

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
CENTER FOR HUMAN RIGHTS
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges the United States to ratify and
- 2 implement the United Nations Convention on the Rights of Persons with Disabilities.

REPORT

This Report & Recommendation urges the United States to ratify and implement the principles of, and ratify, the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹ The United States signed the CRPD on July 30, 2009, but the U.S. Senate has not begun the process of evaluating possible ratification. The American Bar Association (the Association), acting consistently with past policy decisions, should advocate for the United States' ratification of the CRPD 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."²

I. BACKGROUND

The World Health Organization estimates that more than 650 million people (approximately 10% of the world's population) live with disabilities.³ Of that 650 million,

¹ The CRPD also includes an Optional Protocol requiring separate signature and ratification that sets forth additional responsibilities of the Committee on the Rights of Persons with Disabilities (discussed below). The Optional Protocol entered into force on May 3, 2008. States Parties to the Optional Protocol recognize the authority of the Committee on the Rights of Persons with Disabilities to consider communications from individuals or group of individuals claiming to be victims of a violation of the provisions of the CRPD. The procedure is adversarial and there is a publicly available decision. In addition, States Parties to the Optional Protocol may further accept the authority of the Committee to undertake investigations – including country visits – in the case of reliable information of grave and systematic violations of human rights. A State Party to the Optional Protocol must accept the individual complaint procedure, but may opt-out of the inquiry. Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex II, U.N. GAOR, 61st Sess., Supp. No. 49, at 80, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008. This Report and Recommendation does not seek U.S. ratification of the Optional Protocol, only the CRPD. As of October 1, 2009, 143 nations had signed the Convention, 87 nations had signed the Optional Protocol, 70 nations had ratified the Convention (Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Brazil, Burkina Faso, Chile, China, Cook Islands, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Germany, Guatemala, Guinea, Haiti, Honduras, Hungary, India, Italy, Jamaica, Jordan, Kenya, Laos, Lesotho, Malawi, Mali, Mexico, Mongolia, Morocco, Namibia, New Zealand, Nicaragua, Niger, Oman, Panama, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Rwanda, San Marino, Saudi Arabia, Serbia, Slovenia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Thailand, Tunisia, Turkmenistan, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, Uruguay, Vanuatu, and Yemen), and 45 nations had ratified the Optional Protocol. United Nations Secretariat for the Convention on the Rights of Persons with Disabilities, Department of Economic and Social Affairs, Ratifications of the Convention and its Optional Protocol, <http://www.un.org/disabilities/countries.asp?id=166> (visited October 19, 2009).

² United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008 Art. 1 [hereinafter CRPD].

³ World Health Organization, Disability and Rehabilitation Team, <http://www.who.int/disabilities/en/> (visited October 19, 2009). The World Health Organization (WHO) defines "disability" as "the outcome or result of a complex relationship between an individual's health condition and personal factors, and of the external factors that represent the circumstances in which the individual lives." Impairments are defined as "problems in body function or structure such as significant deviation or loss." *See Id.* When immediate family members are included, the number of people affected by disabilities exceeds one billion. Disabilities are a contributing factor for poverty, reduced access to education and health, exclusion and discrimination for both persons with disabilities and their families. The global population of persons with disabilities is increasing, according to the WHO. *Id.* Population

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approximately 80% (400 million) live in developing countries. The number of persons affected by disabilities, such as family members of persons with disabilities, is even higher. Persons with disabilities are among the largest minority groups around the world.

Unfortunately, persons with disabilities are often excluded from the mainstream of society. Discrimination against such persons can be explicit or implicit, but the result is the same—persons with disabilities are often denied their basic human rights. According to the United Nations, the effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public places and services. This exclusion may result from distinction, exclusion, restriction or preference, or denial of reasonable accommodation, which effectively nullifies or impairs the recognition, enjoyment or exercise of the rights of persons with disabilities.

The Inter-Parliamentary Union reports that only one-third of all countries have anti-discrimination or other disability-specific laws. Thus, the human rights of persons with disabilities have not been systematically addressed in society. Where such rights are addressed, legislation and policies are based on the assumption that persons with disabilities simply are not able to exercise the same rights as non-disabled persons.

United Nations human rights conventions protect the rights of women (Convention on the Elimination of All Forms of Discrimination against Women), children (Convention on Rights of the Child), and other groups.⁴ The CRPD is the first global convention to specifically address the rights of persons with disabilities. The CRPD draws on existing human rights conventions and fills the gap between the promise such conventions offer to promote and protect the rights of persons with disabilities and the fact that such promise largely was not realized.⁵

growth, medical advances and the aging of the world population all contribute to such increase. In countries with life expectancies over 70 years, individuals spend on average about 8 years, or 11.5 per cent of their life span, living with disabilities. *Id.*

⁴ We note that the United States has not ratified Convention on the Elimination of All Forms of Discrimination Against Women or Convention on Rights of the Child. Existing Association policy supports U.S. ratification of each such convention. *See* Report and Recommendation 107C (February 1996); Report and Recommendation ____ (Aug. 1984) (CEDAW); ____ February 1991 (CRC). This report and recommendation should not be construed as suggesting that one convention should be ratified before another, rather that the Association should be on record as supporting ratification of each such convention. The Association also has adopted policy supporting the Universal Declaration of Human Rights (October 2008 Board); International Covenant on Economic, Social and Cultural Rights (Report No. 1, February 1979); International Covenant on Civil and Political Rights (Report No. ____, February 1979); International Convention on the Elimination of All Forms of Racial Discrimination (Report No. ____, August 1978).

⁵ For example, only 2% of children with disability in the developing world receive any education or rehabilitation. More than 40% of countries have no policy on intellectual or psychosocial disabilities and 30% have no mental health program. People with disabilities are reported to have twice the rate for non-participation in the labour market as compared to persons without disabilities. The unemployment rate for persons with a severe disability is about three times the level for persons without disabilities. Workers with disability typically receive a lower wage than others and segregation begins at an early stage with children being placed in parallel education networks. United Nations Secretariat for the Convention on the Rights of Persons with Disabilities, Department of Economic and Social Affairs, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/default.asp?id=212> (visited October 19, 2009).

The convention does not create new rights for persons with disabilities, but it does set forth globally-accepted legal standards on disability rights and clarifies the application of human rights principles to persons with disabilities.⁶ The CRPD serves as an authoritative reference point for the development and refinement of relevant domestic law and policy. The convention is intended to develop a human rights instrument that is cross-disability and applicable across economic sectors.

The rights referenced in the CRPD are drawn from existing human rights texts, including the Charter of the United Nations;⁷ the Universal Declaration of Human Rights;⁸ the International Covenant on Economic, Social, and Cultural Rights;⁹ the International Covenant on Civil and Political Rights;¹⁰ the Standard Rules on the Equalization of Opportunities for Persons with Disabilities;¹¹ and World Programme of Action on Disabled Persons.¹² The CRPD also is influenced by policy instruments such as the Copenhagen Declaration and Programme of Action, the Millennium Declaration, and the Millennium Development Goals.

The convention also builds upon several disability-specific but non-binding international instruments such as:

- Declaration of the Rights of Mentally-Retarded Persons;¹³
- Declaration on the Rights of Disabled Persons;¹⁴

⁶ *Id.*

⁷ Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, Preamble (“...the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world....”).

⁸ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 2 [hereinafter UDHR].

⁹ International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, Art. 2(2) [hereinafter ICESCR].

¹⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Art. 2(1) [hereinafter ICCPR].

¹¹ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th Plenary Meeting, Dec. 20, 1993. These rules are not legally binding. They express generally-accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities.

¹² World Programme of Action on Disabled Persons, A/RES/37/52, Dec. 3, 1982. This program is not legally binding. It expresses generally-accepted principles and represent a moral and political commitment by States. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities.

¹³ Declaration of the Rights of Mentally-Retarded Persons, G.A. res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971).

¹⁴ Declaration on the Rights of Disabled Persons, G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975).

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- Tallinn Guidelines for Action on Human Resources Development in the Field of Disability;¹⁵
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care;¹⁶ and
- International Labor Organization Recommendation Concerning Vocational Rehabilitation and Employment (Disabled Persons).¹⁷

The CRPD was adopted by the United Nations General Assembly on December 13, 2006, opened for signature on March 30, 2007, and entered into force on May 3, 2008 upon receipt of its 20th ratification. The United States did not actively participate in the drafting of the CRPD. While the United States signed the CRPD in July 2009, it has not yet ratified it. As a signatory, the United States is committed to not act in any manner inconsistent with the CRPD's goals.

II. ANALYSIS OF CRPD

The CRPD is intended to be a development, human rights, and policy instrument. The document sets forth eight general principles supporting the participation and inclusion of, and non-discrimination against, persons with disabilities. The convention also provides methods to measure the accessibility of a society to persons with disabilities. As a threshold matter, the CRPD defines "disability" with reference to a person's interaction with society.

A. Defining "Disability" and Shifting Views on Persons with Disabilities

Rather than reference a specific list of disabilities, the convention acknowledges that:

Disability is an evolving concept, and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others.¹⁸

Further, Article 1 of the Convention states:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in

¹⁵ Tallinn Guidelines for Action on Human Resources Development in the Field of Disability, G.A. res. 4470, ____ U.N. Doc. A/Res/44/70 (1989).

¹⁶ Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, G.A. res. 46119, ____ U.N. Doc. A/Res/46/119 (1991).

¹⁷ International Labor Organization, Recommendation Concerning Vocational Rehabilitation and Employment (Disabled Persons), Recommendation R168, June 20, 1983, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R168> (visited October 19, 2009),

¹⁸ CRPD, *supra* note 2, at Preamble.

interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁹

By using the concept that disability stems from the interaction between a person and a noninclusive society, the CRPD's principles and standards may be applied to currently-known and emerging forms of impairments. The convention references a non-exhaustive concept of "disability," so States Parties to the CRPD may draft national legislation with a wider, but not narrower, focus. States Parties to the CRPD are legally bound to treat persons with disabilities as subjects of the law with clearly defined rights and must adapt their domestic legislation to the international standards set forth in the convention.

The way in which the CRPD defines "disability" reinforces the convention's premise that persons with disabilities are subjects of human rights, are able to make decisions about life and the future, and claim rights on their own behalf. As such, persons with disabilities should be provided equal access to society. As envisioned by the CRPD, persons with disabilities should have avenues to defend their rights and/or promulgate legal or other changes within society to ensure equal access and protections. This premise departs from the more traditional view that persons with disabilities are objects to be fixed by medical treatment or objects of charity or social welfare.

C. General Principles of the CRPD

Article 3 sets forth the CRPD's general principles:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disabilities;
- Non-discrimination against persons with disabilities;
- Full and effective participation and inclusion in society for persons with disabilities;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity for persons with disabilities;
- Accessibility;
- Equality between men and women with disabilities; and
- Respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities.²⁰

Of the above-listed principles, the core three principles are (1) non-discrimination; (2) participation and inclusion; and (3) accessibility.

¹⁹ *Id.* at Art. 1.

²⁰ *Id.* at Art. 3.

i. Non-discrimination

The CRPD states that all persons, regardless of disability status, are equal before and under the law and are entitled, without discrimination, to the equal protection and equal benefit of the law.²¹ The convention does not create any new rights for persons pursuant to this non-discrimination principle, but identifies specific actions that States Parties must take to protect against disability-based discrimination, including making reasonable accommodations.

States Parties to the CRPD are to prohibit all direct and indirect discrimination on the basis of disability.²² As a part of the prohibition against discrimination, States Parties to the CRPD are to provide reasonable accommodation to persons with disabilities, so long as the accommodation is not an undue burden or cost.²³ A report by National Council on Disability (NCD) analyzing the CRPD notes that the convention, in supporting its non-discrimination and accessibility goal, contemplates quota regimes and set-asides for persons with disabilities.²⁴

²¹ *Id.* at Art. 5(1). The principle of non-discrimination is a fundamental principal of human rights law and the focus of several other human rights treaties. See, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 and Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981. Article 6 of the CRPD makes specific reference to women with disabilities, and provides that States Parties should take measures to ensure the full and equal enjoyment by them of human rights and fundamental freedoms. Article 7 sets forth the same requirement for children with disabilities. Freedom from discrimination is one of the underlying principles of human rights, which are based on the equal worth and dignity of all human beings. It is included in all international and regional human rights conventions. CRPD, *supra* note 2, Arts. 6-7. Article 1 of the UDHR states that "...all human beings are born free and equal in dignity and rights." UDHR, *supra* note 8, Art. 1. UDHR Article 2 provides that "...everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind..." *Id.* at Art. 2. Article 7 of the UDHR states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* at Art. 7. Article 16 speaks of the equal right of men and women to marry. *Id.* at Art. 16. Article 25 (1) is of particular importance for disabled persons: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the even of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." *Id.* at Art. 25(1). Article 2 of the ICESCR and Article 2 of the ICCPR include similar lists of prohibited discrimination. ICESCR, *supra* note 9, at Art. 2; ICCPR, *supra* note 10, at Art. 2. Although none of these instruments mention disability specifically, it is implicitly included in "other status" in each of these conventions.

²² CRPD, *supra* note 2, at Art. 5(2).

²³ *Id.* at Art. 5(3). The CRPD defines "reasonable accommodation" as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." *Id.* at Art. 2.

²⁴ National Council on Disability, Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), May 12, 2008, available at <http://www.ncd.gov/newsroom/publications/2008/CRPD.html> (visited October 19, 2009), p. 9 [hereinafter NCD Report].

ii. Participation and Inclusion

The CRPD states that persons with disabilities are entitled to full and effective participation and inclusion in society—as a general principle, general obligation, and right. As a basic matter, persons with disabilities should be enabled to participate and be included in significant decision-making processes. The CRPD requires that States Parties closely consult with persons with disabilities in connection with any decision-making process relating to disability issues.²⁵ The convention provides, in part, that persons with disabilities, as to the societies in which they live, have the right to take part in the conduct of public affairs, the right to take part in cultural life (article 29), the right to education (article 24), and the right to live in the community.²⁶

iii. Accessibility

Accessibility, defined as providing equal access to services such as transportation and communications, is a general principle of the CRPD and a stand-alone article. There is some overlap between the concepts of participation and inclusion and the concept of accessibility. The CRPD, for example, covers issues related to physical accessibility and information and communications accessibility. More specifically, the CRPD obligates States Parties to ensure access by persons with disabilities to:

- Justice;²⁷
- Living independently and being included in the community;²⁸
- Information and communication services;²⁹
- Education;³⁰
- Health;³¹
- Habilitation and rehabilitation;³²
- Work and employment;³³
- Adequate standard of living and social protection;³⁴

²⁵ CRPD, *supra* note 2, at Art. 4(3).

²⁶ *Id.* at Arts. 19, 24, 29, and 30.

²⁷ *Id.* at Art. 13. The ICCPR states that all persons have the right. “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.” ICCPR, *supra* note 10, at Art. 14, para. 3(d).

²⁸ CRPD, *supra* note 2, at Art. 19.

²⁹ *Id.* at Art. 21.

³⁰ *Id.* at Art. 24.

³¹ *Id.* at Art. 25.

³² *Id.* at Art. 26.

³³ *Id.* at Art. 27.

³⁴ *Id.* at Art. 28.

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- Participation in political and social life;³⁵ and
- Participation in cultural life, recreation, leisure and sport.³⁶

D. Freedoms Recognized by the CRPD

The CRPD recognizes several civil, cultural, economic, political and social rights for persons with disabilities, including:

- Equality before the law without discrimination;³⁷
- Right to life, liberty and security of the person;³⁸
- Equal recognition before the law and legal capacity;³⁹
- Right to respect physical and mental integrity;⁴⁰
- Freedom of movement and nationality;⁴¹

³⁵ *Id.* at Art. 29. The UDHR provides that everyone has the right to take part in the Government of his/her country, either directly or indirectly, through freely chosen representatives. Periodic and genuine elections shall be open to every citizen of the country, with universal and equal suffrage. Voting stations shall be fully accessible to disabled people. UDHR, *supra* note 8, at Art 21. The ICCPR states that every citizen has the right without unreasonable restrictions to take part in the conduct of public affairs, and to vote and be elected at genuine periodic elections. It also requires equal access to public services in the country. ICCPR, *supra* note 10, at Art. 25.

³⁶ CRPD, *supra* note 2, at Art. 30.

³⁷ *Id.* at Art. 5. This is not a new concept. For example, Article 6 of the UDHR proclaims the right of everyone to be recognized as a person before the law. UDHR, *supra* note 8, at Art. 6. Article 7 of the UDHR recognizes the right to equality before the law and to the equal protection of the law without discrimination. *Id.* at Art. 7. The ICCPR speaks in article 16 of the rights of every person to recognition as a person before the law. ICCPR, *supra* note 10, at Art. 16. Article 26 of that covenant develops that statement stating that the law shall prohibit any discrimination and guarantee effective protection against discrimination. *Id.* at Art. 17.

³⁸ CRPD, *supra* note 2, at Arts. 10, 14. The right of everyone to “...life, liberty and security of person...” is stated in the article 3 of the UDHR, whereas article 9 forbids “...arbitrary arrest, detention or exile.” UDHR, *supra* note 8, at Arts. 3, 9. These provisions are of great importance for mentally disabled persons who are subject to unlawful detention. Furthermore, article 8 of the ICCPR states “... except on such ground and in accordance with such procedures as are established by law...” ICCPR, *supra* note 10, at Art. 8.

³⁹ CRPD, *supra* note 2, at Art. 12. UDHR Article 6 proclaims the right of everyone to be recognized as a person before the law. It focuses on the legal position of the individual. Everyone includes disabled people even if it is not specifically stated. UDHR, *supra* note 8, at Art. 6. UDHR Article 7 recognizes the right to equality before the law and to the equal protection of the law without discrimination. *Id.* at Art 7. The ICCPR speaks in article 16 of the rights of every person to recognition as a person before the law. ICCPR, *supra* note 10, at Art. 16. ICCPR develops that statement stating that the law shall prohibit any discrimination and guarantee effective protection against discrimination. *Id.* at Art. 26.

⁴⁰ CRPD, *supra* note 2, at Art. 17.

⁴¹ *Id.* at Art. 18. Everyone has the right to freedom of movement and residence within the borders of each State, the right to leave any country and to return to any country, and to seek and enjoy asylum from persecution in other countries. *Id.* The right to freedom of movement is also included in general terms in UDHR Article 3. UDHR, *supra* note 8, at Art. 3. Article 14 of the UDHR assures that everyone has the right to seek and enjoy asylum from persecution in any other country. Deportation for reason of disability cannot be accepted anywhere and from any country or Government. This text however, does not confer a right to be granted asylum. *Id.* at Art. 14.

- Freedom of expression and opinion;⁴² and
- Respect for privacy.⁴³

E. Obligations of Convention Signatories

Pursuant to Article 4, signatories to the CRPD, including the United States, shall not engage in any act or practice that is inconsistent with the CRPD's goals or principles. As stated above, States Parties, nations that have ratified the convention, shall modify or abolish existing discriminatory laws, customs and practices, and closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies to implement the CRPD. In addition, States Parties are to promote research and development into provision of goods and services for persons with disabilities.

F. Increasing International Cooperation

Article 32 of the CRPD provides that cooperative international programs, including international development programs, should be inclusive of, and accessible to, persons with disabilities. Such inclusiveness reflects the need for more social development programming that relates specifically to strengthening the rights of persons with disabilities. In addition, there is a need to mainstream the rights of persons with disabilities into social and human rights programs. The CRPD recognizes that disability specific measures—on national and international levels-- may be necessary to “accelerate or achieve de facto equality of persons with disabilities.”⁴⁴

G. CRPD Bodies

The CRPD creates two United Nations bodies. The first is the Conference of States Parties that meets in order to consider any matter with regard to the implementation of the CRPD (biennially or upon decision by the Conference).⁴⁵ The second is the Committee on the Rights of Persons with Disabilities, a body of independent experts who serve for four year terms in their individual capacities rather than as government representatives.⁴⁶ States Parties are to provide

⁴² CRPD, *supra* note 2, at Art. 21. UDHR Article 19 provides for the liberty of opinion and expression, and consequently the liberty to hold opinions without any interference. UDHR, *supra* note 8, at Art. 19. ICCPR Article 19 reiterated this statement. ICCPR, *supra* note 10, at Art. 19. Article 20 sets out a limitation on freedom of speech. It asks States to forbid any kind of propaganda constituting an incitement to discrimination, hostility or violence. Disability is not included in the grounds of the article that prohibits advocacy of national, racial or religious hatred, but the prohibition of discrimination can be extended to this issue. *Id.* at Art. 20.

⁴³ CRPD, *supra* note 2, at Art. 22.

⁴⁴ *Id.* at Art. 5.

⁴⁵ *Id.* at Art. 40.

⁴⁶ *Id.* at Art. 34. The Committee on the Rights of Persons with Disabilities held its first session on February 23-27, 2009. The provisional agenda for such session is available at http://www.ohchr.org/EN/HRBodies/CRPD/Documents/CRPC_C_1_1_E.htm. As of October 1, 2009, the Committee had not heard any communications from individuals or groups pursuant to the Optional Protocol, and it has not initiated any inquiries pursuant to the Optional Protocol.

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reports to the Committee every two years, which reports will provide a comprehensive explanation on the progress made towards implementation of the CRPD. This Committee comprises 12 independent experts nominated by the Conference of States Parties, and increases to 18 members after an additional 60 ratifications of the CRPD.

In addition to the Conference of States Parties and the Committee on the Rights of Persons with Disabilities, the United Nations established the Inter-Agency Support Group for the Convention on the Rights of Persons with Disabilities (IASG) in 2007. The ISAG is the entity through which the United Nations will support the States Parties within a framework of coordinated planning and action. Further, the IASG will ensure that the programs and policies of the United Nations are inclusive of persons with disabilities, and will work to strengthen recognition of and respect for the principles of the CRPD.

III. INTERACTION BETWEEN CONVENTION AND U.S. DISABILITY LAW

On May 12, 2008, the National Council on Disability (NCD) issued a report examining the degree to which U.S. law is consistent with the CRPD. The report concluded that

...as a general matter, the aims of the CRPD are consistent with U.S. disability law. For the majority of articles, U.S. law can be viewed as either being of a level with the mandates of the Convention or capable of reaching those levels either through more rigorous implementation and/or additional actions by Congress.⁴⁷

The NCD concluded that “there is no legal impediment to U.S. signature and ratification on the basis that, in large measure, the legal standards articulated in the CRPD align with U.S. disability law.”⁴⁸ As a conceptual matter, the NCD report notes that the “United States legal framework is directed toward civil and political (or negative) rights protection, and leaves economic, social, and cultural (or positive) rights, when these are provided, to Congress.”⁴⁹ Therefore, some CRPD concepts fall within the scope of existing U.S. disability law while the CRPD’s promotion of positive rights, such as the full participation in society of persons with disabilities, is outside the scope of existing U.S. law.⁵⁰

⁴⁷ NCD Report, *supra* note 24, at 1.

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 8.

There are some gaps between the CRPD's goals and relevant U.S. law, as noted in the NCD report:

- Article 5 - Equality and Non-Discrimination: Current U.S. law and policy lacks equality measures such as vocational training, affirmative action, quotas, and job set-asides.
- Article 6 - Women with Disabilities: Current U.S. law and policy lacks positive measures sufficient to ensure the full and equal enjoyment of all human rights by women.
- Article 7 - Children with Disabilities: Generally, State, rather than U.S. law, governs the rights of children.
- Article 8 - Awareness Raising: Current U.S. law and policy has no affirmative mandate to alter social stereotypes.
- Article 9 – Accessibility: Current under-enforcement of federal laws create a gap between legal requirements and reality.
- Article 11 - Situations of Risk and Humanitarian Emergencies: Current U.S. laws and policy prohibiting discrimination in the provision of services relating to emergency services have not been implemented.
- Article 12 - Equal Recognition Before the Law: Legal capacity is governed primarily by State-level law.
- Article 13 - Access to Justice: U.S. courts have interpreted physical access to court services to be limited by a fundamental alteration defense, and have not sufficiently ensured other access to justice.
- Article 16 - Freedom from Exploitation, Violence, and Abuse: Current U.S. law and policy does not provide for proactive education and training to prevent exploitation, violence, and abuse.
- Article 18 - Liberty of Movement and Nationality: Current U.S. immigration policy restricts potential residents and certain visitors with disabilities.
- Article 19 - Living Independently and Being Included in the Community: Current U.S. law and policy limits the right to live in the community to services that do not cause fundamental alterations.

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- Article 20 - Personal Mobility: Current U.S. law and policy does not recognize a right to the provision of medical and assistive devices in the manner required by the CRPD.
- Article 23 - Respect for Home and the Family: State, rather than U.S. law, mainly governs these rights.
- Article 24 – Education: Current U.S. law does not seek to develop children’s full potential but instead requires an adequate education.
- Article 25 – Health: State, rather than U.S. law, mainly governs this right.
- Article 27- Work and Employment: Current U.S. law and policy does not provide equality measures, such as vocational training, affirmative action, or job set-asides.
- Article 28 - Adequate Standard of Living and Social Protection: Current U.S. law does not recognize economic or social protections as rights.
- Article 29 - Participation in Political and Public Life: Current U.S. law explicitly protects most of what the CRPD envisions, yet has been laxly implemented in the field of voting rights.
- Article 30 - Participation in Cultural Life, Recreation, Leisure, and Sport: Current U.S. law does not recognize cultural, recreational, leisure or sport participation as an affirmative right.
- Article 32 - International Cooperation: Current U.S. law does not mandate inclusive development practices abroad.⁵¹

However, as noted in the NCD report, these gaps can be narrowed or eliminated through “either more rigorous implementation of existing U.S. laws and policies, and/or through Congressional action.”⁵²

IV. CURRENT STATUS OF CONVENTION RATIFICATION BY THE UNITED STATES

On May 1, 2008 the U.S. House of Representatives introduced House Resolution 1169, “expressing the sense of the House of Representatives that the United States should become an international human rights leader by ratifying and implementing certain core international

⁵¹ *Id.* at 3-5.

⁵² *Id.* at 5.

conventions.”⁵³ This resolution specifically mentions the CRPD.⁵⁴ On July 24, 2009, President Obama announced that the United States would sign the CRPD, and on July 31, 2009, United States Ambassador to the United Nations Susan Rice signed the convention.⁵⁵

The budget implications of signing and enacting the CRPD are not significant, according to the U.S. Department of State. Discussions on the ratification of the CRPD have not been scheduled in the U.S. Senate.

V. CONCLUSION

The CRPD is intended to protect and promote the rights of persons with disabilities—one of the largest minority groups in the world. The convention builds upon existing international human rights concepts—many that already have been embraced by Association policy—and applies them to persons with disabilities.

This recommendation assumes the likely use of reservations, declarations, and understandings that have facilitated U.S. accession to other human rights conventions.⁵⁶ The NCD report notes that when the U.S. ratified the Convention on the Elimination of All Forms of Racial Discrimination, “it attached a reservation in respect of provisions that could have the effect of restricting American constitutional and federal laws according extensive protections on individual freedom of speech.”⁵⁷ Such reservation served to facilitate U.S. ratification of that Convention, and similar mechanisms could be a tool available to the United States in the case of CRPD ratification.⁵⁸ The recommendation also recognizes that the use of such reservations, declarations, and understandings may not run counter to the object and purpose of the convention at issue.⁵⁹

⁵³ H. Res. 1169, 110th Cong., 2nd Sess. (2008).

⁵⁴ *Id.* at § 3.

⁵⁵ Remarks by Amb. Susan Rice and White House Senior Advisor Valerie Jarrett at the Signing of the UN Convention on the Rights of Persons with Disabilities, available at <http://www.state.gov/p/io/rls/rm/2009/126833.htm> (visited October 19, 2009).

⁵⁶ See NCD Report, *supra* note 24, at 6. For a clearly articulated explanation on US policy in respect of the ratification of human rights conventions, see THOMAS BUERGENTHAL, DINAH SHELTON, & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS 359-377 (2002).

⁵⁷ NCD Report, *supra* note 24, at 6.

⁵⁸ *Id.* See also David Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L. J. 77 (1993).

⁵⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, Art. 19. Although the United States has not ratified this convention, the United States has “generally recognized [the convention] as the authoritative guide to current treaty law and practice.” See Letter of Submittal, Vienna Convention on the Law of Treaties, November 22, 1971, Treaty Doc. 92-12. See also U.S. Department of State, Office of the Legal Adviser, Treaty Affairs, “Vienna Convention on the Law of Treaties”, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (visited Oct. 21, 2009) (“The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”).

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U.S. ratification of the CRPD would signal our clear support for the principles of the convention, and to continue the United States' tradition as a world leader for people with disabilities. Ratification can also help to fill some of the gaps in U.S. disability law. Further, ratification can enable the United States to play a more active role in setting, and executing, the United Nations' disability program, and restore U.S. leadership in international policy-making.

Respectfully Submitted,

Glenn P. Hendrix
Chair, Section of International Law

February 2010

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Glenn P. Hendrix, Chair
Section of International Law

1. Summary of Recommendation.

The recommendation urges the United States to ratify and implement the United Nations Convention on the Rights of Persons with Disabilities.

2. Approval of Submitting Entities.

This Recommendation was approved by the Council of the Section of International Law at its meeting on October 31, 2009. The Commission on Mental & Physical Disability Law approved this Recommendation on November 7, 2009. The Center for Human Rights approved this Recommendation on November 9, 2009. The Section of Individual Rights and Responsibilities tentatively approved this Recommendation on November 17, pending expected formal approval by the end of November, 2009.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Existing Association policy supports most, if not all, of the principles in the United Nations Convention on the Rights of Persons with Disabilities. *See* Report and Recommendation 107C (February 1996); (Aug. 1984) (Convention on the Elimination of All Forms of Discrimination Against Women); February 1991 (Convention on the Rights of the Child); the Universal Declaration of Human Rights (October 2008 Board); International Covenant on Economic, Social and Cultural Rights (Report No. 1, February 1979); International Covenant on Civil and Political Rights (February 1979); International Convention on the Elimination of All Forms of Racial Discrimination (August 1978). This recommendation is consistent with past Association policy.

5. What urgency exists which requires action at this meeting of the House?

Debate in the U.S. Senate on the ratification of the Convention is expected to be scheduled for the first half of 2010.

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6. Status of Legislation.

Not yet submitted.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

This recommendation and report will be referred to all ABA entities.

10. Contact Person. (Prior to the meeting.)

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EXECUTIVE SUMMARY

(a) Summary of the Recommendation.

The recommendation urges the United States to ratify and implement the United Nations Convention on the Rights of Persons with Disabilities.

(b) Summary of the issue(s) which the recommendation addresses.

The Convention on the Rights of Persons with Disabilities is the first global convention to specifically address the rights of persons with disabilities. The convention draws on existing human rights conventions and fills the gap between the promise such conventions offer to promote and protect the rights of persons with disabilities and existing practice. The United States signed the convention on July 30, 2009 but the U.S. Senate has not begun the process of evaluating possible ratification.

(c) How the proposed policy position will address the issue.

The proposed policy position will enable the ABA to speak in support of ratification when the U.S. Senate deliberates the issue.

(d) Summary of any minority views of opposition which have been identified:

None identified.