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DISABILITY RIGHTS IN CAMBODIA: USING THE CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES TO EXPOSE HUMAN RIGHTS VIOLATIONS

Ulrike Buschbacher Connelly[†]

Abstract: In Cambodia, the percentage of the population living with disabilities is one of the highest in the world. At least 650,000 Cambodians live with a disability, and the exact count may be as high as 1.4 million. The incidence of disability is also expected to increase in the future. Despite the fact that many Cambodians have at least one disability, the country does not have adequate legal provisions to protect the human rights of people with disabilities. There are no comprehensive laws that address disability issues. The few existing laws provide only implicit protections and some directly discriminate against people with disabilities.

The inadequacy of Cambodia's disability rights scheme is reflected in Cambodia's failure to comply with the new Convention on the Rights of People with Disabilities ("Convention"), a treaty that Cambodia has already signed and is expected to ratify soon. To provide a minimal level of protection for people with disabilities, Cambodia's first critical move should be to pass the proposed disability law that the legislature has been considering since 2003. Cambodia should use the Convention's guidance to revise this draft law to provide a more comprehensive protective scheme for its most vulnerable citizens. This proposed law would improve the existing scheme of disability rights and bring Cambodia into substantial compliance with the Convention.

I. INTRODUCTION

In Cambodia, a higher percentage of the population lives with a disability than anywhere in the world, due to a perfect storm of tragic events and circumstances.¹ Between 1975 and 1979 alone, the Khmer Rouge regime caused approximately three million deaths—out of an estimated population of only seven million Cambodians.² This history of conflict and the resulting poverty has left a large number of Cambodians with at least one kind of disability.³

[†] The author would like to thank the *Pacific Rim Law and Policy Journal* editors and members who provided invaluable feedback, and Prof. Joel Ngugi for his advice and guidance. Most importantly, my family deserves credit for their love and support.

¹ UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, PATHFINDERS: TOWARDS FULL PARTICIPATION AND EQUALITY OF PERSONS WITH DISABILITIES IN THE ESCAP REGION 15 (2002).

² Bureau of East Asian Affairs, U.S. State Dep't, Background Note: Cambodia "Democratic Kampuchea," (2007), <http://www.state.gov/r/pa/ei/bgn/2732.htm> (last visited Nov. 30, 2008).

³ One reliable estimate places the number of Cambodians with a disability at 663,995, approximately 4.7% of the population. Disability Action Council, Disabilities in Cambodia, http://www.dac.org.kh/disabilities_in_Cambodia/index.htm (last visited Apr. 7, 2008).

And yet, Cambodia has only a very limited number of legal provisions addressing disability rights.⁴ As a whole, Cambodia's current disability rights paradigm is grossly inadequate; a state of affairs revealed by a comparison with the newly enacted Convention for the Rights of People with Disabilities ("Convention").⁵ When measured against the human rights proscriptions outlined in the Convention, it becomes clear that Cambodia's current measures both fail to provide adequate protections for people with disabilities and actively discriminate against people with disabilities.

Yet, Cambodia considers disability rights a priority,⁶ and there are both short- and long-term goals in place.⁷ The country has made progress towards addressing disability rights. Most recently, the country signed the Convention, a public statement to the international community that Cambodia values disability rights.⁸ Most importantly, a comprehensive disability law has been drafted and presented to the legislature, although it has not yet been enacted.⁹

The new Convention will be a useful tool for Cambodia to continue to improve its disability law. With an international standard that provides concrete guidance in how human rights for people with disabilities should be protected, states can use the treaty to evaluate their own disability rights paradigms. This Comment uses the Convention's standards to evaluate Cambodia's current disability rights and its proposed disability law. This Comment also argues that Cambodia's current scheme is inadequate, and its draft law should be revised and enacted to provide legal protections for the human rights of people with disabilities.

Part II of this Comment provides a brief overview of the scope of Cambodia's need for disability rights and the current perceptions of disability that affect the treatment of people with disabilities. Part III introduces the Convention as a new international standard and analyzes four specific disability rights issues in detail to serve as a basis for comparison

⁴ See *infra* Part III.A.1-2.

⁵ Convention on the Rights of Persons with Disabilities art. 1, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 6, 2006), available at <http://www.un.org/esa/socdev/enable/documents/tccconve.pdf>.

⁶ See H.E. Sem Sokha, Under-Sec'y State Ministry Soc. Affairs, Veterans & Youth Rehabilitation, Statement by Cambodian Delegation on Victim Assistance (Nov. 18, 2007), available at <http://www.apminebanconvention.org/fileadmin/pdf/mbc/MSP/8MSP/day4/8MSP-Item11d-21Nov2007-Cambodia-en.pdf> (discussing how disability rights are a priority for the Cambodian government).

⁷ Cambodia Participation Papers ¶ 1.2 (2003), <http://www.worldenable.net/bangkok2003/paper/cambodia.htm> (last visited Nov. 30, 2008) [hereinafter Participation Papers].

⁸ UN Enable, <http://www.un.org/disabilities/> (follow link to "Signatories & Ratifications") (last visited Aug. 17, 2008).

⁹ The working group to draft this law was established by Ministerial Decision in 2000, and in 2003 the law was first presented to the legislature. Participation Papers, *supra* note 7, at ¶ III.3.

between Cambodian law and the Convention: 1) generally necessary legislation, 2) the definition of disability, 3) accessibility, and 4) legal competency procedures for individuals with mental disabilities. Parts IV and V examine how these four issues are dealt with in Cambodia's laws and in the proposed draft law.

II. THE HIGH INCIDENCE OF DISABILITY IN CAMBODIA MAKES DISABILITY RIGHTS A CRUCIAL ISSUE

The protection of people with disabilities' rights is so important for this struggling country because a very high percentage of its population lives with at least one disability. Despite the needs of so many of its citizens, the Cambodian government has failed to enact comprehensive laws that target the social stigma and stereotypes attached to disability, which often lead to human rights violations.

A. *Cambodia Has One of the Highest Incidences of Physical and Mental Disability in the World*

Cambodia's population contains an unusually high number of individuals with disabilities. The number of Cambodians with disabilities is between 650,000 (4.7% of the population)¹⁰ and 1.4 million (15% of the population).¹¹ More troubling is the fact that an estimated twenty-one percent of Cambodian children have one or more disabilities,¹² indicating that the population of people with disabilities will increase in the future. In addition to traditional sources of disability,¹³ two factors increase the incidence of disability in Cambodia: war and poverty.

For more than one out of ten Cambodians with a disability, the cause of their disability is war or conflict.¹⁴ Between 1974 and 1993, civil war and foreign occupation made violence and conflict a feature of everyday life for

¹⁰ See Disabilities in Cambodia, *supra* note 3.

¹¹ PHILLIPA THOMAS, POVERTY REDUCTION AND DEVELOPMENT IN CAMBODIA: ENABLING DISABLED PEOPLE TO PLAY A ROLE 5-6 (Disability Knowledge and Research 2005), available at http://www.disabilitykar.net/research/pol_cam.html. The government has not had the resources to execute a reliable census of people with disabilities or sponsor a thorough study to gather accurate numbers, but at least three separate surveys within the last ten years provide rough estimates of the numbers involved. *Id.* These three studies are: the *Socio-Economic Survey*, 2003; *Skills Training as a National Strategy for Poverty Reduction in Cambodia*, 1997; and *Identifying Disability Issues Related to Poverty Reduction: Cambodia Country Study*, 1999. *Id.*

¹² *Id.* at 6.

¹³ The main causes of disability in Cambodia are illness, congenital disabilities, and accidents. *Id.*

¹⁴ Participation Papers, *supra* note 7, at ¶ III.3.

Cambodians.¹⁵ The proliferation of landmines during the conflict was so extensive that landmines still cause approximately eighty injuries every month, an approximately 40,000 to 50,000 Cambodians are disabled due to a landmine injury.¹⁶ The violence and its attendant circumstances—the threat of starvation, torture, and death of friends and family—has also left a large number of Cambodians with mental health problems ranging from post-traumatic stress disorder to depression.¹⁷ The upcoming Khmer Rouge tribunals may even trigger a surge in the incidence of depression and post-traumatic stress disorder as the population revisits this tortuous period.¹⁸

Poverty adds to the difficult circumstances faced by Cambodians. Cambodia ranks among the least developed countries in the world,¹⁹ and its economic plight has left thirty-six percent of its population living in poverty.²⁰ Poverty is both a major cause and consequence of disability,²¹ and as long as Cambodia struggles economically, the poor living standards will continue to add to the population of people with disabilities. With so many of its citizens suffering from the stigma and natural limitations of a disability, the country needs to implement a comprehensive legal scheme that protects and promotes the rights of people with disabilities.

B. Cambodians with Disabilities Face Human Rights Violations Due to Social Barriers and a Lack of Positive Law

People with disabilities are among the most marginalized of all groups, and such individuals suffer from poverty and human rights violations in disproportionate numbers.²² Cambodia is no exception. Its society stigmatizes and ignores disability. The social reluctance to accept

¹⁵ See Bureau of East Asian Affairs, *supra* note 2.

¹⁶ UN ESCAP, *supra* note 1, at 15.

¹⁷ One study revealed that 28.4% of Cambodians suffer from post-traumatic stress disorder. Joop T.V. M. de Jong et al., *Lifetime Events and Posttraumatic Stress Disorder in 4 Postconflict Settings*, 286 J. AM. MED. ASS'N 555, 558 (2001) (Issue 5). Another study found that over forty percent of Cambodians reported symptoms that meet the diagnostic criteria for depression, anxiety, or post-traumatic stress disorder. THOMAS, *supra* note 11, at 25.

¹⁸ See Youk Chhang, Documentation Center of Cambodia, Crimes Covered Under the KR Law (2001), http://www.dccam.org/Tribunal/Analysis/Crimes_Covered_under_KR_Law.htm (last visited Nov. 30, 2008) (discussing the need for establishing mental health clinics that could provide a variety of mental health support services during the tribunal process).

¹⁹ Cambodia ranks 131 out of 170 countries. United Nations, Human Development Report Index Rankings (2007), <http://hdr.undp.org/en/statistics/> (last visited Nov. 30, 2008).

²⁰ THOMAS, *supra* note 11, at 6.

²¹ *Id.*

²² ANDREW BYRNES ET AL., FROM EXCLUSION TO EQUALITY: HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION FOR THE RIGHTS OF PEOPLE WITH DISABILITIES AND ITS OPTIONAL PROTOCOL III (2007), available at <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> [hereinafter HANDBOOK].

people with disabilities has translated into sluggish action by the government to provide legal and social support for people with disabilities.²³ This state of affairs has resulted in a legal and legislative void that leaves people with disabilities without protection or recourse when their human rights are ignored and violated.²⁴

It is clear from the terms used to describe disability and from anecdotal evidence that people with disabilities are treated as inferior, weak, stupid, or all of the above. For example, the word for being deaf, “akor,” also means “dumb,” and these derogatory terms are used both informally and in official publications.²⁵ People with disabilities are often shunned and excised from their communities,²⁶ and employers are often unwilling to hire a person with a disability, leaving a large percentage of people with disabilities in poverty.²⁷

Furthermore, “public awareness and mass education campaigns on the inclusion of people with disabilities in the country’s mainstream . . . are almost non-existent.”²⁸ The lack of such awareness means that numerous superstitions and misinformation regarding disability linger in Cambodia. Such mistaken beliefs affect how Cambodians with disabilities are perceived. As a predominantly Buddhist country, many Cambodians believe that the cause of disability is a person’s previous actions, and it is assumed that only past sins could lead to a current state of disability.²⁹ This belief reduces the amount of sympathy and tolerance shown to people with disabilities.³⁰ Another traditional belief attributes mental disabilities to angry spirits and ancestors, and herbal remedies or ceremonies to honor such spirits are believed necessary to cure this state, rather than medical treatment.³¹

In a country that has both a large population of disabled people and a society that denigrates such citizens, it is important that specific laws

²³ See THOMAS, *supra* note 11, at 6-8.

²⁴ This Comment uses the term “human rights” to refer to those rights specifically enumerated in existing U.N. treaties, with a focus on those rights addresses in the Convention.

²⁵ International Disability Rights Monitor, Cambodia (2005), http://www.ideanet.org/idrm_reports.cfm (choose Cambodia under “IDRM reports by country” menu) (last visited Nov. 30, 2008) [hereinafter IDR Report]. For example, some children with disabilities are never given their own name, being referred to instead by their disability. THOMAS, *supra* note 11, at 28.

²⁶ See, e.g., THOMAS, *supra* note 11, at 30 (containing a case study of Theara, a 66 year old woman struggling with permanent disability).

²⁷ *Id.* at 27.

²⁸ Participation Papers, *supra* note 7, at ¶ I.4.

²⁹ THOMAS, *supra* note 11, at 21; see Participation Papers, *supra* note 7, at ¶ I.3.

³⁰ THOMAS, *supra* note 11, at 21; see Participation Papers, *supra* note 7, at ¶ I.3.

³¹ Daniel Savin, *Developing Psychiatric Training and Services in Cambodia*, 51 PSYCHIATRIC SERVICES 935, 935 (2000) (Issue 7).

address the human rights of people with disabilities. Yet, Cambodia has not enacted such legislation,³² and its general laws do not offer enough protection. The standards set out in the Convention reveal the overall inadequacy of Cambodia's disability rights paradigm.³³

III. AS AN INTERNATIONAL STANDARD, THE CONVENTION EXPOSES THE INADEQUACIES IN CAMBODIA'S DISABILITY RIGHTS SCHEME

The Convention is the first international, legally binding document that clearly sets out the rights of people with disabilities.³⁴ It seeks to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities."³⁵ Rather than creating new human rights for people with disabilities, the treaty elucidates how human rights specifically apply to people who face social and physical impairments barring their equal participation in society.³⁶ Such a Convention was necessary because norms and standards for the treatment of this vulnerable group prevent human rights violations.³⁷

The Convention garnered swift commitments worldwide when it opened for signature on March 30, 2007.³⁸ To date, 130 countries have signed the Convention, and thirty-four have ratified it.³⁹ The Convention entered into force in May 2008.⁴⁰ This Convention, unlike some other United Nations ("UN") conventions,⁴¹ has gathered immediate international approval and seems to embody the minimum standard for the protection of people with disabilities. The Convention constitutes international law, and it is legally binding on those states that have consented to be bound by its

³² Participation Papers, *supra* note 7, at ¶ II.1.

³³ See Convention on the Rights of Persons with Disabilities, *supra* note 5.

³⁴ HANDBOOK, *supra* note 22, at III.

³⁵ Convention on the Rights of Persons with Disabilities, *supra* note 5.

³⁶ HANDBOOK, *supra* note 22, at 12.

³⁷ DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 29 (2007).

³⁸ UN Enable, *supra* note 8.

³⁹ *Id.*

⁴⁰ Tunisia, the twentieth country, ratified the Convention on Apr. 2, 2008. *Id.* The Convention states that the treaty will enter into force 30 days after the twentieth country deposits a ratification of the treaty. Convention on the Rights of People with Disabilities, *supra* note 5, art. 45.

⁴¹ For example, the International Convention on the Rights of Migrant Workers and Their Families was approved by the UN but has failed to gather significant international interest. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 1-11 (2004), available at <http://www.unhchr.ch/pdf/report.pdf> [hereinafter STATUS REPORT]. It took over ten years to gather the necessary twenty ratifications after the convention was adopted, and currently only twenty-six states have ratified the treaty and only nine more have signed onto the treaty. *Id.*

terms.⁴² Unless adopted into national law, an individual or organization must turn to an international court to seek redress for human rights violations.⁴³

Whether or not Cambodia ratifies the Convention, comparing its current disability rights scheme to the minimum standards set out in the Convention allows for an objective evaluation of Cambodia's protection of the rights of people with disabilities. Specifically, this Comment will look at four disability rights issues, chosen for their importance to Cambodia and its citizens with disabilities. First, the Convention requires positive laws to be enacted to protect people with disabilities and mandates that discriminatory provisions be eliminated. Second, the Convention defines "disability," which governs the scope of people protected by the treaty. Third, the Convention mandates that states address accessibility issues. Fourth, the Convention provides guidance as to how legal competency should be determined and under what conditions it can be revoked.

C. *The Convention Requires the Implementation of Protective Laws and the Abolishment of Discriminatory Laws*

One of the Convention's first articles requires states to enact positive laws and modify or repeal discriminatory laws. Article 4 of the Convention addresses the need for laws.⁴⁴ States must "adopt all appropriate legislation" to "ensure and promote the full realization of all human rights" for people with disabilities.⁴⁵ The official UN handbook to the Convention stresses that to give full effect to the Convention, "implementing legislation will usually still be required," even if the Convention is adopted wholesale into domestic law.⁴⁶ States must also modify or abolish all existing "laws, regulations, customs and practices that constitute discrimination" against people with disabilities.⁴⁷ Indeed, the tandem obligations of creating positive laws and eliminating discriminatory ones repeat throughout the Convention's articles.⁴⁸ To craft such disability rights legislation, a state first needs to adopt a proper definition of "disability."

⁴² Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

⁴³ WEISSBRODT, *supra* note 37, at 4-5.

⁴⁴ Convention on the Rights of People with Disabilities, *supra* note 5, art. 4, cl.1(a).

⁴⁵ *Id.* art. 4, cl. 1.

⁴⁶ HANDBOOK, *supra* note 22, at 54.

⁴⁷ Convention on the Rights of People with Disabilities, *supra* note 5, art. 4, cl.1(b).

⁴⁸ *See id.* art. 23 (mandating that states recognize and eliminate discrimination against people with disabilities in matters relating to family, marriage, and relationships); *see id.* art. 27 (mandating that states recognize the right to work for every person with a disability and requiring that discrimination against such individuals is prohibited).

D. *The Convention Provides a Broad Definition of Disability*

The Convention adopted a broad description of what constitutes a disability.⁴⁹ Unlike other human rights treaties, this treaty, as well as any disability law, needs a definition of the protected group. It governs the scope of the Convention by setting out the individuals that are covered by the treaty.⁵⁰ The second article of the Convention provides a good working definition for states,⁵¹ although the treaty does not require that its definition be included, and states are free to define disability in their own terms and expand the definition to cover more people with disabilities.⁵²

The Convention's definition reads: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interactions with various barriers may hinder their full and effective participation in society on an equal basis with others."⁵³ The definition's first section, which deals with the medically assessable symptoms or features of disability, is broad enough to adapt as medical and social knowledge of disability expands.⁵⁴ It eschews listing standard symptoms, including instead an open-ended list by stating that "[p]ersons with disabilities *include . . .*"⁵⁵ The treaty implies that its definition is a non-exclusive list, which will allow courts to interpret the statute broadly and add illnesses or impairments.

The second half of the Convention's definition sets a threshold for an impairment to be considered significant enough to qualify as a disability. To be protected, the impairment must "hinder their full and effective participation in society on an equal basis with others."⁵⁶ This definition provides a very low standard for the protection of disability rights to be activated, as it requires only that people with disabilities be denied equal participation, no matter how substantial or necessary to daily life.⁵⁷

⁴⁹ See *id.* art. 1.

⁵⁰ For example, the Convention on the Rights of the Child needed only to define which age constitutes a "child." Convention on the Rights of the Child, G.A. Res. 44/25, art. 1, U.N. Doc. A/44/49 (Nov. 20, 1989). Another example is the Convention on the Elimination of All Forms of Racial Discrimination, which needed only to define the term "discrimination." Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 1, U.N. Doc. A A/6014 (Dec. 21, 1965).

⁵¹ Convention on the Rights of People with Disabilities, *supra* note 5, art. 2.

⁵² HANDBOOK, *supra* note 22, at 12-13.

⁵³ Convention on the Rights of People with Disabilities, *supra* note 5, art. 1.

⁵⁴ HANDBOOK, *supra* note 22, at 13.

⁵⁵ Convention on the Rights of People with Disabilities, *supra* note 5, art. 1.

⁵⁶ *Id.*

⁵⁷ Compare with this threshold the Americans with Disabilities Act, which requires a "substantial" limitation to be actionable. Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2007).

The Convention's definition thus contains three key elements that a state's definition should also include to protect the entire group of people with disabilities: 1) a non-exclusive list of impairments, 2) the inclusion of at least physical, mental, intellectual, and sensory impairments, and 3) a low threshold for the impairment to be legally protected.

E. The Convention Sets Out Specific Guidelines for Physical and Communication Accessibility

The Convention's Article 9 sets out a state's minimal level of accessibility.⁵⁸ One of the most visible and effective barriers against full social participation by people with disabilities is the lack of accessibility. "Accessibility" encompasses the need of people with disabilities for alternative mechanisms to allow them to participate in society on an equal basis with others, and Article 9 addresses both physical access and access to channels of communication.⁵⁹

States must develop "minimum standards and guidelines for accessibility"⁶⁰ to ensure equal access to the physical environment, transportation, information, communications, and public facilities and services.⁶¹ This provision targets both public and private actors,⁶² and it applies to any facility or service that is open to the public at large.⁶³ The Convention mandates that states enact laws or regulations regarding accessibility and expend resources to attain at least minimal accessibility compliance.

F. The Convention Provides Procedural Safeguards for the Suspension of Certain Human Rights

The Convention's elaboration on the right of legal capacity is one of the best examples of how this treaty takes a previously defined human right and clarifies its application to a person with a disability. The International Covenant on Civil and Political Rights guarantees that "[e]veryone shall have the right to recognition everywhere as a person before the law."⁶⁴ The Convention elaborates this right over five separate provisions under Article

⁵⁸ Convention on the Rights of People with Disabilities, *supra* note 5, art. 9.

⁵⁹ Article 9 explicitly includes physical access, access to information, and access to channels of communication in its accessibility article. *Id.*

⁶⁰ *Id.* art. 9, cl. 2(a).

⁶¹ *Id.* art. 9, cl. 1.

⁶² *Id.* art. 9, cl. 2(b).

⁶³ *Id.* art. 9, cl. 1.

⁶⁴ International Covenant on Civil and Political Rights art. 16, Dec. 16, 1996, 999 U.N.T.S. 302.

12.⁶⁵ Such elaboration is necessary because, at times, a person with a disability may need to cede, or be stripped of, this recognition before the law.⁶⁶ A court might rule that a person is thus “incompetent” to exercise certain of their rights, and this process is usually referred to as legal incapacitation.⁶⁷ Such situations can be distinguished from other rights deprivations, such as forced imprisonment as punishment for criminal activity. The Convention includes procedural safeguards needed when a person loses rights based on the status as a person with a disability.

Usually the need for incapacity rulings arises when the individual is unable to make rational decisions about his or her daily life, such as the handling of financial affairs or providing for basic needs.⁶⁸ The individual may even be a threat to him or herself or others, and a forced institutionalization may be necessary.⁶⁹ While such actions may be necessary, they may also violate a person’s rights.⁷⁰

The Convention acknowledges the need for such rights suspensions. It includes several provisions to ensure that any abrogation of liberty and legal capacity are carefully executed. Legal capacity legislation is an “essential means of upholding the rights of people with mental disorders, ensuring appropriate treatment and promoting the mental health of populations.”⁷¹ Article 14, which addresses the right to liberty and security of persons, sets out that states must ensure that people with disabilities “are not deprived of their liberty unlawfully or arbitrarily” and in conformity with the law.⁷² Thus, a state must have legal procedures in place for the abrogation of capacity.

⁶⁵ Convention on the Rights of People with Disabilities, *supra* note 5, art. 12.

⁶⁶ MICHELLE FUNK ET AL., WORLD HEALTH ORGANIZATION, WHO RESOURCE BOOK ON MENTAL HEALTH, HUMAN RIGHTS, AND LEGISLATION 31 (2005), *available at* http://www.who.int/mental_health/policy/legislation/policy/en/ [hereinafter WHO RESOURCE BOOK].

⁶⁷ Bazelon Center for Mental Health Law, Involuntary Commitment, <http://www.bazelon.org/issues/commitment/> (last visited Feb. 18, 2008). The term “legal incapacitation” will be used throughout this Comment to refer to the process of limiting or stripping a person of their rights to a finding that there are mentally incompetent.

⁶⁸ WHO RESOURCE BOOK, *supra* note 66, at 39.

⁶⁹ For example, in the United States, 37 out of 50 states have enacted an involuntary admission statute that gives local authorities the power to constrain an individual in a mental health facility for the short term and administer medical treatment, with or without the person’s consent. Bazelon Center for Mental Health Law, *supra* note 67.

⁷⁰ Larry Gostin, *Human Rights in Mental Health*, in PSYCHIATRY, HUMAN RIGHTS AND THE LAW 149 (Martin Roth & Robert Blugrass, eds., 1985).

⁷¹ WORLD HEALTH ORGANIZATION [WHO], REPORT: SECOND INTERNATIONAL TRAINING FORUM ON MENTAL HEALTH, HUMAN RIGHTS AND LEGISLATION 4 (2003), *available at* http://www.who.int/mental_health/policy/en/Geneva_Forum_report.pdf.

⁷² Convention on the Rights of People with Disabilities, *supra* note 5, art. 14, cl. 1(b).

Article 12 sets out the means by which people can be stripped of their legal capacity.⁷³ The Article first establishes that persons with disabilities have the same legal capacities as others, and the Article as a whole deals with the recognition of a person with a disability “as a person before the law” with a legal capacity equal to others.⁷⁴ Deprivations or limitations of such capacity are a “measure that relates to the exercise of legal capacity,” and states must ensure that such measures “provide for appropriate and effective safeguards to prevent abuse.”⁷⁵ Such measures should “respect the rights, will and preferences of the person, [be] free of conflict of interest and undue influence, [be] proportional and tailored to the person’s circumstances, apply for the shortest time possible and [be] subject to regular review by a competent, independent and impartial authority or judicial body.”⁷⁶ Basic procedural safeguards help ensure that the human rights of a person with a disability are not curtailed or abused.

The Convention sets out clear standards in these four areas of disability rights, and, as Part IV will discuss, Cambodia’s current disability rights law fails to meet each of these standards.

IV. CAMBODIA’S FAILURE TO COMPLY WITH THE CONVENTION’S HUMAN RIGHTS PROVISIONS REFLECTS THE INADEQUACY OF ITS LEGAL PROTECTIONS FOR PEOPLE WITH DISABILITIES

By comparing Cambodia’s existing disability rights scheme to the minimum standards of the Convention, it is clear that Cambodia fails to adequately protect the large portion of its population that lives with disabilities. The existing legal scheme does not guarantee disability rights, lacks an adequate definition of disability, and addresses neither accessibility nor legal capacity, and it is these four issues that this comment examines more closely.

A. *Cambodia Fails to Provide Basic Legislation to Protect the Rights of People with Disabilities*

There is no comprehensive disability law in Cambodia,⁷⁷ and the few scattered provisions that deal with disability are grossly inadequate to

⁷³ *Id.* art. 12.

⁷⁴ *Id.* art. 12, cl. 1-2.

⁷⁵ *Id.* art. 12, cl. 4.

⁷⁶ *Id.*

⁷⁷ Participation Papers, *supra* note 7, ¶ I.1.

address the myriad of human rights abuses that occur. Worse, several laws actively discriminate against people with disabilities.

I. No Laws Ensure Protections for People with Disabilities

No single law exists that addresses disability rights or the protections enumerated in the Convention. Instead, there are approximately twelve *prakas*—ministerial decisions that address discrete disability issues or establish services for people with disabilities.⁷⁸ Some of these *prakas* create organizations to help with disability issues, such as the National Center for Disabled Persons⁷⁹ and the Disability Action Council,⁸⁰ while others establish awareness-raising programs like a National Paralympic Committee⁸¹ and Disability Awareness Modules.⁸² While these help raise awareness about disabilities and provide some services to people with disabilities, none of them establish concrete rights or protections. By comparison, the United States has at least ten separate laws that explicitly address disability rights.⁸³

The most extensive coverage of disability rights can be found in the Constitution of Cambodia. One article specifically addresses the rights of people with disabilities: “The State shall assist the disabled and the families of combatants who sacrificed their lives for the nation.”⁸⁴ Although this is a clear mandate for state support of people with disabilities, the government has largely focused on soldiers and civil servants with disabilities incurred during their service.⁸⁵

Other constitutional provisions only implicitly cover people with disabilities. The Cambodian Constitution states: “Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.”⁸⁶ Disability could fall into the category of “other status,” but unless specifically included, government agencies and courts in Cambodia often

⁷⁸ *Id.* ¶ II.

⁷⁹ Created by Ministerial Decision No. 757/MOSALVA, which was enacted May 1997. *Id.* ¶ II.1.

⁸⁰ Created by Ministerial Decision No. 308/MOSALVY, which was enacted Oct. 1999. *Id.*

⁸¹ Established by Government Subdecree No. 70/ANL/BK, which was enacted Oct. 1997. *Id.*

⁸² Since 2000, the government has sponsored awareness-raising programs to educate people about disability, intervention, and referrals. *Id.* ¶ III.2.

⁸³ DISABILITY RIGHTS SECTION, U.S. DEPARTMENT OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAW 2 (2005), available at <http://www.ada.gov/cguide.pdf>.

⁸⁴ Constitution of the Kingdom of Cambodia art. 74, reprinted in RAOUL M. JENNER, THE CAMBODIAN CONSTITUTIONS (1953-1993) 16 (1995) [hereinafter CONST. (Cambodia)].

⁸⁵ THOMAS, *supra* note 11, at 36.

⁸⁶ CONST. art. 31 (Cambodia).

assume that disability is not covered by a provision.⁸⁷ As it stands, the provision for “other status” is, at best, ambiguous about whether disability is a protected group.⁸⁸

It is this kind of ambiguity that the Convention seeks to redress. The Convention obliges states “to guarantee equal and effective protection to persons with disabilities.” The official UN interpretation of the treaty argues that this obligation requires states to include explicit protections in their legal instruments, both in national laws and (preferably) constitutions.⁸⁹ Cambodia’s Constitution does not explicitly protect persons with disabilities as a group.⁹⁰

Another prominent law that fails to address disability is the Labor Law.⁹¹ Its non-discrimination provision for employment decisions protects race, color, sex, creed, religion, political opinion, birth, social origin, and union membership.⁹² There is no catch-all provision, like the Constitution’s “other status,” that could be interpreted to protect people with disabilities.⁹³ Within the Labor Law’s list, the only protected class that might encompass some disability would be birth, although even this category would exclude those disabilities not caused by a congenital condition.⁹⁴ Even if the Constitution expressly protected the rights of persons with disabilities, the lack of a legal definition of “disability” would still impede legislative efforts to protect persons with disabilities.

2. *Several Provisions of Cambodian Law Directly Discriminate Against People with Disabilities*

Some Cambodian laws violate the Convention’s bar against discriminatory laws and policies. Two specific examples⁹⁵ are the Marriage

⁸⁷ IDR M REPORT, *supra* note 25, at “Legal Barriers.”

⁸⁸ CONST. art. 31 (Cambodia).

⁸⁹ HANDBOOK, *supra* note 22, at 56.

⁹⁰ See CONST. (Cambodia).

⁹¹ Labor Code of the Kingdom of Cambodia (enacted Mar. 1997), *reprinted in* THE COMPENDIUM OF CAMBODIAN LAWS: VOLUME III LAWS AND REGULATIONS ADOPTED IN 1997-2000 9-1 (Sok Siphana ed., 2000), *available at* http://www.cdpcambodia.org/labor_law.asp.

⁹² *Id.*

⁹³ *Id.* art. 12.

⁹⁴ *Id.*

⁹⁵ Other discriminatory laws exist in Cambodia. For example, people with disabilities are not allowed to obtain a driver’s license, no matter what kind of disability they have. See IDR M Report, *supra* note 25, at “Legal Barriers.”

and Family Law⁹⁶ and the government-issued recruitment criteria for teachers.⁹⁷

The Marriage and Family Law prohibits six categories of people from marrying, including three categories that include people with disabilities: 1) men “whose penis is impotent,” 2) a person “who has [leprosy], tuberculosis, cancer or venereal disease which are not completely cured,” and 3) a person “who is insane” or “who has a mental defect.”⁹⁸ Although this law may be trying to fulfill legitimate state goals, such as protecting the health and safety of both people with disabilities and their intended spouses, the breadth of this law constitutes a violation of the Convention.

All three categories of people prohibited to marry in this law fall into the definition of disability offered in the Convention, which spans “physical, mental, intellectual or sensory impairments.”⁹⁹ The Convention protects all of these individuals and prohibits laws that discriminate on the basis of disability. A “state shall take effective and appropriate measures . . . to ensure . . . the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses.”¹⁰⁰ The Marriage and Family Law specifically excludes people with disabilities from being able to marry, even those capable of informed consent. It directly discriminates against people with disabilities.

A second example of a discriminatory law is the recruitment and hiring policy for teachers. This policy stipulates that recruitment for teachers must be made among candidates “free of disabilities.”¹⁰¹ Another proposed policy would ban people with visible disabilities from being teachers.¹⁰² In contrast, the Convention mandates that states prohibit discrimination on the basis of disability “with regard to all matters concerning all forms of employment, including conditions of recruitment.”¹⁰³ Both of these policies affect employment and exclude

⁹⁶ Cambodian Law on the Marriage and Family (enacted July 1989), *available at* <http://www.cambodia.gov.kh/unisql1/egov/english/material.list.html> [hereinafter Cambodian Law on Marriage and Family].

⁹⁷ Council of Minister’s Decisions No. 1356/1995, 223/1997, 872/1997, 835/1998, & 39/1999. INTERNATIONAL LABOR OFFICE, CAMBODIA COUNTRY PROFILE 8 (2003), *available at* www.ilo.org/public/english/employment/skills/disability/publ/index.htm [hereinafter ILO REPORT].

⁹⁸ Cambodian Law on Marriage and Family art. 6.

⁹⁹ Convention on the Rights of People with Disabilities, *supra* note 5, art. 1.

¹⁰⁰ *Id.* art. 23, cl. 1(a).

¹⁰¹ ILO REPORT, *supra* note 97, at 8.

¹⁰² *Id.* (discussing a *prakas* on physical appearance standards for all teaches identifies numerous physical disabilities that would prevent a person from becoming a teacher).

¹⁰³ Convention on the Rights of People with Disabilities, *supra* note 5, art. 27, cl. 1(a).

people on the basis of disability. Despite discriminatory measures that specifically reference “disability,” Cambodia still lacks an official definition of “disability.”

B. Cambodia’s Working Definition of Disability Is Inadequate

Cambodia’s working definition of disability fails to address the three elements set out in the Convention’s definition: 1) a non-exclusive list of impairments, 2) the inclusion of at least physical, mental, intellectual, and sensory impairments, and 3) a low threshold for the impairment to be legally protected.¹⁰⁴ It thus fails to include several categories of people with disabilities that are protected under the Convention. Currently, there is no statutory definition of “disability” in Cambodian law.¹⁰⁵

The working definition of “disability” derives from an unofficial agreement published after the government surveyed various peoples.¹⁰⁶ Instead of a non-inclusive list that can expand along with the medical understanding of disability, the current definition is merely a list of eight categories that can be classified as a “disability”:

1. Seeing difficulties or visual impairment;
2. Hearing difficulties or hearing impairment;
3. Speaking difficulties or deaf/speaking impairment;
4. Moving difficulties or physical impairment;
5. Feeling difficulties;
6. Strange behavior or mental impairment;
7. Learning difficulties or intellectual impairment; and
8. Fits.¹⁰⁷

No official or unofficial definitions of the terms used within this list exist, although several of the terms, such as “strange behavior” and “fits,” are vague terms that cannot readily be applied to symptoms of disability. For example, mental illnesses do not all include “strange behavior,” nor is that description an adequate indicator of health or symptoms. Having such broad and inexact categories could lead to serious abuses of the concept of disability, as politically or socially unacceptable behavior could lead to an individual being labeled as disabled.¹⁰⁸

¹⁰⁴ See Part III.B; Convention on the Rights of People with Disabilities, *supra* note 5, art. 1.

¹⁰⁵ Participation Papers, *supra* note 7, at ¶ I.1.

¹⁰⁶ *Id.*

¹⁰⁷ Participation Papers, *supra* note 7, at ¶ I.1.

¹⁰⁸ WHO RESOURCE BOOK, *supra* note 66, at 21.

Cambodia's list of conditions is also exclusive, as only the eight kinds of impairments listed count, and there is no language that indicates that these are only representative conditions. Although several of the categories, such as the first three, are expansive and would arguably cover any physical, auditory, or visual impairment, the list cannot expand to include impairments that are not yet recognized as disabilities, locking it into the current medical and social knowledge of disability. Some people with disabilities that are covered by the Convention may thus not be protected by Cambodia's working definition. The Convention specifically eschewed rigid definitions, and the awkward language used in this list could lead to ambiguities and disputes about coverage in the future.¹⁰⁹

While the Convention's definition includes a threshold at which the impairment rises to the level of a disability,¹¹⁰ Cambodia's current definition contains no such threshold determination. Thus, it is unclear whether any impairment or only certain impairments qualify as a disability.

The combination of an exclusive list that uses vague terms and a lack of a threshold ultimately makes this an inadequate definition of disability, which does not protect all the people with disabilities entitled to protection under the Convention. Cambodia's lack of accessibility policies similarly leaves some people with disabilities without the accommodations needed to participate fully in society.

C. *Cambodia Has No Provisions for Accessibility*

A state's provision for accessibility is one of the first steps that any country should take to improve its protection and promotion of rights for people with disabilities, yet Cambodia has no such policies, informal or official, in place. The implementation of accessibility policies is undoubtedly expensive and time-consuming, and Cambodia is unlikely to have the resources to address its accessibility obstacles in the near future. However, no matter what the resources, an official policy recognizing the needs for accessibility should be in place; only with such legislation in place can resources be effectively allocated. Also, the implementation of a formal policy may help draw support from international donors, as it will signal that Cambodia is serious about accessibility and disability rights.¹¹¹

¹⁰⁹ The Preamble to the Convention reads, "Recognizing that disability is an evolving concept and that disability results from the between persons with impairments and attitudinal and environmental barriers . . ." Convention on the Rights of People with Disabilities, *supra* note 5, at Preamble.

¹¹⁰ *Id.* art. 2; see Part II.B.2.

¹¹¹ Alexis Stockwell et al., *Mental Health Policy Development: Case Study of Cambodia*, 13 AUSTRALASIA PSYCHIATRY 190, 194 (2005) (Issue 2).

Physical disabilities that impair vision, impair hearing, or limit mobility comprise the largest percentage of disabilities in Cambodia;¹¹² about 450,000 Cambodians are either deaf or blind.¹¹³ People with such physical disabilities face immediate problems in interacting with society and participating effectively in the community. Their difficulties may result from a variety of deficits, including the lack of Braille materials, sign language interpreters, cheap hearing aids, or ramps to transport wheelchairs.¹¹⁴ Accessibility not only affects the dignity and effective participation of a person with a disability, but it also involves numerous other human rights like the right to vote and the right not to be treated inhumanely or cruelly.¹¹⁵

Cambodia does not have a single provision in place that addresses or promises accessibility, and “awareness of accessibility for [people with disabilities] is minimal outside of organizations working on the promotion of rights of [people with disabilities].”¹¹⁶ There are no published guidelines, much less requirements, for accessibility in private or public buildings.¹¹⁷ Neither has the Department of Transportation issued guidelines regarding access to public transportation or road construction that allows, for example, wheelchair access by including curb ramps.¹¹⁸

The lack of accessibility requirements stretches beyond physical obstacles; there is also a glaring lack of services for people with communication disabilities like blindness, muteness, and deafness.¹¹⁹ The National Library does not offer any Braille, audio, or large print materials, and national television lacks closed-captioning.¹²⁰ Official institutions do not issue any Braille translations of legal documents, sign language interpreters are not provided, even during criminal proceedings, and law enforcement places the responsibility for obtaining an interpreter on the

¹¹² Overall, 44.3% of Cambodians with disabilities have physical disabilities (amputations, paralysis, or physical disability), 11.5% suffer from vision impairment, and another 4.3% are deaf or have severe hearing difficulties. JAPAN INTERNATIONAL COOPERATION AGENCY PLANNING AND EVALUATION DEPARTMENT, WORLD BANK, COUNTRY PROFILE ON DISABILITY: THE KINGDOM OF CAMBODIA 3 (2002).

¹¹³ THOMAS, *supra* note 11, at 6.

¹¹⁴ *Id.*

¹¹⁵ Lack of accessibility leaves many children with disabilities unable to attend school, and since schools are common voting places, it also leaves many people with disabilities unable to take part in elections. IDRM Report, *supra* note 25, at “Education.”

¹¹⁶ Participation Papers, *supra* note 7, at ¶ I.7.

¹¹⁷ IDRM Report, *supra* note 25, at “Accessibility.”

¹¹⁸ *Id.*

¹¹⁹ OUK SISOVANN, INFORMATION AND COMMUNICATION TECHNOLOGY POLICY REPORT (2003), <http://www.worldenable.net/manila2003/papercambodia.htm> (last visited Nov. 12, 2008).

¹²⁰ IDRM Report, *supra* note 25, at “Communication.”

accused.¹²¹ All of these are services or facilities that are open to the public and denied to people with disabilities—in obvious contravention of the Convention’s requirement that states ensure access to the physical environments, transportation, information, channels of communication, and public facilities and services.¹²² Without such services, or the legal right to such services, Cambodians with disabilities are left without the ability and means to move freely and participate in society on an equal basis.

D. *Cambodia Lacks Legal Incapacity Provisions*

Because Cambodia includes insanity as a device limiting a person’s legal liability, it should also provide for procedural and legal safeguards against the ready human rights violations that can ensue from the use of legal incapacitation. Cambodia has no legal provisions that protect an individual when his or her legal capacity is questioned or stripped, and this absence of provisions is not due to the fact that Cambodia refuses to recognize mental disability. The mental health system in Cambodia is “significantly underdeveloped,”¹²³ but mental health services do exist: numerous hospitals offer psychiatric treatment.¹²⁴ Forced institutionalization of people with disabilities is uncommon;¹²⁵ nevertheless, the mere possibility of forced institutionalization underscores the need for procedural protections.

Although Cambodia has no legislation that addresses mental health or mental disability,¹²⁶ criminal and contract laws do acknowledge that insanity may affect a person’s legal competence.¹²⁷ Under the statute governing contracts and tort liability, the “insane” are deemed incompetent and cannot be held liable for damages.¹²⁸ Such a provision signals that the government and courts are sensitive to the cognitive limitations that can result from mental disability. Similarly, under criminal law, the insane are exempt from

¹²¹ *Id.*

¹²² Convention on the Rights of People with Disabilities, *supra* note 5, art. 9, cl. 1.

¹²³ Stockwell, *supra* note 111, at 190.

¹²⁴ An estimated 350 mental health care providers, including twenty psychiatrists and 251 psychologists, work in Cambodia. *Id.* at 191.

¹²⁵ IDRM Report, *supra* note 25, at “Institutionalizations.”

¹²⁶ The drafting of a National Mental Health Plan began in 2001, sponsored exclusively by foreign organizations like the World Health Organization, but it failed to attract the Ministry of Health’s involvement and has been effectively shelved. Stockwell, *supra* note 111, at 191.

¹²⁷ Decree 38: Referring to Contract and Other Liabilities § 122 (enacted Oct. 1988) (Cambodia), available at <http://www.cdpcambodia.org/contract.asp>.

¹²⁸ *Id.*

imprisonment.¹²⁹ Although “insane” is again undefined, it is distinguished in the next sentence of the Act, which stipulates that only adults of sound mind and proper reasoning to know right from wrong are subject to jail time.¹³⁰ Thus, one can interpret “insane” to refer to individuals who are not of sound mind and are unable to know right from wrong. Cambodian law recognizes mental disability and a person’s legal rights and liabilities can be altered based on their competency, and thus there should be corresponding procedures to govern such determinations.

The Constitution establishes general rights that could serve as the basis for protecting the legal capacity of persons with disabilities. Article 32 states that “Every Khmer citizen shall have the right to life, personal freedom, and security.”¹³¹ The Constitution also guarantees that the “prosecution of any person shall not be done except in accordance with the law.”¹³² The Convention’s purpose in restating existing human rights was to concretely secure specific rights to people with disabilities, and these vague references and scattered provisions do not suffice. In response to concerns about the inadequacy of disability rights in Cambodian law, a proposed disability rights law was drafted and presented to the legislature.

V. CAMBODIA SHOULD REVISE AND ENACT THE DRAFT LAW TO ENHANCE PROTECTIONS FOR PEOPLE WITH DISABILITIES AND AVOID TREATY VIOLATIONS

Besides exposing the gaps in Cambodian disability law, the Convention can also be a useful tool in drafting new legislation. Cambodian government agencies and civil agencies are actively working on disability rights. Most notably, the legislature is considering legislation addressing disability rights,¹³³ the Draft Law on the Rights of People with Disabilities¹³⁴ (“Draft Law”). Although the Draft Law lacks some key provisions and mishandles others, its passage would advance the disability rights paradigm

¹²⁹ Forced Physical Imprisonment Law § 4 (enacted Feb. 1992) (Cambodia), *available at* <http://cambodialaw.ifrance.com/> (select English, then Criminal Law, then Forced Physical Imprisonment).

¹³⁰ *Id.*

¹³¹ CONST. art. 32 (Cambodia).

¹³² *Id.* art. 38.

¹³³ A working group to draft disability legislation was established by Ministerial Decision No. 308/MOSALVY (enacted Aug. 2000). Participation Papers, *supra* note 7, ¶ II.1.

¹³⁴ Draft Law on the Rights of People with Disabilities (2003) (Cambodia), <http://www.dac.org.kh/legislation/list-laws/draft-disability-law.htm> (last visited Nov. 12, 2008) [hereinafter Draft Law].

for Cambodia, as the law would substantially comply with the Convention under the model of progressive realization.¹³⁵

The Draft Law was completed and presented to the legislature in 2003.¹³⁶ Although it has not yet been enacted, there are several indications that this Draft Law is viable legislation. The Disability Action Council, the preeminent national disability advocacy group, and government officials have publicly praised this law and continue to discuss disability rights as a legislative priority.¹³⁷ Government officials plan to use the Convention as a means to draw attention to the Draft Law and lobby for its passage.¹³⁸ The Draft Law was also mentioned by Cambodian officials during a discussion of the status of disability rights in Cambodia that took place at a conference discussing the Convention.¹³⁹ Although such public statements of support for disability rights may be no more than posturing, Cambodia's recent step of signing the Convention indicates that Cambodia is serious about disability issues. The Draft Law should thus be considered a viable piece of legislation whose enactment would significantly improve Cambodia's disability rights protection.

For Cambodia, improving its disability rights scheme is important not only because of its high number of people with disabilities that need help and protection, but also to remain in compliance with international law. Currently, Cambodia's laws do not comply with the Convention because its disability rights paradigm is inadequate to protect the human rights of people with disabilities. In fact, this paradigm may be so poor as to violate Cambodia's obligations as a signatory of this Convention and as a party to other human rights treaties.¹⁴⁰

According to the Convention's handbook, "signing also creates an obligation, in the period between signing and ratification or consent to be bound, to refrain from acts that would defeat the object and purpose of the treaty."¹⁴¹ The lack of legal protections for people with disabilities and the existence of numerous discriminatory laws collectively defeat the object and

¹³⁵ Convention on the Rights of People with Disabilities, *supra* note 5, art. 4, cl. 2. *See infra* note 146 (discussing progressive realization).

¹³⁶ Participation Papers, *supra* note 7, at ¶ I.1.

¹³⁷ *See* Sokha, *supra* note 6; *see* Disability Action Council, *supra* note 3.

¹³⁸ Sokha, *supra* note 6, at 3.

¹³⁹ *See* Participation Papers, *supra* note 7.

¹⁴⁰ Cambodia has ratified the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. STATUS REPORT, *supra* note 41, at 3.

¹⁴¹ HANDBOOK, *supra* note 22, at 40.

purpose of the treaty, as people with disabilities are left without legal protections and suffer from direct discrimination.¹⁴² Furthermore, this Convention has not created any new human rights; rather, the treaty explains how existing human rights apply to people with disabilities.¹⁴³ In that light, the failure to secure the rights elucidated in this Convention could be construed as violations of previous human rights treaties to which Cambodia is a party.

The enactment of the Draft Law, either as it stands or revised, is a crucial step toward compliance with the Convention. The Draft Law does not need to achieve full compliance with the Convention to be considered effective. Like the International Covenant on Economic, Social and Cultural Rights,¹⁴⁴ the Convention includes a provision that allows for states to meet their obligation under the treaty gradually.¹⁴⁵ Article 4 of the Convention states that “each State party undertakes to take measures to the maximum of its available resources . . . with a view to achieving progressively the full realization of these rights.”¹⁴⁶ The concept of progressive realization acknowledges the difficulty of bringing a state with few or no human rights protections into compliance with a treaty in a short period of time.¹⁴⁷ States may not delay implementing any measures or take measures that contradict the treaty’s object and purpose. States should take “steps towards that goal” of full rights.¹⁴⁸ Civil and political rights must be protected and promoted immediately.¹⁴⁹ Under the principle of progressive realization, the Draft Law need only be a concrete and deliberate step towards the full realization of human rights for people with disabilities in order to satisfy the Convention.

The Draft Law represents several such concrete steps, most notably by implementing positive law and abrogating discriminatory measures;¹⁵⁰ it also establishes a definition for disability and standards for accessibility. Yet, the Draft Law leaves important issues unresolved; for example, it does not address the problem of legal capacity. While Cambodia should ultimately

¹⁴² See Part III.A.

¹⁴³ See HANDBOOK, *supra* note 22, at 12.

¹⁴⁴ International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁴⁵ Convention on the Rights of People with Disabilities, *supra* note 5, art. 4, cl. 2.

¹⁴⁶ *Id.*

¹⁴⁷ U.N. Committee On Economic, Social & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties Obligations (Art. 2, para. 1), ¶ 9*, contained in U.N. Doc. E/1991/23 (Dec. 14, 1990).

¹⁴⁸ *Id.* ¶ 2.

¹⁴⁹ HANDBOOK, *supra* note 22, at 19-20.

¹⁵⁰ See Draft Law, *supra* note 134.

enact some form of the Draft Law, it would benefit from revising the Draft Law to more fully comply with the Convention. Cambodia should modify the definition of disability and the provision for accessibility to fully comply with the Convention in these areas, and add provisions that protect people with mental disabilities. With such changes, the Draft Law would bolster disability rights in Cambodia.

A. *The Draft Law Offers Comprehensive Legislation and Eliminates Discriminatory Laws and Policies*

Enacting the Draft Law would ameliorate the lack of protections for people with disabilities and bar discrimination on the basis of disability. To provide at least minimal protections for its people with disabilities, the Cambodian government must institute general laws, as the Convention's obligation "requires both that the prohibition be included in national laws and . . . that detailed legislative provisions covering discrimination in all fields of public and private life be adopted."¹⁵¹

The Draft Law contains seventy provisions¹⁵² and addresses fifteen of the twenty-seven specific rights set out in the Convention.¹⁵³ The wholesale adoption of the Draft law would significantly increase Cambodia's future compliance with the Convention. The Draft Law goes further than the minimal threshold contained in the Convention in several provisions, as the Draft Law includes provisions such as budget allocations to ministries,¹⁵⁴ financial support programs for people with disabilities,¹⁵⁵ and incentives for employers to hire and train people with disabilities.¹⁵⁶

The Draft Law's final article also provides that "any legal provision [contrary] to this law shall be abrogated."¹⁵⁷ This article would invalidate the two discriminatory provisions discussed above,¹⁵⁸ as well as any other discriminatory sections of Cambodia's legal code.¹⁵⁹ The Draft Law would thus enact comprehensive legislation addressing the needs and rights of people with disabilities and nullify discriminatory laws, fulfilling the Convention's general obligation regarding legislation.

¹⁵¹ *Id.* art. 56.

¹⁵² *See* Draft Law, *supra* note 134

¹⁵³ *Id.*

¹⁵⁴ *See id.* art. 9; *id.* art. 57-59.

¹⁵⁵ *Id.* art. 11.

¹⁵⁶ *Id.* art. 60-65.

¹⁵⁷ *Id.* art. 70.

¹⁵⁸ *See* Part III.A.2.

¹⁵⁹ For example, there is a law that bars people with disabilities from receiving a driver's license. *See* IDRM Report, *supra* note 25, at "Legal Barriers."

B. *The Draft Law Finally Provides a Comprehensive Definition of Disability*

As one of its first provisions, the Draft Law would finally establish an official definition of disability.¹⁶⁰ Its existing definition substantially complies with the Convention's standard definition, but it could benefit from more closely mirroring the Convention's language regarding the threshold at which an impairment becomes a disability.

The Draft Law's definition of "disability" includes all three elements set out in the Convention's definition. While it also contains two potential requirements that could limit disability rights as set out in the Convention, the Draft Law substantially complies with the Convention.

Article 2 of the Draft Law sets out the new definition of "disability:"

A person with [a] disability is any citizen who lacks any physical organ or capacity or suffers any mental impairment, which causes decent restriction on his/her daily life or activities such as loss of limbs, quadriplegia, visual or hearing impairment or mental handicap etc., and obtains a certified document issued by Ministry of Health.¹⁶¹

Like the Convention, this list of impairments is non-exclusive.¹⁶² The definition includes "any physical organ or capacity" or "any mental impairment."¹⁶³ The definition also lists some specific impairments, but the legislation here uses the inclusive phrase "such as" to indicate that this list is not exhaustive.¹⁶⁴

The Draft Law's definition satisfies the second element of the Convention's definition, which requires that physical, mental, intellectual, and sensory impairments be included. The listed categories are broad enough to cover the four categories of disability in the Convention,¹⁶⁵ because "physical organ or capacity" also includes sensory impairments, and "mental impairments" also encompass intellectual impairments. Whereas the Convention sought to include more detail and eliminate any doubt that all four variations of disability should be included,¹⁶⁶ Cambodia's simplified definition should be sufficient, as it does not explicitly exclude any of the

¹⁶⁰ Draft Law, *supra* note 134, art. 2.

¹⁶¹ *Id.*

¹⁶² See Convention on the Rights of People with Disabilities, *supra* note 5, art. 1.

¹⁶³ Draft Law, *supra* note 134, art. 2 (emphasis added).

¹⁶⁴ *Id.*

¹⁶⁵ Convention on the Rights of People with Disabilities, *supra* note 5, art. 2.

¹⁶⁶ *Id.*; see HANDBOOK, *supra* note 22, at 12-13.

Convention's impairments and uses broad language that includes all of these areas of disability.

The definition also contains a threshold for an impairment to be protected by law, although this threshold is higher than the one set out in the Convention.¹⁶⁷ The Draft Law states that to be a disability, the impairment must be one "which causes decent restriction on his/her daily life or activities."¹⁶⁸ This is a more restrictive view of what should be considered a disability; the Convention defines a disability as one that simply "affects the full and effective participation" of people with disabilities.¹⁶⁹ This deviation from the treaty is the first of two potential conflicts with the Convention.

A conflict between the Draft Law's definition and the Convention's may indicate that the Draft Law's definition does not adequately protect the people with disabilities that are covered by the treaty. The first potential issue is that narrower protections conflict with the more permissive threshold set out in the Convention. The Draft Law's language, similar to the ADA's requirement that a disability "substantially limit" a major life activity,¹⁷⁰ could leave a loophole in protections for people with disabilities who are covered by the Convention. For example, people with epilepsy may be able to control their illness with medication to the point that their illness does not impede their daily life. Yet, such a person may need reasonable accommodations, such as more breaks at work to take the medication with food or the freedom to go to frequent doctor's appointments to manage the illness. Under the Draft Law, a court could rule that such a person does not have a disability; yet, the denial of accommodations would clearly interfere with that person's "full and effective participation" in society on an equal basis with others.¹⁷¹ Because this more restrictive element of the definition could lead to the denial of human rights protection to a person with a disability, the Draft Law may need adaptation to comply with the Convention's definition.

The second potential conflict with the Convention stems from the requirement of a government-issued certificate of disability. The Draft Law defines a "person with disability" as someone who "obtains a certified document issued by the Ministry of Health."¹⁷² Such a requirement is eminently practical for the administration of benefits and services to which a

¹⁶⁷ Convention on the Rights of People with Disabilities, *supra* note 5, art. 2.

¹⁶⁸ Draft Law, *supra* note 134, art. 2.

¹⁶⁹ Convention on the Rights of People with Disabilities, *supra* note 5, at 1.

¹⁷⁰ Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2007).

¹⁷¹ Convention on the Rights of People with Disabilities, *supra* note 5, art. 2.

¹⁷² Draft Law, *supra* note 134, art. 2.

person with a disability may be entitled. But, it is troubling to include this administrative criterion in the very definition of “disability,” especially in a country that lacks a well-developed administrative infrastructure. These resource and procedural problems might keep some people with disabilities from obtaining the necessary certificates, leaving them without the protection of Cambodia’s laws and regulations simply because of administrative incapacity or error. Although this requirement does not conflict with any express provision of the treaty, the burdens and limitations imposed by it could be found to violate the object and purpose of the Convention, which seeks to make people with disabilities equal to all other citizens.¹⁷³

These two elements of the Draft Law’s definition could be seen to compromise the entire definition. However, under the principle of progressive realization,¹⁷⁴ this deviation from the Convention’s definition is likely to be tolerated. The definition as a whole includes the three Convention requirements. Cambodia may be able to justify the two deviations based on legitimate policy reasons, such as the need to provide oversight for the administration of disability benefits and to limit scant resources.

Before enacting the Draft Law, Cambodia should use the standards laid out in the Convention to revise this legislation. It should be amended in two ways to allow the definition to cover the same range of people as the Convention. A revised definition could read: “A person with a disability is any citizen who lacks any physical organ or capacity or suffers any mental impairment, which causes a restriction on his/her full and effective participation in society such as loss of limbs, quadriplegia, visual or hearing impairment or mental handicap.”

These changes would address the two potential areas of conflict between the Draft Law and the Convention. First, the language that elevates an impairment to a disability only when it presents a “decent” restriction on a daily life activity¹⁷⁵ can be revised to mirror the threshold language in the Convention. Second, this revision eliminates the language requiring a certificate of disability.¹⁷⁶ As discussed above,¹⁷⁷ certificates would create an unnecessary administrative burden for both government agencies and

¹⁷³ Standard treaty interpretation mandates that states have an obligation “to refrain from acts which would defeat the object and purpose of a treaty.” Vienna Convention on the Law of Treaties, *supra* note 42, art. 18.

¹⁷⁴ Convention on the Rights of People with Disabilities, *supra* note 5, art. 4, cl. 2.

¹⁷⁵ Draft Law, *supra* note 134, art. 2.

¹⁷⁶ *Id.*

¹⁷⁷ See Part V.B.

people seeking recognition of their disabilities. A certification requirement could be instituted for a person with a disability to receive certain government services—such as receiving reasonable accommodations or pensions—but it should not be a part of the definition.

C. *The Draft Law Makes Physical Accessibility a Priority but Information Accessibility Is Largely Ignored*

The Draft Law provides concrete requirements and enforcement mechanisms for accessibility to public and private facilities, but it focuses almost exclusively on physical accessibility without fully addressing information accessibility. Articles 21 through 25 set out new regulations for physical locations. The Draft Law would require that all new construction of public places provide accessible facilities, and that all existing locations take all reasonable measures to add accessible facilities.¹⁷⁸ “Public places” is defined broadly as “areas, buildings, premises and transportation means owned by state, public or private entities which are open to the general public.”¹⁷⁹ This definition differs from the Convention’s only in that the term “services” is not included in the Draft Law.¹⁸⁰ The Convention lists examples of services that should be accessible: “other services, including electronic services and emergency services.”¹⁸¹ The Draft Law’s lengthy list of examples of public places includes places that the Convention envisions as “services,” such as hospitals, institutions, and health centers.¹⁸² The Draft Law thus covers the same range of buildings and facilities as envisioned by the Convention.

The Draft Law exceeds the Convention’s general language regarding accessibility and adopts concrete accessibility requirements for both existing and future public buildings. Article 22 addresses *all* places being constructed or to be constructed, and it provides a clear requirement that such public places must be accessible “to the people with all kinds of disabilities” with features such as “ramps, accessory handrails and signs etc.”¹⁸³ Existing public places must also alter their facilities to be accessible under Article 23.¹⁸⁴ However, to avoid the hardships of such a requirement, the Draft Law allows the owners of existing facilities to be excused from the

¹⁷⁸ See Draft Law, *supra* note 134, arts. 22, 23.

¹⁷⁹ *Id.* art. 21.

¹⁸⁰ Convention on the Rights of People with Disabilities, *supra* note 5, art. 9, cl. 1.

¹⁸¹ *Id.* art. 9, cl. 1(b).

¹⁸² Draft Law, *supra* note 134, art. 21.

¹⁸³ *Id.* art. 22.

¹⁸⁴ *Id.* art. 23.

law's requirement if such an alteration is "structurally impracticable or can only be made at extreme expens[e]." ¹⁸⁵ This loophole would not violate the Convention's mandate of taking "appropriate measures," ¹⁸⁶ as the concept of reasonable accommodation is accepted and encouraged within the Convention and the handbook. ¹⁸⁷ Finally, the Draft Law also includes an enforcement mechanism for the two main accessibility articles, ¹⁸⁸ making it one of the few disability issues that are assigned a penalty and enforcement mechanism. ¹⁸⁹

One potential criticism of this accessibility provision is that the law is too vague about non-physical accessibility, but such vagueness would not violate the Convention at this point. The Draft Law fails to explicitly include communication accessibility, such as providing information in formats usable by people with various disabilities, most notably blindness and deafness. The Convention clearly envisions this kind of accessibility; Article 9(1)(b) specifically lists "information, communications, and other services" as facilities that should be accessible. ¹⁹⁰ The only indication that the Draft Law does mandate this kind of information accessibility comes in Article 22, which lists examples of accessible facility measures: "such as ramps, accessible hand rails, and signs etc." ¹⁹¹ Such scant mention of the large array of information accessibility measures that must be enacted throughout the country—starting with Braille voting cards and sponsoring closed-captioned television broadcasts ¹⁹²—is inadequate to realize and implement the rights embodied in the Convention. Still, this omission is unlikely to be serious enough to constitute a violation of the Convention and signal that this provision is inadequate. Under a progressive realization scheme, this initial legislation is a significant and beneficial first step towards guaranteeing the rights of people with disabilities.

The Draft Law should be modified to improve the initial drive towards greater accessibility. The law should explicitly recognize the need for information and communication accessibility and at least encourage private actors to provide this kind of accessibility. For public entities,

¹⁸⁵ *Id.*

¹⁸⁶ See Convention on the Rights of People with Disabilities, *supra* note 5, art. 14, cl. 2.

¹⁸⁷ See *id.*; *id.* art. 24, cl. 2(c); HANDBOOK, *supra* note 22, at 60 (discussing that an employer should provide reasonable accommodations).

¹⁸⁸ Article 67 includes both fines and imprisonment for the violation of the accessibility articles. Draft Law, *supra* note 134, art. 67.

¹⁸⁹ *Id.* arts. 66, 67 (mandating fees and/or imprisonment for violations of select articles).

¹⁹⁰ Convention on the Rights of People with Disabilities, *supra* note 5, art. 9, cl. 1(b).

¹⁹¹ Draft Law, *supra* note 134, art. 22.

¹⁹² These two measures have been specifically identified as being needed. THOMAS, *supra* note 11, at 32.

providing such accessibility should be required. Cambodia's limited public resources would most likely leave it unable to provide accessible communication and information services for all public proceedings and documents.¹⁹³ Accepting limited public resources, public entities should at least be required to furnish accessible means on an "available upon request" basis, especially for criminal and civil proceedings that involve a person with a disability. Such a requirement would allow people with a disability to at least access materials that affect their legal rights and obligations as citizens.

Beyond the first step of passing a current or amended Draft Law, Cambodia should also spend resources on bringing government facilities and services into compliance with the new law, raising awareness of the issue, and enforcing the new law. Furthermore, as promising as the legislation is, the Draft Law does not address all of the current deficiencies in Cambodian disability rights. The Draft Law still leaves people with mental disabilities with significant gaps in their protection, as it does not address legal capacity.

D. *The Draft Law Does Not Address Legal Capacity*

The Draft Law fails to include procedural safeguards and guidelines to govern legal incapacity. While the Draft Law appropriately includes mental impairments in its definition,¹⁹⁴ and specifically reiterates that mental disabilities should be included,¹⁹⁵ only one provision tackles an issue closely related to legal capacity.¹⁹⁶

Article 12 deals with an issue related to incapacity, namely guardianship. Those who are determined legally incompetent are usually incapable of caring for their needs, requiring others to step in.¹⁹⁷ Thus, a guardian is a necessary ingredient in any situation involving incapacity. Article 12 contains two separate obligations for these guardians.

¹⁹³ According to the World Bank, the 2006 Gross National Income ("GNI") per capita (Atlas Method) for Cambodia was \$490. The World Bank, *Regional Fact Sheet from the World Development Indicators 2008: East Asia & Pacific*, available at http://siteresources.worldbank.org/DATASTATISTICS/Resources/eap_wdi.pdf. Any country with per capita GNI lower than \$935 is classified as a low income country. The World Bank, *Data & Statistics: Country Classification*, <http://go.worldbank.org/K2CKM78CC0> (last visited Nov. 28, 2008). In comparison, the U.S. GNI per capita (Atlas Method) for 2007 was \$46,040, and the U.S. ranks 15th in the world as compared to Cambodia's rank of 180 out of 207 countries. The World Bank, *Gross National Income Per Capita in 2007*, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> (last visited Nov. 28, 2008).

¹⁹⁴ See Draft Law, *supra* note 134, art. 2.

¹⁹⁵ See *id.* art. 13-17 (providing for rehabilitation services for physical and mental handicaps).

¹⁹⁶ *Id.* art. 12.

¹⁹⁷ ROBERT ANDERSON, PRACTITIONER'S GUIDE TO CLINICAL NEUROPSYCHOLOGY 187 (1994).

First, it obligates parents and guardians of a person with a disability to “protect the rights and the interests of people with disabilities.”¹⁹⁸ Yet, this clause is inadequate to actually protect people with disabilities against abuse and exploitation. Only a very small group of individuals who interact with or control rights for people with disabilities are covered by this clause. Doctors, nurses, police officers, community officials—none of them are subject to this clause, although all are involved in the administration of rights for a person with mental disabilities. Article 12 also presupposes that the person with a disability has a guardian or parent to care for him or her; without such an individual to press for their protection, it seems that the duty to protect this individual is left unassigned and unenforceable.

The second obligation of Article 12 would cover this latter group, and it is more specific about which actions are prohibited. The Article’s last clause prohibits “carelessness of, [exploitation], and [abandonment]” of people with disabilities.¹⁹⁹ Yet, this is not one of the articles that has an explicit enforcement mechanism or fine associated with it.²⁰⁰ Neither does it elaborate on what kind of common procedures in mental health facilities should be considered either exploitative or careless.

With the basic procedural protections set out in the Constitution²⁰¹ and the implementation of the Draft Law, the rights of all Cambodians with disabilities will be enhanced and substantially protected—even those with mental disabilities, as the legal protections for all people with disabilities will notably improve. The failure to include specific provisions for mental and legal capacity is not fatal to the effectiveness of the Draft Law, and its enactment would go far in providing adequate human right protections for people with disabilities.

Cambodia should also add provisions to the Draft Law that address legal capacity. At the very least, Cambodia should adopt detailed procedural safeguards to govern abridging the legal capacity of people with disabilities, including the right to receive reasonable accommodation and assistance as they navigate the legal system.²⁰² The Draft Law would have to add entirely new provisions to account for these rights, but such model provisions

¹⁹⁸ Draft Law, *supra* note 134, art. 12.

¹⁹⁹ *Id.*

²⁰⁰ *See id.* art. 66-69.

²⁰¹ *See* Part III.A.1.

²⁰² Such reasonable accommodation would address accessibility issues and allow reasonable exemptions or exceptions to normal rules that are difficult for people with disabilities to follow. For example, a person with a mental disability might have been incapacitated for a period, causing the statute of limitation to run. A court should be allowed, and encouraged, to waive the statute of limitation period.

already exist in mental health scholarship and could be adapted to Cambodia's needs.²⁰³

The Draft Law should craft procedures and safeguards for legal incompetency determinations. Cambodia could start by adopting some of the Convention's language regarding legal capacity.²⁰⁴ The Convention states that procedures for determining legal capacity must "respect the rights, will and preferences of the person, [be] free of conflict of interest and undue influence, [be] proportional and tailored to the person's circumstances, apply for the shortest time possible and [be] subject to regular review by a competent, independent and impartial authority or judicial body."²⁰⁵ This language sets out the factors a capacity proceeding must evaluate and provides guidelines as to the time and severity of the incapacity mechanism ultimately used (which can range from involuntary institutionalization to taking away the power of attorney). Finally, this section also guarantees that the capacity decision be regularly reviewed.

These measures correspond with many of the procedural safeguards that the World Health Organization ("WHO") recommends in its guide to drafting mental health legislation.²⁰⁶ This guide expands on these procedures to suggest the right to receive counsel regardless of means, and the right to appeal decisions of incapacity.²⁰⁷ These WHO measures would also ensure that persons with disabilities have an active voice in their treatments, as they can initiate proceedings rather than waiting for review procedures. Such additional provisions could easily fit within Cambodia's existing infrastructure. Cambodia already supports two legal aid organizations that provide legal services free of charge, Legal Aid of Cambodia and the Cambodian Defenders Project.²⁰⁸ The legal needs of people with disabilities could be added to the cases accepted by these organizations. Cambodia also has a functioning, independent judicial system that could provide an appeals process.²⁰⁹ Whether Cambodia decides to revise the Draft Law or not, the government must pass some version of the Draft Law to protect the human rights of Cambodians with disabilities.

²⁰³ See generally WHO RESOURCE BOOK, *supra* note 66.

²⁰⁴ Convention on the Rights of People with Disabilities, *supra* note 5, art. 12, cl. 4.

²⁰⁵ *Id.*

²⁰⁶ See generally WHO RESOURCE BOOK, *supra* note 66.

²⁰⁷ *Id.* at 40-41.

²⁰⁸ See Legal Aid Cambodia, <http://www.lac.org.kh/> (last visited Feb. 28, 2008); The Cambodia Defenders Project, <http://www.cdpcambodia.org> (last visited Feb. 28, 2008).

²⁰⁹ See generally KOY NEAM, INTRODUCTION TO THE CAMBODIAN JUDICIAL PROCESS (1998).

VI. CONCLUSION

Cambodians with disabilities need the help and support of the Cambodian government. Only by setting an example of inclusion and protection can the government start to sway the common derogatory opinions about people with disabilities. Furthermore, the numerous Cambodians with disabilities need new legal provisions; only then can individuals with disabilities combat a violation of their human rights, even if such laws do not immediately address all violations. Cambodia must enact disability legislation that meets the minimal protections for people with disabilities as set out in the Convention, and the Draft Law provides a good opportunity to do so.

Cambodia should also ratify the Convention to spur policymaking and legislative action, such as passing the Draft Law, and encourage its citizens with disabilities that the country will finally tackle some of the many barriers to full participation. Ratification would also send an encouraging signal to the disability organizations within Cambodia that the government is ready to deliver on its promises. Such a demonstrative effort could also secure more international funding and support, as many organizations and individuals are loath to contribute to a stagnant government that is notorious for its violations of human rights.²¹⁰ Cambodia should take this momentous step towards the protection of all its citizens' human rights and in turn alleviate the suffering of thousands of its citizens.

²¹⁰ See Stockwell, *supra* note 110.