

Washington International Law Journal

Volume 18 | Number 1

1-1-2009

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Recommended Citation

Yanghee Lee, *Keynote Address: Expanding Human Rights to Persons with Disabilities: Laying the Groundwork for a Twenty-First Century Movement*, 18 Pac. Rim L & Pol'y J. 283 (2009).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol18/iss1/11>

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EXPANDING HUMAN RIGHTS TO PERSONS WITH DISABILITIES: LAYING THE GROUNDWORK FOR A TWENTY-FIRST CENTURY MOVEMENT

Keynote Address, April 24, 2008
Symposium on Disability Rights in Asia
University of Washington School of Law

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Abstract: Dr. Lee's keynote speech provides a brief history of disability rights as provided for by international human rights treaties. The speech focuses in particular on the Convention on the Rights of the Child ("CRC") and the recently enacted Convention on Rights of Persons with Disabilities ("CRPD"). The CRC was the first treaty to include a specific provision dealing with the rights of children with disabilities. In this speech, Dr. Lee takes the position that although the CRPD does not create new rights for persons with disabilities, it still represents an important step forward. Dr. Lee emphasizes that the CRPD establishes a legal framework that explicitly addresses the needs and situations of persons with disabilities.

This Conference could not have been timed better. On April 3, 2008, the Convention on the Rights of Persons with Disabilities ("CRPD") received its twentieth ratification.¹ As of May 12, 2008, the CRPD will enter into force. The Optional Protocol to the CRPD will also enter into force on the same day. The CRPD is the first human rights convention of the twenty-first century and the first legally binding instrument with comprehensive protection of the rights of persons with disabilities. It is worth noting that it took only five years after Mexico considered opening negotiations for the Convention in 2001 for it to be adopted by the UN General Assembly in December 2006, and opened for signature in March 2007. The Convention was opened for ratification, pursuant to Article 45 of the Convention, on May 12, 2008.

An Optional Protocol that provides for an individual-complaints mechanism was also adopted at the same time. A little over a year since the CRPD and its Optional Protocol were opened for signature, these two

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¹ Ratifications, United Nations: Enable, <http://www.un.org/disabilities> (last visited October 8, 2008).

very important human rights treaties will enter into force together on May 12, 2008.

This year marks the sixtieth anniversary of the Universal Declaration of Human Rights (“UDHR”). Although it is not a legal instrument, it lays the foundation for the rights of every human being; covering economic, social, cultural, political, and civil rights. Two decades after the UDHR, two landmark legally binding human rights treaties were adopted: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These two Covenants, along with the UDHR, make up what is known as the International Bill of Rights. Since then, treaties that address the rights of specific groups of people; including children, women, migrant workers, racial minorities, and people facing torture; have also been adopted. Central to these human rights treaties are the following concepts:

- 1) **Universality and Inalienability:** Everyone in the world possesses these rights, and these rights cannot be taken away.
- 2) **Indivisibility:** All rights have equal status and cannot be ranked.
- 3) **Inter-dependence and Inter-relatedness:** Realization of a right may depend, wholly or in part, upon the realization of other rights.
- 4) **Equality and Non-discrimination:** Every human being is equal and is entitled to rights without any discrimination.

Over the past three decades, rights of persons with disabilities have been given growing attention. This was possible through the actions of individuals with disabilities and their advocates from national and international non-governmental organizations (“NGOs”). It was also due to the increasing attention in the framework of human rights at the United Nations. In 1971, the United Nations adopted the Declaration on the Rights of Mentally Retarded Persons.² The path continued into 1993 when the General Assembly of the United Nations adopted its Resolution 48/96, Standard Rules on the Equalization of Opportunities for Persons

² Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI) (Dec. 20, 1971), available at http://www.unhcr.ch/html/menu3/b/m_mental.htm.

with Disabilities (“Standard Rules”).³ Although the Standard Rules provided policy guidelines for the enjoyment of opportunities for persons with disabilities that non-disabled persons enjoy, it is not a legally binding instrument. Therefore, there was a need for a legally binding instrument that provided international standards to ensure that persons with disabilities would be provided the same opportunities to live life to their fullest potential.

The CRPD does not create new rights. However, it does provide a legal basis whereby the rights of persons with disabilities are promoted, protected, and ensured. It specifically includes *prohibition* of discrimination in all areas of life;⁴ *promotion* of measures to guarantee equal status;⁵ so that all persons with disabilities will be *able to fully enjoy* economic, social, cultural, civil and political rights enshrined in the CRPD.⁶

Article 3 underlines the general principles of the CRPD. These general principles are fundamental to all the other articles of the CRPD and to its implementation. They are as follows:

- 1) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- 2) Non-discrimination;
- 3) Full and effective participation and inclusion in society;
- 4) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- 5) Equality of opportunity;
- 6) Accessibility;
- 7) Equality between men and women;

³ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. Doc. A/RES/48/96 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r096.htm>.

⁴ See Convention on the Rights of Persons With Disabilities, G.A. Res. 61/106, art 5., U.N. Doc. A/RES/61/106 (Dec. 6, 2006), available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> [hereinafter C.R.P.D.].

⁵ See *id.*, art. 4.

⁶ See *id.*, art. 1.

- 8) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.⁷

The Convention on the Rights of the Child (“CRC”) was the only human rights treaty, until recently, that contained a specific reference to disability⁸ and a separate article regarding the rights of children with disabilities.⁹ The CRC was adopted unanimously by the General Assembly on November 20, 1989, after ten long years of drafting and negotiation process. It is the only treaty that has an almost universal ratification record. One hundred ninety-three countries have ratified the CRC, with the exception of Somalia, which has neither signed nor ratified, and the United States, which has signed but not yet ratified the CRC.

The CRC is the most comprehensive treaty and contains forty-two detailed provisions enshrining the rights of children in all areas of their lives; including economic, social and cultural rights, and civil and political rights. The CRC has been supplemented by two Optional Protocols. The first Optional Protocol, adopted on February 12, 2002, addresses the involvement of children in armed conflict by raising the minimum age for involvement in armed conflict to eighteen.¹⁰ The second Optional Protocol, adopted on January 18, 2002, addresses the sale of children, child prostitution and child pornography and strengthens the CRC’s protection in these areas.¹¹ When a government ratifies a convention and/or the optional protocol(s)—the U.S. has ratified the two optional protocols to CRC, but not the CRC—it is obligated to fulfill its promise to the provisions stated in the convention and/or optional protocol(s).

I would like to introduce the two articles of the CRC that address disabilities. The first article is Article 2, which addresses nondiscrimination, and is one of the four articles identified by the Committee on the Rights of the Child as overarching general principles:

⁷ See *id.*, art. 3.

⁸ Convention on the Rights of the Child, G.A. Res. 44/25, art. 2, U.N. Doc. A/44/49 (Nov. 20, 1989), available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> [hereinafter CRC].

⁹ See *id.*, art. 23.

¹⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/54/263 (Feb. 12, 2000), available at <http://www.unhcr.ch/html/menu2/6/protocolchild.htm>.

¹¹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/54/263 (May 25, 2000), available at <http://www.unhcr.ch/html/menu2/6/crc/treaties/opsc.htm>.

1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2) States Parties shall take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.¹²

The second article is an article that specifically addresses children with disabilities. Article 23 is unique in that it gives detailed explanation of the State's obligation in address the rights of children with disabilities:

1) States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2) States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's

¹² See CRC, *supra* note 8, art. 2.

achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4) States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular attention shall be taken of the needs of developing countries.¹³

The four general principles identified by the CRC as fundamental for the realization of all the other rights are as follows:

- 1) Non-discrimination;
- 2) The best interests of the child;
- 3) Survival and development;
- 4) Respect for the views of the child.¹⁴

According to recent estimates, there are about 500-650 million persons in the world living with a disability of one form or another.¹⁵ This is about ten percent of the world population according to the World Health Organization (“WHO”) estimates.¹⁶ A total of about 150 million of these disabled persons are children.¹⁷ More than eighty percent live in developing countries with little or no access to services.¹⁸ It is also

¹³ See CRC, *supra* note 8, art. 23.

¹⁴ See Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, Paragraph 1(a), of the Convention, ¶ 13, U.N. Doc. CRC/C/5 (Oct. 30, 1991), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.5.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.5.En?Opendocument).

¹⁵ See Committee on the Rights of the Child, General Comment No. 9, ¶ 1, U.N. Doc. CRC/C/GC/9 (Sept. 29, 2006), available at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.GC.9.doc> [hereinafter General Comment No. 9].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

known that the majority of causes for disabilities are preventable and secondary impacts of the disabilities are reducible.¹⁹

During the process of reviewing State Party reports to the CRC, it was quite alarming to learn about the reality of children with disabilities worldwide, particularly in Asia. What was equally alarming was the fact that no reservations have been entered specifically to Article 23 by any State Party.²⁰ What does this tell us? State Parties have not kept up with their promise. Children with disabilities are still experiencing difficulties in the full enjoyment of their rights enshrined by the CRC. The barrier is not the disability itself, but a combination of social, cultural, attitudinal and physical barriers which children with disabilities encounter in their daily lives.

Some of the indicators that represent the reality of the lives of children with disabilities are reflected in the fact that only a small number of countries, only forty-five, have legislation that explicitly prohibit discrimination against persons with disabilities.²¹ Allow me to briefly highlight some other facts reported by the United Nations Organization for Science, Culture, and Communication (“UNESCO”), WHO, International Labour Organization (“ILO”), and the United Nations Children’s Fund (“UNICEF”), and during the process of consideration of States Parties reports to the CRC:

- 1) Women and girls with disabilities are more vulnerable to abuse.
- 2) Thirty percent of street children are disabled.
- 3) Ninety percent of children with disabilities in developing countries do not attend school.
- 4) In some countries, large portions of children with disabilities are not registered at birth.
- 5) Poverty is oftentimes the cause and consequence of disability.
- 6) Children with disabilities are systematically institutionalized.

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ United Nations, Some Facts about Persons with Disabilities, <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf> (last visited October 8, 2008).

- 7) Lack of accurate disaggregated data on children in general, and children with disabilities in particular.
- 8) Many children with disabilities do not have access to basic health services.
- 9) Conflict, civil unrest and natural disaster are also causes of childhood disabilities.
- 10) Children with disabilities are more vulnerable in emergency situations.²²

The Committee on the Rights of the Child devotes one day every year during its September session, the first Friday of the session, for a Day of General Discussion. It is opened to the large community of advocates, civil society, governmental persons, academics, etc. There is an outcome document of the discussion day itself, but it can also be followed by other events. For instance, as a response to the Committee's Day of General Discussion on children in armed conflict, the "Graça Machel Study" was commissioned.²³ In addition, the Secretary General appointed a Special Representative for Children Affected by Armed Conflict.²⁴ After devoting two days for the violence of children, the Secretary General appointed an independent expert to conduct the U.N. Global Study on Violence.²⁵ As a result, the Secretary General will soon appoint a Special Representative of the UN Secretary-General on Violence.

The Committee on the Rights of the Child, in addition to considering State Party reports, issuing concluding observations, and planning and organizing the Day of General Discussion, also drafts and adopts General Comments. The purpose of the General Comments is to provide clear understanding and guidance to States parties in implementing the Convention. General Comments are the Committee's interpretation of the human rights provision. They cover thematic issues or a particular right, as enshrined in a particular article in the Convention.

²² *See id.*

²³ Protection of Children Affected By Armed Conflicts, G.A. Res. 48/157, U.N. Doc. A/48/157 (Dec. 20, 1993), available at <http://www.ponline.org/docs/1148/087651.html>. For the completed report, see Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, U.N. Doc. A/51/306 (Aug. 26 1996), available at http://www.unicef.org/graca/a51-306_en.pdf.

²⁴ The Rights of the Child, G.A. Res. 51/77, U.N. Doc. A/51/77 (Dec. 12, 1996), available at www.lavoro.minori.it/normativa/documenti/int/general_assembly121296_51-77.pdf.

²⁵ The Rights of the Child, G.A. Res. 56/138, U.N. Doc. A/RES/56/138 (Feb. 15, 2002), available at www.violencestudy.org/IMG/pdf/General_Assembly_Resolution_56_1_138.pdf.

The Committee on the Rights of the Child devoted one day in September 1997 for a Day of General Discussion particularly on the issue of children with disabilities.²⁶ In recent years, the Committee has been following themes that were chosen for the Day of General Discussion with a General Comment. I have been honored and privileged to draft, along with my colleague from Qatar,²⁷ the General Comment No. 9 entitled, "The Rights of Children with Disabilities."²⁸

Now let's go back to the CRPD. Hopefully, within a relatively short period of time, a treaty monitoring body will be formed. And consequently, the CRPD, initially with twelve members, will hold its inaugural session sometime next year. Allow me to briefly illustrate the next steps following the establishment of the Committee, reflecting from my experience on the Committee on the Rights of the Child.

The first task that the Committee on the Rights of Persons with Disabilities will be entrusted to do will be to adopt reporting guidelines for initial state party reports and establish its rules of procedures. The CRPD consists of thirty-three substantive provisions and will warrant some form of clustering into groups of rights whereby State parties must submit information pertaining to the respective rights. This grouping will probably include:

- 1) General Principles;
- 2) General Measures of Implementation, including legislation, national plans of action and policies, data and statistics, budget, coordinating body/focal point, international cooperation and technical assistance, independent monitoring, civil society, dissemination of knowledge and training of professionals;
- 3) Civil Rights and Freedom;
- 4) Basic Standard of Living;
- 5) Education;
- 6) Children;
- 7) Women;

²⁶ Committee on the Rights of the Child, *Children with Disabilities*, U.N. Doc. CRC/C/66 (Oct. 6, 1997), available at <http://www.unhcr.ch/html/menu2/6/crc/doc/days/disabled.pdf>.

²⁷ Dr. Ghalia Al-Thani, a former member of the Committee on the Rights of the Child.

²⁸ See General Comment No. 9, *supra* note 15.

- 8) Special Protection Measures;
- 9) Employment.

After the Committee begins considering State Party reports, it will decide to devote one day, perhaps annually, to certain articles or themes of rights for in-depth discussion. As is the case with other treaty monitoring bodies, the Committee will be issuing General Comments. Those of you who took part in the drafting and negotiating process of the Convention will remember that much was lost during this process. That is why some of the articles of a convention are very vague and difficult to implement. A General Comment will provide clear guidance to State parties. We must also remember that a Convention is a living instrument. Circumstances will change and there will be times when the Committee will be criticized for stretching beyond the purview of the Convention; both its mandate and its jurisprudence.

The rights of persons with disabilities can now be fully realized as the result of the new Convention. I like to think of human rights treaties as a spider's web. We have spun a web whereby the rights of any individual human being or the collective human beings can, in theory, be upheld, promoted, and protected. But, it has to start with ratification of the particular conventions and political will to comply. A good indicator of political will is through legal reforms that a State Party makes to comply with the particular convention. As we all know, without enforcement and implementation of laws, programs, and policies, an international treaty will be of no use. The key to full realization of rights is the active engagement of many stakeholders: the State, public and private sectors, civil society, international NGO's, and intergovernmental groups, along with the full participation of the group of persons that a particular convention addresses. In other words, it is "our" responsibility.

I am confident that conferences such as this one will aid in a better understanding of this new Convention, push for wider ratification, and also provide some tools for developing countries in their pursuit to achieving "progressive realization" of the rights of persons with disabilities. Hopefully, we will have accomplished all this from a "rights-based approach" perspective.

Once again, on behalf of the Committee on the Rights of the Child, I thank you for your attention.