



**Center for the Human Rights of  
Users and Survivors of Psychiatry**

## **Public Comment on NCD's Engagement with the UN Convention on the Rights of Persons with Disabilities<sup>1</sup>**

April 23, 2013

The National Council on Disability must insist on a robust and meaningful ratification and implementation of the Convention on the Rights of Persons with Disabilities,<sup>2</sup> that will be equally relevant to all persons with disabilities under the jurisdiction of the United States, irrespective of the type of disability or other factors that impact on their enjoyment of rights.

### 1. Object to reservations, understandings and declarations attached to the CRPD

NCD should object to the reservations, understandings and declarations attached to the ratification of the CRPD by the Administration and by the Senate Committee on Foreign Relations.<sup>3</sup> Of particular concern to CHRUSP are the federalism reservation and the declaration that U.S. law fulfills or exceeds its obligations under the treaty. These provisions contravene the core requirement in Article 4.1(a) and (b) of the CRPD to conform U.S. law to the treaty, at both the federal and state levels, which entails the obligation to leave open the possibility that its laws may not comply in some respects, rather than making a sweeping and pre-emptive declaration that disavows the need for further examination.

The obligation to conform domestic law to the treaty is not merely one of many procedural requirements of the CRPD itself. It is an inherent principle of international human rights law that human rights are universal, and that no state can declare its own law to be the measure of compliance with the treaty.<sup>4</sup> Broad reservations to the CRPD referencing national law have been widely denounced by other States Parties.<sup>5</sup> The reservation and declaration violate Article 46 of the CRPD and the corresponding tenet of

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<sup>1</sup> See Annex I for information on submitting organization.

<sup>2</sup> [http://www.un.org/disabilities/documents/convention/convention\\_accessible\\_pdf.pdf](http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf).

<sup>3</sup> See record for treaty number 112-7 at <http://thomas.loc.gov/cgi-bin/thomas>.

<sup>4</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

<sup>5</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en).

customary international law under which reservations incompatible with the object and purpose of a treaty are impermissible; declarations are treated as reservations to the extent that they exclude the legal effects of certain provisions of the Convention.<sup>6</sup>

Furthermore, the substantive impact of the federalism reservation and the declaration that U.S. law fulfills the requirements of the treaty discriminates against people labeled with psychiatric disabilities and others who are subjected to legal incapacitation, substituted decision-making, and involuntary institutionalization under the color of law. As the Administration's own memorandum acknowledges, state laws on guardianship violate Article 12 of the CRPD on the right to legal capacity, and mental health laws authorizing compulsory treatment and detention violate Article 14 on the right to liberty.<sup>7</sup> The memorandum misstates the actual standards, and the scope of violations is much wider than acknowledged; in fact all legal provisions that authorize detention or compulsory treatment on mental health grounds, and all legal provisions that authorize legal incapacitation or substituted decision-making, violate the CRPD.<sup>8</sup> Mental health detention and compulsory treatment violate several provisions in addition to Article 14, in particular Articles 12, 15, 17, 19 and 25. The discriminatory impact against a particular sector of the disability community contravenes the purpose stated in CRPD Article 1, which specifies the aim of the treaty to "promote, protect and ensure the full and equal enjoyment of **all** human rights and fundamental freedoms by **all** persons with disabilities" [emphasis added].

An international legal opinion is on record with the view that reservations against Article 12 are incompatible with the object and purpose of the Convention, because it contravenes fundamental principles articulated in Article 3 and because legal capacity is a necessary underpinning to the enjoyment of all other rights. The reasoning of the experts applies fully to the reservation and declaration denying the obligation to change state laws that allow guardianship, compulsory hospitalization or institutionalization, and compulsory treatment.

Equality and non discrimination along with respect for dignity, individual autonomy and freedom to make one's own choices have been recognized as the general principles of CRPD. The general principles were included to render the

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<sup>6</sup> Note that one of the reservations to the CRPD (by the Islamic Republic of Iran) that has met with condemnation is styled as a declaration. In addition, it is worth noting that the Legal Opinion on Article 12, referenced below, was prompted by an interpretive declaration interposed by Mexico, since withdrawn, which experts viewed as amounting to a reservation. See Gerard Quinn, "The UN Convention on the Rights of Persons with Disabilities: National Institutions as Key Catalysts for Change," delivered in Mexico City, 25, 26 October 2007.

<sup>7</sup> <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf>.

<sup>8</sup> Significant Concluding Observations by the CRPD Committee relevant to users and survivors of psychiatry are highlighted in a summary available at <http://wgwnusp2013.wordpress.com/convention-on-the-rights-of-people-with-disabilities/>.

object and purpose of the Convention explicit. A reservation on article 12 is antithetical to each of these principles and hence not permissible by article 46 of the Convention.

Further if a reservation is entered to either circumscribe the meaning of legal capacity or to limit the persons with disabilities included under the provision the limitation will not be confined to article 12 alone but will also extend to the other rights guaranteed under CRPD be it: the right to education or the right to work or freedom of speech and expression or political participation. Such a consequence would be destructive of both the letter and spirit of the CRPD and hence unimaginable.<sup>9</sup>

United Nations Special Rapporteur on Torture Juan Méndez has underscored the non-derogable nature of the right to be free from nonconsensual psychiatric interventions, calling for an absolute ban and affirming that forced interventions constitute at least inhuman and degrading treatment and may amount to torture.<sup>10</sup> Reservations that deny the obligation to repeal domestic laws authorizing practices that amount to torture and ill-treatment is contrary to the universal prohibition of torture and ill-treatment that is fundamental to international human rights law.

**Recommendation:** NCD should issue a memorandum addressed to the Administration and to Senate leadership, cautioning them against a ratification package that violates international law by its violation of core elements of the treaty: non-discrimination, respect for individual autonomy including the freedom to make one's own choices, the right to legal capacity, the freedom from torture and ill-treatment, and the obligation to revise provisions of domestic law in accordance with universal human rights standards.

## 2. Potential role for NCD in CRPD monitoring and implementation

### a. Monitoring and implementation under Article 33

As an independent federal advisory agency, the NCD should consider whether it is in a position to take on the role of independent monitoring mechanism under Article 33.2 of the CRPD.<sup>11</sup>

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<sup>9</sup> <http://disability-studies.leeds.ac.uk/files/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf>.

<sup>10</sup> Report of the Special Rapporteur on Torture, paragraphs 89(b) and 81, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf); see also paragraph 85 and the remainder of paragraph 89. Note that the Rapporteur elaborated on detention in his statement made to the Human Rights Council on 4 March 2013: "Deprivation of liberty on grounds of mental illness is unjustified... I believe that the severity of the mental illness cannot justify detention nor can it be justified by a motivation to protect the safety of the person or others."

<sup>11</sup> Article 33, National implementation and monitoring, provides:

Article 33 bifurcates the tasks of implementation and monitoring, placing the responsibility for implementation with the government itself, which must designate focal points and consider creating a coordination mechanism, while requiring the establishment of one or more *independent* monitoring mechanisms that comply with the Paris Principles<sup>12</sup> for the functioning of national human rights institutions.<sup>13</sup> Article 33 further provides that civil society shall be involved and participate fully in the monitoring process; read together with Article 4.3, this entails a particular role for persons with disabilities, including children with disabilities, and their representative organizations.<sup>14</sup> Independent mechanisms designated under Article 33 have included existing national human rights institutions, specially created mechanisms, and a civil society organization of persons with disabilities.<sup>15</sup> There can be more than one entity designated as a monitoring mechanism.<sup>16</sup>

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1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

<sup>12</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>, see Annex.

<sup>13</sup> OHCHR Thematic study on the structure and role of national mechanisms for implementation and monitoring of the Convention on the Rights of Persons with Disabilities, U.N. Doc A/HRC/13/29, available at <http://www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx>; paragraphs 15-19.

<sup>14</sup> Article 4.3 provides:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

See also OHCHR Thematic study, paragraphs 19 and 69.

<sup>15</sup> See OHCHR Thematic study, paragraphs 57-61.

<sup>16</sup> U.S. human rights organizations have advocated changing the Civil Rights Commission to a Civil and Human Rights Commission that would comply with the Paris Principles, see <http://www.acslaw.org/files/Powell%20full%20combined.pdf>. If this

In order to function as a monitoring mechanism, NCD would need to increase its capacity both technically and organizationally with respect to human rights standards and their application to all aspects of U.S. law and policy at the federal and state levels.<sup>17</sup> Formally the mandate of NCD would need to be strengthened so that it is recognized as having a formal role to comment from a position of human rights expertise. Strengthening the mandate, as well as designation as an independent monitoring mechanism under Article 33.2, would require an Act of Congress.

It is tempting to suggest that alternatively, NCD could be reconfigured as a government entity with specific expertise on disability and designated as the focal point for implementation and lead agency in a coordinating body. The U.S., unlike many other countries (such as South Africa), lacks a specific government department at Cabinet level tasked with equality and non-discrimination generally or with the rights of persons with disabilities in particular. Such entities contribute to visibility and can lead in the creation of laws, policy and programs reflecting a social and non-discrimination model of disability. NCD has played a leadership role, but as an advisory agency, NCD cannot speak with the authority of the government itself and lacks the power of a government agency to actually engage in implementation. If the U.S. is to make a serious commitment to full implementation of the CRPD, it will need to establish a credible entity within the government, with substantial human rights expertise and substantial expertise in the social model of disability to lead implementation. Consideration should be given to the possibility of bifurcating NCD so that part of its existing structure and role could be incorporated into a new government agency with executive power, while the remainder could be configured as the independent monitoring mechanism.

If NCD does not seek either of the roles available under Article 33 (or if the government does not accept such a proposal), NCD should incorporate CRPD standards into all of its work. This can be done immediately without waiting for ratification; indeed it would help to prepare the U.S. disability community for the opportunities available once ratification is completed. NCD should publicize the jurisprudence of the Committee on the Rights of Persons with Disabilities to inform the public of the continuing evolution of human rights standards,<sup>18</sup> and should publicize related human rights documents like the reports of the Special Rapporteur on Torture related to the rights of persons with disabilities<sup>19</sup> and thematic studies of the Office of the High Commissioner on Human Rights.<sup>20</sup> NCD should also publicize Concluding Observations by other human rights

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were implemented, such a mechanism would be complementary to the role of a mechanism with specific expertise on the rights of persons with disabilities.

<sup>17</sup> See OHCHR Thematic study, paragraphs 62-68.

<sup>18</sup> <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx>.

<sup>19</sup> In addition to the recent report there was one by Manfred Nowak in 2008, U.N. Doc. A/63/175, available at

<http://www.ohchr.org/EN/Issues/Disability/Pages/UNStudiesAndReports.aspx>.

<sup>20</sup> <http://www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx>.

mechanisms of the UN and the Organization of American States that are relevant to persons with disabilities.

If permitted under NCD's mandate, it should, after consultation with persons with disabilities and their representative organizations, submit reports on the human rights of persons with disabilities to mechanisms in force for the United States, such as the Universal Periodic Review, the Committee on Elimination of Racial Discrimination, the Committee against Torture and the Human Rights Committee (monitoring the International Covenant on Civil and Political Rights), and should promote follow-up action with respect to Concluding Observations, also in coordination with persons with disabilities and their representative organizations. If any of these actions conflict in any way with NCD's mandate or its good relationship with the government, NCD should seek to change its mandate to secure its full legal and substantive independence (which would also prepare it to function as the monitoring mechanism if designated at a later time).

**Recommendation:** NCD should urge the President to prepare for ratification by considering how to ensure full and effective implementation on the federal and state levels, in particular to consider which federal entities (existing or to be newly established) would be best suited to lead an implementation process aimed at promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities within the jurisdiction of the United States, and which federal entities (existing or to be newly established) are best suited to function as independent monitoring mechanisms complying with the Paris Principles. NCD should consider its own role and whether to recommend that the President consider designating NCD itself as the independent monitoring mechanism, with suitable adjustments to its mandate and capacities, as well as the possibility that some of NCD's work could become the nucleus of a new federal agency within the Executive Branch tasked with advancing the human rights of persons with disabilities. NCD should furthermore urge the President to ensure, through transparent and open consultation processes, that persons with disabilities, including children with disabilities, and their representative organizations, are fully involved in implementation and monitoring of the CRPD, including in the design, establishment and designation of implementation focal points, coordination mechanisms and independent monitoring mechanisms.

#### b. Monitoring under CRPD Article 16.3

CRPD Article 16.3 provides for independent monitoring of programs and facilities designed to serve persons with disabilities, overlapping with the monitoring required under Article 33. NCD should take an interest in this monitoring as well, which overlaps with obligations the United States would take on if it ratifies the Optional Protocol to the Convention against Torture (OPCAT), as well as the function of the Article 33 monitoring mechanism. The Department of Justice monitors psychiatric institutions and other places of deprivation of liberty under the Civil Rights of Institutionalized Persons Act, and it does an admirable job in many respects, which would be enhanced by ratification and full implementation of the CRPD, and by incorporation of the CRPD

standards into its work. However, as an agency of the Executive Branch it may not satisfy the requirement of independence.

The entity designated under Article 33, whether it be NCD or otherwise, needs to take responsibility for monitoring places where persons with disabilities are confined against their will, as well as other facilities and programs designed to serve persons with disabilities, to prevent any form of violence, exploitation and abuse. Since the CRPD, and arguably the Convention against Torture, prohibit involuntary institutionalization and detention based on disability (including mental health grounds), the monitoring mechanism needs to work for the release of individuals and the dismantling of institution-based services, as well as to ensure that persons with disabilities are treated with all due respect for their human rights and dignity in the context of any disability-related services, including mental health services.

**Recommendation:** NCD should urge the President to ensure that the monitoring mechanism(s) designated under Article 33 is given a specific mandate to monitor facilities and programs designed to serve persons with disabilities with the aim of preventing all forms of exploitation, violence and abuse under Article 16.3. NCD should further urge the President to ensure, through transparent and open consultation processes, that persons with disabilities, including children with disabilities, and their representative organizations are fully involved in the design, establishment, designation and functioning of the independent mechanism(s) that monitor facilities and programs serving persons with disabilities, and to consider designating as independent monitoring mechanisms organizations of persons with disabilities with experience in peer advocacy.

## Annex I: Information about submitting organization

The **Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP)** provides strategic leadership in human rights advocacy, implementation and monitoring relevant to people experiencing madness, mental health problems or trauma. In particular, CHRUSP works for full legal capacity for all, an end to forced drugging, forced electroshock and psychiatric incarceration, and for support that respects individual integrity and free will.

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