{48}\) Twenty-nine countries fail to specify any remedies whatsoever in their laws.\(^{49}\) For example, in Ghana, the law states that there should be no differential treatment of people with disabilities, but the law includes no mechanisms whatsoever for enforcement of this guarantee.\(^{50}\) The most comprehensive laws, however, include specific injunctive, declaratory and/or judicial remedies, including money damages to victims of disability discrimination.\(^{51}\) Unlike the ADA, most country laws seek change through a variety of formal and informal alternative dispute strategies, often with the involvement of a high-profile government commission convened to review complaints of disability discrimination.\(^{52}\)

Although the ADA has spurred the enactment of domestic disability laws in various countries throughout the world, these countries' laws vary greatly in structure, coverage, enforcement mechanisms, and even in their respective definitions of disability. The next section of the Article will discuss efforts by activists and scholars to enforce protections against discrimination under international human rights law that may not yet be secured in individual countries' disability discrimination laws.

IV. THE DEVELOPMENT OF AN INTERNATIONAL AND REGIONAL HUMAN RIGHTS JURISPRUDENCE ON DISABILITY RIGHTS PROTECTIONS

A. Development within the United Nations

In recent years, a body of binding and non-binding international
law addressing the rights of people with disabilities has emerged. For decades, people with disabilities had been totally ignored by the international human rights community, including the United Nations. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 is considered the first international human rights law. The principle that "all human beings are born free and equal in dignity and rights" is enshrined in Article 1 of the Universal Declaration of Human Rights ("UDHR"). Indeed, the UDHR establishes human rights law as "a common standard of achievement for all peoples and all nations." Although it is a declaration and not a formal treaty, it is now recognized as part of customary international law and therefore binding.

The UDHR, together with the International Convention on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") make up what is referred to as the International Bill of Rights. None of these instruments, however, include disability within the list of protected categories.

It was not until 1971, with the Declaration on the Rights of

53. Certain customs and principles have become so widely accepted that they have become binding as customary international law. To establish an international custom, the party must show a widespread practice by states of confirming to the alleged rule, together with evidence that states have followed this practice because they believe that they are under an obligation to do so. As such, customary human rights law may be found binding on all states without regard for whether a particular state has consented. GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hunnan, ed., Ardsley 3d ed. 1999), at 10. The Universal Declaration of Human Rights is one such example of a non-binding General Assembly Resolution that has become binding as customary law. See Eric Rosenthal & Clarence Sundram, Recognizing Existing Rights and Creating New Ones: Tools for Drafting Human Rights Instruments for People with Mental Disabilities, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL (Lawrence Gostin & Harold Koh eds., in press 2003).


55. Id.

56. Id. Although establishing the existence of a customary rule of law may be difficult, the United States Court of Appeals for the Second Circuit, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), recognized the existence of a customary law against torture, even before the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984 and ratified by the United States years later. Modern international sources confirm the propriety of this approach. See The Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, arts. 38 & 59, at 1060.

Mentally Retarded Persons, that the UN adopted its first international human rights instrument addressing specifically the right of people with disabilities. However, this Declaration does not utilize a human rights model; instead, it continues to rely on a medical model, viewing people with disabilities as dependent and in need of treatment. For example, the 1971 Declaration does not even acknowledge that all people with disabilities are capable of living a “normal life.” As it states, the purpose of the Declaration is “...to promote the integration of people with disabilities as far as possible, in normal life.”

In 1975, the Declaration of Rights of Disabled Persons affirmed, for the first time under international law, the right of people with disabilities to have the same civil and political rights as other human beings. Since then, the United Nations has adopted specialized human rights conventions on behalf of other groups, but again, none specifically address the rights of people with disabilities.

UN conventions create obligations on governments to promote or enforce individual rights. However, such conventions become sources of rights for individuals within a given country only if they are incorporated into a country’s own domestic laws. Therefore, one of the primary ways in which governments may implement their

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59. See Degener & Quinn, Survey, supra note 23, at notes 13-14 and accompanying text.
obligations under international law is through the enactment of domestic legislation. A convention, itself, must be ratified by a given nation in order for that government to be bound under international law.\(^\text{64}\)

Despite the complexities of treaty ratification in various countries, over 100 state parties have ratified the ICCPR and ICESCR, the, the Convention on the Prevention and Punishment of the Crime of Genocide ("CPPCG), the Convention against Torture, and the Convention Relating to the Status of Refugees. More than 150 states are parties to the Convention on the Elimination of All Forms of Discrimination against Women. Furthermore, over 185 states are parties to the Convention on the Rights of the Child.\(^\text{65}\) Although the United States has ratified very few conventions relating to human rights, the United States is a signatory to the Convention on Economics, Social and Cultural Rights.\(^\text{66}\) Accordingly the United States and all other signatories are obligated to "refrain from acts which would defeat the object and purpose of [the] treaty. . .".\(^\text{67}\)


65. GUIDE TO INT'L HUMAN RIGHTS PRACTICE, supra note 53, at 9.


Within the past few decades, the United Nations has also begun to focus its attention on disability rights. Although not in the form of a specialized treaty, this attention has come in the form of non-binding instruments on disability issues and the extension of existing instruments to human rights abuses against people with disabilities. 68

1. Specialized Disability-Related International Instruments

Throughout the 1980’s, the UN passed a series of resolutions culminating in the 1982 World Programme on Action Concerning Disabled Persons. The World Programme includes what is likely the first statement on the equalization of opportunities for people with disabilities by the United Nations. It provides that “the general system of society, such as the physical, cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational activities are made accessible to all.” 69 The World Programme provided the impetus for the UN Decade of the Disabled Persons from 1983-1993.

In 1993, the UN adopted the Standard Rules on Equalization of People with Disabilities. The UN Standard Rules, as their name indicates, promote the view of equal rights protections for people with disabilities rather than a social welfare approach. The Standard Rules provide for the appointment of a Special Rapporteur who is mandated to report to the UN Commission on Social Development on the status of people with disabilities throughout the world. These Standard Rules seek to ensure that people with disabilities are entitled to the same rights and obligations as others within their respective societies. They also clearly identify the right to equality for people with disabilities:

The principle of equal rights implies that the needs of each and every individual are of equal importance that those needs must be made the basis for the planning of society and that all resources must be employed in such a way as to ensure that every individual has equal

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opportunity for participation.\footnote{70}

Although the Standard Rules are not compulsory, they do set the standards by which a country’s treatment of people with disabilities may be assessed. They also imply a strong commitment on behalf of member States to take action on behalf of persons with disabilities.\footnote{71} These Rules complement another UN instrument adopted the same year that addresses, specifically, the rights of people with mental illness. In 1993, the General Assembly of the UN also adopted the Principles for Protection of Persons with Mental Illness and the Improvement of Mental Health Care, which provide the standards by which to evaluate the implementation of human rights practices in different countries’ mental health systems.\footnote{72} They also provide the basis for reports about treatment of people with disabilities and conditions to which they are subjected, particularly in institutions.\footnote{73}

2. \textit{Interpretation of Existing Instruments to Human Rights Abuses Against People with Disabilities.}

In 1994, UN Committee on Economic, Social and Cultural Rights issued a General Comment on how to interpret the International Convention on the Economic, Social and Cultural Rights, as applied to people with disabilities. This General Comment adopts a human rights approach by suggesting the need for anti-discrimination legislation on behalf of persons with disabilities:

In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti discrimination legislation in relation to disability would seem to be indispensable in virtually all states parties.\footnote{74}

Despite the adoption of international instruments and the interpretation of existing binding law to afford certain protections to people with disabilities, none of these instruments require member States to prevent, or even monitor human rights abuses, mistreatment or discrimination against people with disabilities. Only a binding treaty will have that authority and effect.

\footnote{71. UN G.A. Res. 48/96, Dec. 20, 1993, at 204.}
\footnote{72. \textit{See MDRI Reports, supra note 8.}}
\footnote{73. \textit{See id.}}
B. International Regional Developments

Regional treaties have also been used as mechanisms to enforce human rights protection for people with disabilities. Examples of such regional conventions include the American Convention on Human Rights (1969), the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the European Convention on Human Rights and Fundamental Freedoms (1950), the European Social Charter, the African Charter, and, more recently, the Charter of Fundamental Rights of the European Union.\(^7\)

With respect to disability rights protections, in particular, the Organization of American States and the European Council as well as the European Union have all passed strong equality legislation on disability.\(^7\) In 1999, the OAS adopted the first the Inter-American Convention on the Elimination of All Forms of Discrimination and the

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76. For a thorough discussion of the development of disability rights protections in the European region, see Degener & Quinn, \textit{Survey, supra} note 23. The authors here note that the fact that the European Council has proposed reform on behalf of people with disabilities should come as no surprise since it was founded in 1949 to address human rights. But the fact that the European Union (formerly the European Economic Community, founded in 1957) has taken on the issue of disability is somewhat surprising given its economic approach. The authors suggest that the EU’s involvement in disability issue may be attributable to its view of people with disabilities as an untapped part of the labor force, as was also a “powerful impulse” behind the ADA, at Part 2, Introduction. \textit{Id.}
first binding human rights treaty on disability. Further, on January 29, 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1592 (2003), entitled "Towards Full Social Inclusion of Persons with Disabilities." This Recommendation adopts a human rights model, as it provides:

The Assembly notes with satisfaction that in certain member states policies concerning people with disabilities have been gradually evolving over the last decade from an institutional approach, considering people with disabilities as "patients", to a more holistic approach viewing them as "citizens," who have a right to individual support and self-determination.

The Recommendation goes on to state:

The right to receive support and assistance, although essential to improving the quality of life of people with disabilities, is not enough. Guaranteeing access to equal political, social, economic and cultural rights should be a common political objective for the next decade. Equal status, inclusion, full citizenship, and the right to choose should be further promoted and implemented.

Pursuant to such regional conventions, aggrieved individuals may bring complaints against governments. Generally such complaints are brought before specialized commissions or courts to settle disputes between individuals and the government or to issue binding decisions on the government parties. Cases decided under these regional conventions may be useful in the interpretation of similar protections in


78. Towards Full Social Inclusion, supra note 77.

79. Id. at para. 3.
other conventions, but they remain binding only within the human rights system created by the respective convention.

A body of case law on the rights of people with disabilities under the European Convention of Human Rights is now developing. The first case involving the rights of a person with a disability was decided by the Inter-American Commission of Human Rights in March 1999, under the American Convention on Human Rights. This case, The Case of Victor Rosario Congo, involved a man with a mental disability from Ecuador, who died of "dehydration" in pre-trial detention after he was beaten by a guard, placed in isolation, and denied adequate medical and psychiatric care. The Commission found that Mr. Congo's mental state degenerated as a result of being held in isolation, and that holding him in seclusion under these circumstances constituted inhuman and degrading treatment in violation of Article 5 of the American Convention. The Commission also found that Ecuador's failure to provide appropriate care for Mr. Congo violated its duty to protect his life under Article 4(1) of the American Convention. The Commission found that detention "under deplorable conditions and without medical treatment" constituted an additional form of inhuman and degrading treatment. As the Commission noted, "the right to physical integrity is even more serious in the case of a person held in preventative detention, suffering a mental disease, and therefore in the custody of the State in a particularly vulnerable position."

The Congo decision is important because the Inter-American Commission indicated for the first time that it will adopt "special standards to the determination of whether the provisions of the Convention have been complied with in cases

80. See Gostin, supra note 75; see also T.W. Harding, The Application of the European Convention of Human Rights to the Field of Psychiatry, 12 INT'L J. L. PSYCHIATRY 245 (1989).


82. The Case of Victor Rosario Congo, supra note 81 at 6.

83. Id. at para. 101; see also Inter-American Convention on Human Rights, supra note 1, at art. 5, which states: "No one shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

84. Inter-American Convention, supra note 1, at art. 4(1). This article states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."


86. Id. at para. 67.
involving persons suffering from mental illnesses . . . " In addition, the Inter-American Commission relied, also for the first time, on the Principles for the Protection of Persons with Mental Illness as a guide to the interpretation of the American Convention.

Since its decision in The Case of Victor Rosario Congo, the Inter-American Commission has been willing to hear additional cases involving the rights of people with mental disabilities detained in psychiatric institutions. For example, in March 2000, the Commission granted a request from Mental Disability Rights International for a hearing on the findings of MDRI’s February 2000 report entitled Human Rights & Mental Health: Mexico, which documents a broad pattern of abuses in Mexico’s psychiatric facilities. This hearing was the Inter-American Commission’s first hearing on the protection of human rights in a mental health system as a whole, and prompted the Commission to raise concerns about human rights abuses in Mexico’s psychiatric hospitals in the OAS’s annual report on Mexico’s human rights record. This hearing also demonstrates the value of regional human rights systems as tools for human rights monitoring and public education about the conditions of people with disabilities in closed institutions.

In addition, the European Court of Human Rights has also recently reviewed two cases involving people with disabilities. The first case decided by the European Court involving disability was Herzeghaly v. Austria. In this case, the European Court observed that, “[t]he position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with.”

In Price v. United Kingdom, decided in July 2001, the Court demonstrated the application of the protection against inhuman and degrading treatment to people with disabilities. Ms. Price was a

87. Id. at para. 53.
91. Id.
92. Price v. United Kingdom, 34 E . H . R . R . 5 3 (2002). The European Court of Human Rights considered this case under Article 3 of the European Convention, which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
woman with a physical disability who used a wheelchair (she was described by the Court as "four-limb deficient" and "suffers from problems with her kidneys"). During a civil proceeding she was placed in jail for seven days for contempt of court. The cell in which she was placed was not adapted for a person with a disability, and she was forced to sleep in her wheelchair. Emergency buttons and light switches were out of her reach, and the toilet was not accessible. When she was finally given access to a toilet, she was left there for hours and undressed in front of male guards.

The European Court found that this treatment constituted degrading treatment under the convention. The Court noted that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of" the convention.94 Even though there had been no intent to cause harm to this woman, the failure to accommodate her needs caused her great suffering. As the Court stated:

In considering whether treatment is "degrading" within the meaning of [the Convention] one of the factors the Court will take into account is the question whether its object was to humiliate or debase the person concerned although the absence of any such purpose cannot conclusively rule out a finding of violation. . . .95

In this case, the court found degrading treatment in violation of the covenant, even though it found "no evidence in this case of any positive intention to humiliate or debase the applicant."96

In recent years, the UN Human Rights Committee has taken a strong stand on the application of Article 7 of the ICCPR to all people in detention, including individuals in psychiatric facilities. General Comment 20(44) states that Article 7 "is complemented by the positive requirements of Article 10, paragraph 1 of the Covenant, which stipulates that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'"97 In addition, the Human Rights Committee has stated that

While the interpretation of the European Court is binding only under the European Convention, its decisions are influential in the understanding of similar provisions in other treaties, such as the ICCPR.

95. Id.
96. Id. at para. 30.
97. General Comment 20(44), para.5 in U.N. HUMAN RIGHTS COMMITTEE, NON-DISCRIMINATION, General Comment 20(44), UN Official Records Suppl. No. 40 (A/45/40), 173-175 [hereinafter General Comment]. This General Comment is also found in the UN Manual on Human Rights Reporting, United Nations Office of the High Commissioner for Human Rights, MANUAL ON HUMAN RIGHTS REPORTING 197 (1997), HR/PUB 91/1 (Rev.1).
“[i]t is appropriate to emphasize... that Article 7 protects, in particular, children, pupils, and patients in teaching and medical institutions.”\textsuperscript{98} The UN Manual on reporting points out that “Article 7 protects not only detainees from ill-treatment by public authorities or by persons acting outside or without any official authority but also in general any person. This point is of particular relevance in situations concerning... patients in... medical institutions, whether public or private.”

In sum, the effect of international conventions on state practices may be changing. The Inter-American Commission on Human Rights’ precedent-setting decision in \textit{The Case of Victor Rosario Congo} builds on the approach adopted by the European Court in \textit{Herczegfalvy}, and recognizes that international instruments, such as the MI Principles in these cases, can be used as a guide to the interpretation of conventions affecting the rights of people with disabilities.\textsuperscript{99}

\section*{V. PROPOSED TREATY ON THE RIGHTS OF PEOPLE WITH DISABILITIES}

Despite the efforts of individual countries and efforts on the international and regional levels, the disability activists and scholars have continued to push for the adoption of a specific treaty on the elimination of discrimination against people with disabilities.\textsuperscript{100} Italy and Sweden proposed consideration of such a disability-specific treaty in 1987 and 1989, respectively. But there was no support for such a


\textsuperscript{98} General Comment, \textit{supra} note 97, at para. 5.


\textsuperscript{100} In 1987, the 3rd Committee of the General Assembly considered the recommendations that had been made by the “Global Meeting of Experts to Review the Implementation of the World Programme of Action Concerning Disabled Persons at the Mid-Point of the United Nations Decade of Disabled Persons.” Among the recommendations was a proposal for an international convention on the elimination of all forms of discrimination against disabled persons. The Italian delegate raised and supported the possibility of such a convention (U.N. Doc. A/C.3/42/SR.16 (1987)), but numerous objections to such a convention were raised in subsequent meetings by various countries (e.g., U.K. and Japan were concerned about financial implications, while Germany and the Nordic countries believed that the rights of disabled persons were protected by existing universal human rights documents such as the ICESCR - see U.N. Docs. A/C.3/42/SR.17 to A/C.3/42/SR/19). Eventually, the 3rd Committee adopted a resolution on disabled persons that did not recommend the drafting or implementation of a binding convention on eliminating discrimination against disabled persons (U.N. Doc. A/C.3/42/L.25). The possibility of a convention was raised again by Sweden in 1989, and once again failed to garner sufficient support, but this later initiative did lead to the eventual establishment of the Standard Rules.
treaty—until recently. Efforts are now underway for the United Nations to draft and adopt a treaty on the rights of people with disabilities that will firmly establish disability rights within the global community as a human rights issue. As one commentator recently observed, "[t]angible material support is necessary to convert formal freedoms into real freedoms for people with disabilities. This is not the freedom of welfare, which places people with disabilities in gilded cages and lock them into cycles of dependency and despondency. It is economic, social and cultural justice, which liberates people with disabilities so that they can play their part in—and contribute their share to—inclusive societies."\(^{101}\)

In March 2000, the first world NGO Summit on Disability was convened in Beijing. This Summit produced the Beijing Declaration of Rights of People with Disability in the New Century, which lends considerable support to the idea of a disability-specific convention.\(^{102}\) The Beijing Declaration explicitly calls for the creation of a UN convention. Such a convention would legally bind nations to promote the full inclusion of people with disabilities, the elimination of discriminatory attitudes and practices, and an improved quality of life for people with disabilities.\(^{103}\) The proposal also calls for information and increased allocations of resources to ensure the equal participation of people with disabilities.\(^{104}\)

Soon after the Beijing Summit, the Third Committee of the UN General Assembly adopted a resolution calling for the establishment of an Ad Hoc Committee of the UN to develop "a comprehensive and integral international convention to protect and promote the rights and dignity of person with disabilities, based on the holistic approach in the work done in the filed of social development, human rights, and non-discrimination."\(^{105}\) This Resolution, entitled the Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disability was adopted in November 2001, and incorporates a human rights model. It also designates an Ad Hoc Committee to draft a disability-specific

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103. *Id.*
104. *Id.*
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convention including a strong statement on discrimination. The goal of the proposed specialized convention on the rights of people with disabilities is to provide guidance to governments and international agencies to ensure inclusion of people with disabilities in international affairs and to promote collaboration between disability rights leaders in the US and abroad. 106 This Resolution also requires the Ad Hoc Committee to hold meetings at the UN prior to the General Assembly and to hold regional meetings as well. Ireland and Mexico have taken leading roles in the Ad Hoc Committee. 107 The first Ad Hoc Committee meeting took place at the UN in August, 2002, at which the Committee reviewed the first draft the Resolution. The next Ad Hoc Committee meeting is scheduled for June 2003.

The idea of a disability-specific convention has begun to gain broad support internationally for several reasons. 108 First, a convention on the rights of people with disabilities will establish disability rights as a human rights issue within the international human rights arena. 109 As such, it should have a positive effect on the inclusion of disability within existing treaties similar to the effect the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination had on the implementation of these treaties with respect to the groups protected by these treaties. 110 Indeed, "a convention would make a huge step forward and should not undermine but underpin the protections provided in the six existing human rights treaties." 111

Some have argued that a separate convention for people with disabilities is stigmatizing in and of itself. 112 A separate disability-specific convention calls attention to the difference between people with disabilities and those without disabilities, which may, in turn, increase


107. This resolution, sponsored by Mexico calls for "a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities. UN Document A/57/357. The Mexican proposal followed on Ireland’s initiative in the previous years.


110. Id. at 182; see also Rosenthal & Sundram, Reorganizing Existing Rights and Creating New Ones, supra note 53.

111. Quinn & Degener, Human Rights, supra note 22, at 297.

112. Id. at 183.
the marginalization and unequal treatment of people with disabilities. To achieve equality, however, requires that differences among people must not only be acknowledged, but also accommodated, if necessary. The scholar, Martha Minow has labeled this situation, the "dilemma of difference," which implies that by ignoring differences in order to prevent stereotyping and stigmatization, we may pay the price of failing to do justice.  

Apparently, no such fears of stigmatization were expressed or reported prior to the enactment of the specialized treaties on women, children, or racial minorities. Thus, it remains a question as to why this criticism may be waged against efforts on behalf of people with disabilities, in particular. However, the risk of not having a disability-specific convention to people with disabilities as well as to the societies in which they live may be far greater than not having a convention at all in order to avoid perpetuating certain stereotypes.

A second reason the proposed convention has begun to gain support is the protection from harm such a convention may provide to people with disabilities worldwide. As a result of the absence of a treaty specifically on disability rights, mistreatment and exclusion of people with disabilities has been allowed to continue in a variety of contexts. Most governments throughout the world remain unaware of any legal obligations with respect to human rights protections of people with disabilities. Only 40 of the 191 countries that are members of the UN have enacted domestic disability laws. Additionally, of those, many continue to rely on charity or medical models of disability and ignore the effects of mistreatment, discrimination and exclusion of people with disabilities themselves as well as on the societies in which they live.

Further, disability remains invisible and marginalized as a human rights issue, even among human rights organizations and NGO’s. Studies have found that NGO’s themselves may perpetuate the segregation of people with disabilities through charity programs that provide treatment and rehabilitative services to people with disabilities based on the medical model of disability and without any input from the

113. Minow, supra note 27; Quinn & Degener, Human Rights, supra note 22, at 183.
114. Quinn & Degener, Human Rights, supra note 22, at 183.
115. Id. at 9-18.
117. This number includes Timor-Leste (East Timor) and Switzerland, which became member states in September 2002. See List of Member States UNITED NATIONS, at http://www.un.org/Overview/unmember.html (last visited Apr. 4, 2003).
118. Quinn & Degener, Human Rights, supra note 22, at 15.
consumers of such services. Without an awareness of the human rights implications of programs for people with disabilities, segregation, exclusion and mistreatment may continue, even in those countries with domestic disability discrimination legislation.

Moreover, without a binding UN convention, international human rights organizations and development organizations will continue to devote little or no attention and resources to the unequal treatment and discrimination people with disabilities face. The World Bank and US AID, for example, provide millions of dollars in aid throughout the world. Such funds could be used to benefit people with disabilities who are poor and comprise the largest segment of the impoverished population of most developing countries. However, in the absence of UN standards regarding the inclusion of people with disabilities in their programs, such organizations will likely continue to ignore disability or, even worse, perpetuate segregation, unequal treatment, and abuse of people with disabilities.

In addition to raising awareness and increasing resources for disability-related work, a treaty would have a "transformative" effect. The treaty process, as well as the language itself, will encourage more effective monitoring and reporting on the enforcement of the convention by government and NGO's. Existing monitoring bodies, such as our own State Department, will be required to collect data and documentation regarding the mistreatment, discrimination, and abuse of people with disabilities worldwide, which is not the case now. Currently, the US State Department is mandated under the Foreign Assistance Act to report annually on human rights practices of all countries that are members of the UN (regardless of whether or not they receive foreign assistance). However, the US has only recently

119. Quinn and Degener observe, "Much of the exclusion was funded by welfare programmes that were more conducive to entrapment than liberation." Id. at 15.

120. See Rosenthal & Kanter, supra note 66.


122. In order to be truly transformative, of course, the treaty process itself must be inclusive of people with all sorts of disabilities so that people with disabilities themselves will be involved in drafting the legal standards which affect directly their human rights. For a thorough discussion of the arguments in favor of a disability-specific treaty, including its transformative value, see NCD Report supra note 106, at 3, 35-44.

123. See Rosenthal & Kanter, supra note 66.

124. Country reports are submitted to the Congress by the Department of State in compliance with sections 116(d)(1) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and Section 505 (c) of the Trade Act of 1974, as amended. As stated in Section 116(d)(1) of the FAA: "The Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, by January 31 of each year, a full and complete report regarding the status of internationally recognized
begun to identify abuse and discrimination against people with disabilities in its state country reports. While such voluntary action by the US State Department is laudable, without a clear legislative mandate requiring the State Department to include information about the treatment of people with disabilities within its annual country reports—which a convention on the rights of people with disabilities would require—such efforts by the State Department could easily give way to other priorities.

VI. CONCLUSION

Thirty years ago disability rights as the focus of international human rights instruments was not even conceivable. If disability was mentioned at all in any international or regional documents, it was only in the context of promoting access to treatment and rehabilitation for people with disabilities under a social welfare or medical model of disability. Such models views people with disabilities as victims in need of services, not as individuals entitled to the same civil and political rights as all human beings. However, in recent years, the situation has changed dramatically. The principle of non-discrimination and equality for people with disabilities has entered center stage in the international arena. Countries throughout the world, many influenced by the ADA, have enacted their own disability discrimination laws. Regionally, the Inter-American and European legal systems also have begun to address disability rights in binding documents and to provide redress for

human rights, within the meaning of subsection (A) in countries that received assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.” 22 USCA § 2151n (d). Section (a) provides: “No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.”

125. The State Department Office of Democracy, Human Rights and Labor (DRL) has made an important step in the right direction by adding a section on disability rights to the Country Report. In some cases, this documentation has already had a valuable impact on the rights of people with disabilities. However, the information about disability rights in Country Reports is extremely limited and does not begin to paint a full picture of the scope of human rights violations against people with disabilities that exist in the world today—the vast patterns of discrimination, physical and linguistic barriers to participation in public life, denial of education, employment, and other economic opportunities, and the arbitrary detention in closed facilities where people with disabilities are left to languish in some of the most inhuman and degrading conditions known to humankind. See Rosenthal & Kanter, supra note 66.
violations of the rights of people with disabilities within their respective court systems. Perhaps most significantly, after nearly four decades of human rights advocacy for other groups, the UN has finally begun to systematically address the rights of people with disabilities.

Over the past year alone, great strides have occurred in the development of a proposed convention on the rights of people with disabilities. This international effort on behalf of a disability-specific treaty has found support in many countries, including the United States. For example, on April 17, 2003, Senator Harkin proposed a draft resolution in the United States Senate "expressing the sense of Congress that the US government should support the human rights and dignity of all persons with disabilities by pledging support for the drafting and working towards the adoption of a thematic convention on the human rights and dignity of persons with disabilities by the UN General Assembly to augment the existing UN human rights system and for other purposes." 126

As we look back thirty years from now, let us hope that the development of domestic, regional, and international laws, including a disability-specific convention ratified in countries throughout the world, will have been the final steps to achieve the recognition of human rights for people with disabilities and the contributions of people with disabilities to our global society.
