

From invisibility to positive legal protection: The drafting of Article 11 of the Convention on the Rights of Persons with Disabilities

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Abstract

Initial drafts of the Convention on the Rights of Persons with Disabilities (CRPD) did not include any significant reference to the obligations of States to protect their citizens with disabilities during armed conflict or other emergency situations; international documents dealing with disability up until that point had not considered persons with disabilities as rights holders during armed conflict either. But early in the negotiations for the CRPD, disabled persons' organizations made it clear that they wanted to see the protections of the Convention extend to times of risk, emergency and armed conflict.

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This study focuses on Article 11 of the CRPD. The negotiating history of Article 11 demonstrates that although there were some disagreements over the scope of the article, support for a clear statement of States' obligations during armed conflict and other emergencies was broad-based and came from all regions.

Keywords: Article 11, *travaux préparatoires*, drafting history, situations of risk, persons with disabilities in armed conflict, disability and humanitarian emergency.

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Introduction

Legal scholars and disability advocates have documented the invisibility of persons with disabilities in international law for much of the twentieth century. When persons with disabilities were thought of for inclusion in international documents in the first decades of the United Nations (UN), it was as subjects of medical intervention, protection or rehabilitation. Disability was seen as a medical problem that needed to be prevented, or fixed, or ameliorated through health care or charity.¹

Only from the 1980s did things begin to change, as the disability rights movement began to gain traction and persons with disabilities created organizations led by themselves to advocate for their rights. Disabled persons' organizations transformed themselves into human rights advocacy groups and played a major role in the drafting of the Convention on the Rights of Persons with Disabilities (CRPD).

This article focuses on the negotiating history of Article 11 of the CRPD. The first section highlights how early UN documents dealing with disability only saw disability as a consequence of armed conflict, without considering whether people with disabilities should be rights holders in their own right during armed conflict. The following sections describe how thinking began to change as disabled persons' organizations advocated for States to accept that people with disabilities are rights holders not just under international human rights law, but also under international humanitarian law (IHL).

Early UN documents concerning persons with disabilities

The World Programme of Action concerning Disabled Persons

Up until the 1980s, UN documents dealing with disability issues mostly took a medical or social welfare perspective, if they mentioned disability at all. The

1 A summary of this history can be found in Theresia Degener and Andrew Begg, "From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations", in Valentina Della Fina, Rachele Cera and Guiseppa Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham, 2017.

Universal Declaration of Human Rights, for example, refers to disability only as an event or a condition, like unemployment and sickness.² A good illustration of this limited perspective can be seen in a report of the Secretary-General entitled *Social Rehabilitation of the Physically Handicapped*, in which the main subject is medical, occupational and physical therapy, and the provision of services such as prosthetic fitting. The focus of the report is on the service providers, and not on the individuals with disabilities.³

This limited perspective began to change with the designation of 1981 as the International Year of Disabled Persons, and the adoption of the *World Programme of Action concerning Disabled Persons* (World Programme).⁴

The World Programme was largely consistent with that era's focus on disability as a medical issue, with most of the document focused on the prevention of disability and the rehabilitation of disabled persons. The document contained a brief reference to persons with disabilities in the context of armed conflict, but only to mention conflict as a cause of disability. It stated that “[w]ars, and the consequences of wars[,] and other forms of violence, destruction, poverty, hunger epidemics, [and] major shifts in population” were all factors that cause disability.⁵ There was no consideration of whether persons who already had disabilities should be protected during armed conflict, or of their status as civilians or non-combatants. But the Programme did contain a small chapter on human rights, which called on UN organizations, governments and other stakeholders to pay due attention to the human rights of disabled persons.⁶ This opened the door for a broader perspective to emerge.

The Standard Rules

The *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* (Standard Rules) were adopted by the UN General Assembly in December 1993.⁷ The Rules were significant in that much of the language took a rights-based approach, and specific rules addressed individual economic, social and cultural rights such as equal access to education and health care. A significant criticism, however, was that civil and political rights were absent, and the document overall exhibited the same failings as earlier documents by not fully asserting that persons with disabilities were full citizens and rights holders.

The Standard Rules were also silent about the situation of persons with disabilities in armed conflict and humanitarian emergencies – but while the Rules might have been silent on that issue, the Special Rapporteur mandated to monitor their implementation was not. He attempted to rectify the omission,

2 UNGA Res. A/RES/3/217A, 10 December 1948, Art. 25.

3 *Report of the Secretary General to the Social Commission*, UN Doc. E/CN.5/197, 22 March 1950.

4 UNGA Res. A/RES/37/52, 3 December 1982.

5 *World Programme of Action Concerning Disabled Persons*, UN Doc. A/37/351/Add.1, 15 September 1982, Annex, recommendation 1, para. 40.

6 *Ibid.*, paras 162–169.

7 UNGA Res. A/RES/48/96, 20 December 1993.

reporting in 1999 that he had identified several shortcomings of the Standard Rules. Among those, he noted that “[d]isabled persons in refugee or emergency situations are ... areas that have not been dealt with”.⁸ In 2002 he proposed a supplement to the Standard Rules to address weaknesses and omissions in the text. The proposed supplement read:

35. It has often been recognized that the needs of persons with disabilities are forgotten or neglected in general relief programmes.

36. In cooperation with concerned United Nations agencies such as [the Office of the UN High Commissioner for Refugees] and the United Nations Development Programme ..., States should develop policies and guidelines for the inclusion of support measures with regard to persons with disabilities in emergency situations. Their emergency services should be adequately equipped and prepared to provide medical treatment and support to persons with disabilities and their families.

37. Special attention should be paid to the fact that persons with disabilities are particularly vulnerable to abuse in emergency situations.⁹

The proposed supplement, however, was met with a “relatively low degree of interest” by States,¹⁰ and no action was ever taken on it. By that stage focus had shifted to calls for a legally binding human rights treaty, and those efforts eclipsed the Special Rapporteur’s proposal.

Pre-existing international human rights instruments

Before moving on to look at the negotiating history of the CRPD, it is worth looking at the extent to which the existing body of human rights law addressed situations of armed conflict or humanitarian emergency. Those treaties were all templates for the new Convention.

The International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights (ICCPR) recognizes that situations of “public emergency” will exist, and explicitly sets out provisions allowing a State to derogate from some of the provisions of the Covenant. Article 4(1) states:

8 *Final Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on His Second Mission, 1997–2000*, UN Doc. E/CN.5/2000/3, 17 December 1999, Annex, para. 119.

9 *Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on His Third Mandate, 2000–2002*, UN Doc. E/CN.5/2002/4, 9 January 2002, Annex, paras 35–37.

10 *Views of Governments on the Proposals Contained in the Report of the Special Rapporteur on Disability*, UN Doc. E/CN.5/2004/4, 26 November 2003, para. 10.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹¹

What is curious about this provision is that the grounds of prohibited discrimination in Article 4 of the ICCPR are more limited than the general guarantee of non-discrimination in Article 2, in which States undertake to respect the rights in the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹² While Article 2 does not explicitly include disability, the open-ended nature of its phrasing, including “without distinction of any kind” and the phrase “or other status”, would (or should) prohibit discrimination on the basis of disability. The exclusive nature of the phrasing in Article 4 implies by contrast that some derogations could be made during public emergencies that would otherwise amount to discrimination based on disability.

The UN Human Rights Committee has adopted a General Comment putting clear limits on States’ abilities to derogate human rights protections under Article 4, including that the derogations must be strictly required by the situation and must be as limited as possible.¹³ Nonetheless, not only does the ICCPR fail to offer any positive obligation to protect persons with disabilities during public emergencies, it also provides a potential opening through which their protection could in fact be weakened.

The Convention on the Elimination of All Forms of Discrimination against Women

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly includes a list of emergency situations, but only in its preamble, and only to acknowledge that such situations undermine human rights. The preamble outlines that States adopted the CEDAW

[e]mphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

and affirming that

11 International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 4(1).

12 *Ibid.*, Art. 2(1).

13 Human Rights Committee, General Comment No. 29, “States of Emergency (Article 4)”, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women.¹⁴

The CEDAW did not, however, go on to identify any binding obligations in the operative provisions relevant to protecting women from discrimination during any of the emergency situations listed in the preamble.

The Convention on the Rights of the Child

The 1989 Convention on the Rights of the Child (CRC) was the first core human rights treaty prior to the CRPD to include specific protections that apply in situations of armed conflict. Article 38 of the CRC provides that:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.¹⁵

Article 38 was seen by persons with disabilities as directly relevant to their own aspirations, and proved to be the template from which discussions on the CRPD would begin.

The Ad Hoc Committee

In the latter half of the 1990s, disabled persons' organizations became more organized and focused on lobbying for a convention on their rights, and they sought references in UN resolutions for the need for one, and delegations willing

14 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (entered into force 3 September 1981) (CEDAW), Preamble.

15 Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990) (CRC), Art. 38.

to advance the cause. In 2001 they found success with Mexico, whose delegation at the UN drafted a resolution creating an Ad Hoc Committee of the General Assembly mandated to look at the issue, and lobbied hard for its adoption.¹⁶

The first session of the Ad Hoc Committee

The first meeting of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee) in August 2002 was marked by a low turnout and a general lack of preparedness. In addition, some delegations had instructions to slow things down by questioning whether a convention was needed, and they made calls for further study. Few delegations had sent experts from their capitals, and most were represented only by their New York-based diplomats. It is fair to say that most delegates had a limited understanding of the experiences of persons with disabilities, and this led to an underwhelming debate.

The UN Secretariat was also unprepared. The Office of the UN High Commissioner for Human Rights had commissioned a thorough study, but it was not yet published, and the Office was only able to distribute a brief executive summary.¹⁷ The Division for Social Policy and Development distributed its own background paper, but it was short and lacked any real analysis. This was most evident in its reference to armed conflict: the paper simply noted that “[d]isability often arises from war and inhuman treatment”.¹⁸ UNICEF made a similar statement at an informal briefing, again noting armed conflict only as a cause of disability.¹⁹ This simplistic view of war as a cause of disability, without any analysis of persons with disabilities as rights holders and subjects of IHL, had not changed since the adoption of the World Programme two decades earlier.

The issue of persons with disabilities in armed conflict was raised by a few delegations during the debate, but only to make essentially the same point. The delegates of Sierra Leone and Croatia both spoke out early in the meeting to urge that a convention be negotiated, noting its relevance to the significant number of their citizens disabled by recent conflicts in their countries.²⁰ Only Nigeria

16 UNGA Res. A/RES/56/168, 19 December 2001.

17 *Note by the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2002/18/Add.1, 12 February 2002.

18 UN Secretariat, Division for Social Policy and Development, *Human Rights of Persons with Disabilities*, background paper prepared for the Informal Consultative Meetings on International Norms and Standards for Persons with Disabilities, 9 February 2001, distributed as an informal paper during the First Session of the Ad Hoc Committee, 10 July 2002 (on file with author).

19 UNICEF, “Statement on Childhood Disability”, presented by Gulbadan Habibi at the Informal Briefing on the Work of the UN Bodies and Organizations at the Ad Hoc Committee on an International Convention on the Rights of Persons with Disabilities, 6 August 2002 (on file with author).

20 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 1 No. 1, 29 July 2002, and Vol. 1 No. 3, 31 July 2002. The daily summaries were an informal record produced by a coalition of disabled persons’ organizations throughout the negotiations and distributed widely to help interested parties to follow the discussions. While they do not purport to be an accurate verbatim record of the debate, they offer a rich account of it. Most are available in the negotiation archives, accessible at: www.un.org/esa/socdev/enable/rights/adhoccom.htm (all internet references were accessed in September 2022). Where they are not available on that website, they are on file with the author.

suggested a broader perspective, using its statement to draw attention to the fact that the broader challenges facing persons with disabilities were exacerbated during armed conflicts and natural disasters.²¹

While a lack of preparation was the mark of most delegations, Mexico, by contrast, came with a large delegation of experts and submitted as a working paper the text of a draft convention in a bid to kick-start discussions.²² The Mexican draft was a very solid document – it is broadly consistent in terms of scope and style to the final Convention – but in the context of a negotiation where there was not yet a commonality of purpose and direction, it was not warmly received. The fact that it had been pulled together by invited experts in a meeting that was not open to all meant that it suffered from a legitimacy deficit, and the draft was largely ignored by delegates who were not yet ready to begin negotiating. Nonetheless, it set an important template as the first text on the table.

In terms of the situation of persons with disabilities in humanitarian emergencies, the Mexican draft suffered from the same flaw as all documents that preceded it. The only reference to the situation of persons with disabilities in situations of armed conflict was in the preamble. As with previous references, armed conflict was mentioned merely as part of a list of conditions that contributed to the cause of disability, along with accidents, violence, extreme poverty and others.²³

The second session of the Ad Hoc Committee

Nearly a year later, in June 2003, the debate at the second session of the Ad Hoc Committee was much more focused. Delegates largely accepted that a legally binding treaty was needed, and the discussion was focused on the type of instrument that was most suitable. The meeting was also significantly better attended, not only with more States present, but with many more being represented by capital-based experts. Many of those experts were persons with disabilities, and the number of disabled persons' organizations represented also increased.

This is important not just because it signified that governments were starting to take the process seriously, but it also meant that the debate became more substantive and less political. This aspect was tested early in the second meeting, in a debate over which elements should be included in a future draft. The New York-based Palestinian delegate attributed the large number of newly acquired disabilities in Palestine to indiscriminate firing by Israeli armed forces. The delegate argued that the Convention must address the suffering of persons

21 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 1, No. 7, 6 August 2002.

22 *Report of the Meeting of Experts on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities (Mexico City, 11–14 June 2002)*, UN Doc. A/57/212, 15 July 2002.

23 *Ibid.*, preambular para. 1.

who live under especially difficult circumstances including armed conflict and foreign occupation, noting that these are both major causes of disability.²⁴

In any other UN meeting, this would have triggered a familiar reaction, with endorsements from other Arab States criticizing Israel and repeating the call for inclusion of a reference to foreign occupation. These would be followed by statements by Israel and the United States (and sometimes others) rejecting a reference to one single element of IHL on the basis that it was unbalanced, and objecting to the singling out of one State for criticism. What would not feature in such an exchange would be any debate on the substance of the elements of IHL relevant to the issue at hand, and the document under discussion would risk becoming politicized and subject to a vote, undermining its credibility.

The advantage of having delegations dominated by capital-based experts, many of whom came from government agencies dealing with disabilities and not foreign ministries, is that few of those delegates had that playbook. Israel's statement the next day focused mainly on the country's experience with its domestic measures to protect persons with disabilities, and the positive impact that an international treaty could have at the domestic level. The delegate concluded by noting the number of citizens killed or disabled in terrorist attacks by Palestinian groups, but pleaded for the meeting to remain focused on the promotion of the rights and dignity of persons with disabilities rather than political debates.²⁵

In other circumstances this exchange of views could have thrown sand into the gears and the meeting would have wasted a lot of time with back-and-forth criticisms. But disabled persons' organizations had made it clear that they had limited patience for New York-based delegates bringing extraneous political fights into the negotiations, and that the focus of discussions should be on their own lived experience.²⁶ Both the Palestinian and Israeli delegates appeared to read the room and get the message, and no other delegation jumped into the debate to raise the issue again at that meeting.

By contrast, one of a series of outcome documents submitted from regional meetings that had been held in advance was the Beirut Declaration. It was adopted by the Arab Regional Conference on Norms and Standards related to Development and the Rights of Persons with Disabilities in May 2003, and it did not pull any punches. Its first recommendation stated:

Those present at the Conference condemned the Israeli occupation and all forms of oppression and armed conflict in the occupied Arab territories, on

24 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 2, No. 3, 18 June 2003.

25 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 2, No. 4, 19 June 2003.

26 This message was conveyed not just by disabled persons' organizations but also by persons with disabilities on national delegations. A good discussion of the emergence of an international advocacy network of disabled persons' organizations with the legitimacy and authority to speak for themselves can be found in Janet Lord, *International Disability Rights: Challenging Traditional Theory in the Emergence of a New Transnational Advocacy Network*, paper presented to the Annual Meeting of the International Studies Association, Portland, OR, 26 February–1 March 2003 (on file with author).

the grounds that they obstruct the goals of sustainable development and increase the number of disabled persons.²⁷

This document did not have any impact on the meeting, however, because it was completely overlooked. The detailed report commissioned by the Office of the UN High Commissioner for Human Rights, which was more than 300 pages long, had finally been published, and its in-depth analysis became the focus of attention. There was also a growing number of regional and national documents being submitted – so many, in fact, that the Secretariat did not attempt to print them, and they were instead published on a dedicated website and distributed in the room only on CD-ROM. This electronic distribution was an innovation that was perhaps a bit ahead of its time; June 2003 was the era of flip phones and 2 G telecoms technology, wireless internet had not yet been installed in UN meeting rooms, and mobile phone reception in the basement where negotiations took place was not reliable. UN negotiations were on the cusp of becoming digital, but at that point documents not distributed in the room on paper failed to gain any attention.

A review of the various papers that had been submitted before the meeting does, however, show a noticeable trend beginning to emerge for a recognition that persons with disabilities faced additional risks during armed conflicts and humanitarian emergencies. This included, for example, a regional meeting of African national human rights institutions (NHRIs) in June 2003, which proposed that “[t]he Convention should recognize the vulnerability of persons with disabilities in situations of crisis such as conflict and natural disasters”.²⁸ The European Union (EU) submitted a conference room paper with elements for the Convention, noting that the preamble should “[e]xpress concern that the situation of persons with disabilities is often exacerbated in situations of poverty and armed conflict”.²⁹ The Economic Commission for Latin America and the Caribbean stressed that the Convention should address the situations of persons with disabilities as members of other groups, including civilians in armed conflicts or humanitarian emergencies.³⁰ Although not submitting a proposal *per se*, the European Disability Forum submitted a statement that included a criticism of humanitarian organizations for devoting very little time and resources to the subject of disability.³¹

27 *Beirut Declaration and Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/CRP/12, 29 May 2003, para. 4.

28 *Regional Workshop on Promoting the Rights of Persons with Disabilities: Towards a New UN Convention – Final Declaration*, Kampala, 5–6 June 2003, para. 30 (on file with author).

29 *European Union Elements for an International Convention*, UN Doc. A/AC.265/2003/CRP.13/Add.2, July 2003.

30 *Views Submitted by Governments, Intergovernmental Organizations and United Nations Bodies Concerning a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/4, 6 May 2003, para. 55.

31 *European Disability Forum, The EDF Contribution to the Second Ad Hoc Committee to consider proposals for a United Nations Convention to Protect and Promote the Rights of Persons with Disabilities*, Brussels, May 2003 (on file with author).

The Working Group and the first draft

The Working Group was created by the Ad Hoc Committee at the end of its second meeting as a mechanism to pull together a first draft to be the basis for negotiations. Although Mexico had already submitted a draft at the first meeting and Venezuela submitted its own at the second meeting, these were not seen as viable starting points because they had not emerged from open processes. Disabled persons' organizations had repeated their mantra "Nothing about us without us" from early in the process, and it was clear that a negotiating text needed to emerge from a process that included them. So the Working Group was formed, with twenty-seven member States, twelve disabled persons' organizations and one NHRI.³²

When the Working Group met in January 2004, it had before it an impressive amount of documentation. In addition to the Mexican and Venezuelan drafts, additional drafts had also been submitted by China, the EU and India. The chair of the Ad Hoc Committee submitted his own draft, and a regional meeting of NHRIs in Bangkok had also submitted one. On top of that, there were many position papers submitted by disabled persons' organizations and national delegations.³³

The preambular section

Of the various drafts that the Working Group had on the table, the Indian draft and the chair's draft did not contain any mention of persons with disabilities in situations of risk or armed conflict at all. Several other drafts included mention of armed conflict, but only in terms of it as a cause of disability. The preamble of the Venezuelan draft, for example, expressed concern that "extreme poverty, marginalisation, social exclusion, war and underdevelopment" contributed to disability.³⁴ An almost identical preambular paragraph was included in the Bangkok draft submitted by Asia-Pacific NHRIs.³⁵ Both of these paragraphs were near-duplicates of the earlier Mexican text, with only minor modifications. The Chinese draft took things a step further by bringing the idea into the operative section as part of an obligation on States to "promote [the] overall improvement of [the] status of persons with disabilities". The article required States to

32 *Report of the Working Group to the Ad Hoc Committee*, UN Doc. A/AC.265/2004/WG.1, 27 January 2004, para. 1.

33 These proposals were not issued as official UN documents, but were listed in paragraph 7 of the report of the Working Group (*ibid.*), issued in an informal compilation at the meeting in hard copy and on CD-ROM, and made available on the UN Enable website. Some, but not all, are available in the archives of the negotiations (see above note 20). Where they are not available, they are on file with the author.

34 *Letter Dated 18 June 2003 from the Deputy Permanent Representative of Venezuela to the United Nations Addressed to the Secretary of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/WP.1, 18 June 2003, Annex, preambular para. (n).

35 *Bangkok Draft: Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities*, Bangkok, 14–17 October 2003, preambular para. (i), available at: www.un.org/esa/socdev/enable/rights/bangkokdraft.htm.

“eliminate causes leading to or aggravating disabilities”, including armed conflict in a long list of causes.³⁶

All those drafts still only viewed armed conflict as a cause of disability. None of them met the expectations of the disabled persons’ organizations on the Working Group, who made it clear that they were not interested in discussing causes of disability. This point was made during a larger debate over whether the Convention should address the prevention of disability. Many persons with disabilities found the idea of prevention inherently problematic. For some, the promotion of health, well-being and the prevention of disability were all well and good, but they were relevant to the broader population. In their view the Convention needed to focus on protecting the rights of people who already had disabilities.³⁷

Consequently, the various proposed preambular paragraphs that referenced causes of disability were not taken into the Working Group draft. The idea of prevention was relegated to the draft article on the right to health, where it was restricted to the prevention of secondary disabilities.

The Working Group had received, on the other hand, one proposal that took a broader view, and that was in the draft submitted by the EU. It contained a preambular paragraph that recognized armed conflict as a situation where people with disabilities were at particular risk. It expressed concern “that barriers to the full and equal enjoyment of human rights by persons with disabilities are exacerbated in situations of poverty and armed conflict”.³⁸

That idea found general support, and it was included in the Working Group draft, albeit in a different formulation.³⁹ The preambular paragraph included by Working Group in its draft noted that States were “[c]oncerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities”.⁴⁰

The operative section

When the discussions began on specific rights for the operative section of the Convention, a proposal emerged out of the debates on the right to life and the

36 *Convention on Rights of Persons with Disabilities: A Proposed Draft Text by China*, Art. 13(5), available at: www.un.org/esa/socdev/enable/rights/wgcontrib-china.htm.

37 A New Zealand position paper summed up the point well. It read: “Social and economic development activities that help prevent impairment are targeted at, and assist, whole populations. New Zealand believes, therefore, that such activities are more appropriately addressed within the context of more general instruments. A convention on the rights of persons with disabilities should focus on its unique role to promote and protect the rights of those who require special consideration in order to enjoy their rights and freedoms.” *New Zealand’s View on a Convention on the Rights of Disabled People: A Proposed Draft Text by New Zealand*, 28 November 2003, para. 12, available at: www.un.org/esa/socdev/enable/rights/wgcontrib-NewZealand.htm.

38 *EU Proposal for the Text of an International Convention on the Full and Equal Enjoyment of all Human Rights and Fundamental Freedoms by Persons with Disabilities*, Preamble, available at: www.un.org/esa/socdev/enable/rights/wgcontrib-EU.htm.

39 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 7, 13 January 2004.

40 *Report of the Working Group to the Ad Hoc Committee*, UN Doc. A/AC.265/2004/WG.1, 27 January 2004, Annex, preambular para. (p).

right to be free from torture that there should be a statement on the “vulnerabilities” of persons with disabilities.⁴¹ Sweden disagreed that people with disabilities should be considered vulnerable, and called for a more positive statement instead. The World Federation of the Deaf agreed, adding that the proposal “would add stigma that we don’t need”. Germany suggested instead using the words “at risk”.

The debate on this point ultimately became muddled, however. Some disabled persons’ organizations regarded forced medical intervention as tantamount to torture, with the health sector being the most likely source of abuse. The debate became focused on forced institutionalization, and it was unclear whether the issue should be dealt with as part of the right to be free from torture, or the right to liberty and security of the person, or in the right to health itself.⁴²

These inchoate ideas emerged a little more clearly during the debates on two other rights, where the concept of “risk” would emerge again. First, in discussions on the right to privacy, Germany suggested adding in an explicit reference to sexual violence, because women with disabilities were at particularly high risk.⁴³ This proposal arose from a discussion of privacy in group homes and institutions. It was noted, however, that the CRC had a separate article dedicated to protecting children from sexual exploitation and abuse.⁴⁴ Second, during the debate on children with disabilities, the Landmine Survivors Network asserted that the article should acknowledge that children with disabilities are disproportionately vulnerable to physical, sexual and emotional abuse. In addition, in countries lacking a formal government or experiencing armed conflict, children with disabilities are particularly vulnerable, and this must be recognized.⁴⁵

From these proposals it is possible to see that delegations were describing an intersectional risk. The fact of disability *per se* can raise the risk of violence and abuse, and in addition, particular situations can disproportionately raise the risk for people with disabilities. It is worth noting that in this respect no previous UN human rights treaty had included an article on general situations of risk, so in this respect delegates were proposing to push the human rights treaty language beyond where it had previously gone.

Later in the debate, the Landmine Survivors Network was the first to suggest a specific article on the situation of persons with disabilities in armed conflict. The delegate noted that persons with disabilities are typically the last to be evacuated in conflict situations, and when they are evacuated their rights are seldom addressed in centres for refugees and internally displaced persons. The delegate drew attention to Article 38 of the CRC, and made a proposal that was essentially a direct copy of paragraphs 1 and 4 of that Article, replacing the reference to children with a reference to disability:⁴⁶

41 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 2, 6 January 2004.

42 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 3, 7 January 2004.

43 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 4, 8 January 2004.

44 CRC, above note 15, Art. 34.

45 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 5, 9 January 2004.

46 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 7, 13 January 2004, and Vol. 3, No. 9, 15 January 2004.

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts.

2. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure that the rights of persons with disabilities who are affected by an armed conflict are guaranteed.⁴⁷

It is unlikely that this wording would have been accepted unchanged because the obligations on States in the second paragraph were stricter than in their previous iteration in the CRC. The Landmine Survivors Network proposal changed the obligation from “ensure protection and care” to “ensure ... rights ... are guaranteed”. It is reasonable to assume that the reason for this change is that “protection and care” has paternalistic connotations of the old medical model of disability, and refocusing the wording on “rights” was consistent with the aims of the negotiations. But it is doubtful that States would have accepted such a strict obligation to “guarantee” the rights of persons with disabilities during an armed conflict when they had not done so previously for other groups.

In the end, however, the Working Group had no time to look at adding additional articles, much less consider specific drafting, and the proposal was not debated in detail. While some supported the idea of a separate article, some suggested instead that the right to life included the right to survive. This assertion was not accepted by others, and Ireland and Canada strongly objected to extending the article, arguing that it should be kept short and succinct. But with Thailand recalling that persons with disabilities had been included in the Holocaust, it was clear that many delegations viewed the two issues of the protection of life and protection during armed conflict as being very closely bound together.⁴⁸

The debate concluded with the issue being included as a footnote to the article on the right to life. The footnote read:

In the context of the discussion on this draft Article, some members of the Working Group suggested that the Convention should contain a separate draft article on the protection of the rights of persons with disabilities in armed conflict, similar to the approach taken in Article 38(4) of the Convention on the Rights of the Child. It was also suggested that such an article could deal more broadly with the protection of the rights of groups at particular risk.⁴⁹

The first reading

The Ad Hoc Committee met for its third session a few months later in May 2004 for the first reading of the Working Group draft. It was the first opportunity for all

47 Intervention by Adnan Al Aboudi, Landmine Survivors Network, 13 January 2004. Written copy with proposed language provided to the Working Group coordinator (on file with author).

48 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 9, 15 January 2004.

49 *Report of the Working Group to the Ad Hoc Committee*, above note 40, Art. 8.

States to comment on the text, and interest in the process (and the number of delegates attending) continued to increase.

When discussion began on the article on the right to life, it was clear that there was a lot of support for including a reference to the need for States to protect people with disabilities during armed conflict – but there were divergent views on its placement. Jordan’s proposal was the most succinct, adding to the existing text a reference to IHL so that the article would read:

States Parties reaffirm the inherent right to life of all persons with disabilities, and shall take all necessary measures to ensure its effective enjoyment by them[, in particular, in situations of armed conflicts and natural disasters, in accordance with international law, human rights, refugee and international humanitarian law].⁵⁰

While this proposal was succinct, most voices in the room did not want to alter the wording of the right to life language, preferring to keep it closely matched to the corresponding provision in the ICCPR.

Yemen suggested adding a second paragraph instead, with a proposal that expanded Article 38 of the CRC to explicitly cover persons with disabilities who are refugees or are internally displaced:

States Parties shall, in accordance to their obligations in the context of international law and the Universal Declaration of [H]uman [R]ights and international treaties and conventions for the protection of civilians from armed conflicts, take all necessary measures to guarantee the protection and care for persons with disabilities that are affected by armed conflicts or are refugees or are internally displaced persons.⁵¹

Uganda proposed an alternative variation:

In accordance with their obligations under international humanitarian law to protect civilian populations in armed conflicts and risk situations, States Parties shall take all feasible measures to ensure the protection and care of all persons with disabilities who are affected by armed conflicts.⁵²

It is worth noting that these two proposals contained different standards of obligation on States. Yemen’s proposal obliged States to “take all necessary measures”, whereas Uganda’s used “all feasible measures”. The latter is the wording used in Article 38 of the CRC. Paragraph 2 of Article 38 was itself largely based on Article 77 of Additional Protocol I to the Geneva Conventions

50 *Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2004/5, 9 June 2004, Annex II, Art. 8. The square brackets indicate the addition proposed by Jordan.

51 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 4, No. 2, 25 May 2004.

52 *Ibid.*

(AP I), which also obliges States to take “all feasible measures” to prevent the participation of children in armed conflict.⁵³

The International Committee of the Red Cross (ICRC) Commentary on Article 77 notes that the original draft of AP I read “take all necessary measures”, but this encountered opposition because governments did not wish to adopt unconditional obligations. It was changed during the negotiations to the “weaker” formulation.⁵⁴ It is worth noting, however, that the assertion that one formulation is weaker than the other is not necessarily borne out by the corresponding commentary on the meaning of “feasible measures” with respect to Articles 57 and 58 of AP I, which also relate to the protection of civilians.⁵⁵ Delegates negotiating those articles appear to have anticipated quite a high standard of obligation on parties to an armed conflict.⁵⁶ These nuances, however, were not debated during the first reading of the disabilities convention, so it is not possible to determine how delegations viewed the difference, or if they were aware of the ICRC Commentaries.

Responding to the proposed additions to the article on the right to life, several delegations objected to any addition at all, preferring to keep the language focused and succinct. The EU stated that it had agreed to the text “after a very difficult discussion” and that it did not support any addition. Columbia, Norway and South Africa agreed.⁵⁷

Going in another direction, Costa Rica repeated earlier calls in the Working Group to separate out the idea of situations of risk into an entirely new article addressing situations of armed conflict, natural disasters and extreme poverty.⁵⁸ This position was supported by Japan, Lebanon, Kenya, Save the Children International and the Landmine Survivors Network, which suggested expanding it to also include persons with disabilities in rural or remote locations, or in scattered populations.

When the Ad Hoc Committee returned to the debate the following day, the Arab Group had clearly caucused after the previous meeting, and Yemen returned to its own proposal to add a final phrase on behalf of the Arab Group, proposing that the phrase “and under foreign occupation” be appended to the end of its earlier proposal. This is the version that was entered into the report of the meeting.⁵⁹

Later in the meeting, Arab Group delegations also proposed adding a reference to foreign occupation to the preambular paragraph dealing with armed conflict, so at the end of the first reading of the text, two references to foreign occupation existed in the text in square brackets.⁶⁰

53 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 77.

54 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 900.

55 AP I, Arts 57, 58.

56 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 54, pp. 681, 692.

57 Ad Hoc Committee, above note 51.

58 *Ibid.*

59 *Report of the Third Session of the Ad Hoc Committee*, above note 50.

60 *Ibid.*, preambular para. (p).

The second reading

The first reading had been completed in two weeks because there were no substantive negotiations – it was simply an opportunity for delegations to make proposals. The second reading proceeded much more slowly, spread out over three meetings in August 2004 and January and August 2005. The task of the Ad Hoc Committee during that reading was to refine and reduce the large numbers of overlapping proposals made during the first reading.

The Ad Hoc Committee reached the article on the right to life at its meeting in January 2005. Views in favour of adding a reference to persons with disabilities in situations of risk were still more or less evenly split. Some delegations supported a new article, some thought situations of risk or armed conflict belonged in a second paragraph in the article on the right to life, and some thought the mention of armed conflict in the preamble was enough, wanting nothing further.

Ambassador Don MacKay of New Zealand, acting as the coordinator of the negotiations, took the initiative to propose a new article as a compromise, splitting out situations of risk and leaving the article on the right to life short and focused. In his report he noted that the new article “would cover the broader obligation of States parties to preserve the safety of persons with disabilities”. He proposed the following wording:

States parties recognize that in situations of risk to the general population persons with disabilities are especially vulnerable and shall take all feasible measures for their protection.⁶¹

The report of the meeting also noted that the phrase “all feasible measures” came from Article 38(4) of the CRC.⁶²

The coordinator’s draft text made no attempt to include any specific situations of risk, and it left the proposed article very general in nature. The report, however, noted that “[t]here was a divergence of views on whether the wording of the draft article ... should be further elaborated to include specific instances of situations of risk”.⁶³

During the debate, several delegations had proposed the inclusion of specific situations. These included both natural and man-made disasters, including foreign occupation and conflict (Yemen, supported by Libya, Palestine, Iran and Bahrain); exile, foreign occupation and conflict (Syria); times of natural and man-made risk (India, with a similar formulation proposed by Thailand); and all man-made disasters (South Africa). Jamaica illustrated the need to include the issue of disability by describing how its national policy on early warning for natural disasters disadvantaged people with disabilities because communications

61 *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Fifth session*, UN Doc. A/AC.265/2005/2, 23 February 2005, Annex II, para. 12.

62 *Ibid.*, para. 13.

63 *Ibid.*, para. 14.

were not accessible.⁶⁴ Whether or not any or all of these ideas should be included was left for further discussion at a later meeting.

The third reading

The operative section

In between the sixth and seventh sessions of the Ad Hoc Committee, the New Zealand ambassador, now chair of the Committee, prepared a new working text based on the debates in the Committee up to that point, drawing out the broad areas of agreement and highlighting the key issues that remained. This chair's text became the basis of work when the Committee met for its seventh session in January 2006.

The chair's text was accompanied by a covering letter, in which the chair provided a commentary to explain the drafting that had been used. The draft included a separate article on situations of risk, as he had proposed during the second reading (now Article 11 following a re-ordering of the text). Introducing the article, the chair wrote:

You will recall the discussion relating to the need for the protection of persons with disabilities in situations of risk to the general population. I hope that the language that I proposed at the fifth session ... drawing on article 38(4) of the Convention on the Rights of the Child, which is replicated in the new text, can quite quickly provide a basis for consensus.⁶⁵

The new Article 11 was included entirely in square brackets, indicating that its inclusion was not yet agreed.

The International Disability Caucus issued a position paper prior to the meeting indicating that while it accepted the new article, the text needed two amendments. First, it proposed replacing the word "vulnerable" with "neglected", objecting to the negative connotations of the former. During the debate, the Caucus noted that the use of the word "vulnerable" may have been appropriate in Article 38(4) of the CRC with respect to children, but that it was not appropriate with respect to adults with disabilities.⁶⁶ The written explanation accompanying the amendment noted that the purpose of the article was to

remind States Parties, that in natural disasters, wars, armed conflicts and other situations of risk, persons with disabilities are often forgotten and left behind. ...

64 Summary notes of the discussion prepared by the Secretariat for the chair, 24 January 2005 (on file with author).

65 *Letter Dated 7 October 2005 from the Chairman to All Members of the Committee*, UN Doc. A/AC.265/2006/1, 14 October 2005, para. 51.

66 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 8, No. 2, 17 January 2006.

The word “vulnerable” does not really reflect the situation of “being forgotten or left behind”. The word “neglected” is, unfortunately, much closer to reality.⁶⁷

To take this perspective into account, the chair proposed changing the language “persons with disabilities are especially vulnerable” to “persons with disabilities are a group in especially vulnerable circumstances”. This would indicate that vulnerability was inherent to the situation, rather than to the members of the group. He noted that this nuance reflected an underlying theme of the Convention, and asked delegates to reflect further on it.⁶⁸

The Caucus’s second proposed amendment was to replace the phrase “shall take all feasible measures for their protection” with “shall take all feasible measures for the protection of their human rights, according to international law”. This proposal took the obligation in the article away from a somewhat vague and general obligation to “protect” persons with disabilities, which was based on the language of the CRC, and towards a more specific obligation to protect their rights. The language used was similar to the earlier proposal from the Landmine Survivors Network in the Working Group.

The written explanation made it clear that the Caucus was still concerned with possible paternalistic interpretations of disability, and it wanted to ensure that the text was focused on legal rights. The Caucus argued that “[r]eference to international laws, such as the Geneva Conventions, is necessary” to make it clear that protection from disability is not the issue.⁶⁹ Speaking to this point in the debate, the Caucus argued that in situations of risk, all people were vulnerable, and people with disabilities are often in no greater position of vulnerability than anyone else. What the text needed to say is that IHL protects persons with disabilities on an equal basis to others.⁷⁰

The points made by States in the debate were somewhat simpler. Palestine restated its wish to include specific situations of risk, including armed conflict and foreign occupation, arguing that a general reference to situations of risk was not clear.⁷¹ This position was endorsed by Yemen, Syria, Libya and Qatar. Other States, including New Zealand, Australia, Japan, the United States, Israel, Russia and El Salvador, argued that keeping the article general, without specifying any particular situations, would give it broader and more general applicability.⁷² El

67 International Disability Caucus, *Chairman’s Text as Amended by the International Disability Caucus*, 9 January 2006, Art. 11, available at: www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idccchairamend1.doc.

68 *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Seventh Session*, UN Doc. A/AC.265/2006/2, 13 February 2006, Annex II, Art. 11.

69 International Disability Caucus, above note 67.

70 Ad Hoc Committee, above note 66.

71 On this, Palestine may well have had a good point. No other UN human rights treaty had included the term “situations of risk” previously, and its inclusion in the draft had emerged from the debates of the lived experience of persons with disabilities. It is reasonable to argue, therefore, that providing specific examples would indeed help to clarify a new phrase that had not up until that point appeared in international human rights law.

72 Ad Hoc Committee, above note 66.

Salvador argued that if there were to be a list, it would feel obliged to add its own priorities, such as persons with disabilities facing HIV/AIDS.

Qatar's intervention was perhaps a bit more helpful, and went beyond the simplistic "list/no list" debate. Like the International Disability Caucus, Qatar suggested adding a specific reference to the Geneva Conventions. Iran also nudged the debate in a helpful direction by suggesting that the Ad Hoc Committee should consider the preambular paragraph and Article 11 together.

Canada, for its part, noted that there were no comparable provisions in other human rights treaties, and on that basis the text should contain language indicating that the obligations on States were to protect persons with disabilities on an equal basis to others. On that point it agreed with the International Disability Caucus. But the chair pointed out that this proposal was complicated because persons with disabilities may in fact have additional needs in emergency situations that would not be a factor for people without disabilities. Following this note of caution, Canada's proposal was not taken any further.

The final report of the meeting concluded with the article being retained in the working text but without square brackets, indicating that its inclusion was generally accepted, but with the inclusion in square brackets of a placeholder for a list of specific situations of risk. At the end of the third reading, Article 11 read:

States Parties recognize that in situations of risk to the general population[, including situations of ...] persons with disabilities are a group in especially vulnerable circumstances and shall take all feasible measures for their protection.⁷³

The preambular section

The preamble had been largely skipped over during the second reading, and the Ad Hoc Committee only turned to it towards the end of the third reading. With respect to the paragraph referencing armed conflict, the chair's text under discussion was the same language that had been used in the Working Group draft, and it had remained in the working text unchanged, without the proposed addition of a reference to foreign occupation having been added.

The debate over the paragraph trod a familiar path. Bosnia got in first with a written proposal that was submitted prior to the meeting, adding a reference to obligations under IHL. The proposed paragraph read:

Concerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities, [NEW: and reaffirming that in such situations parties to armed conflict must abide by their obligations under international humanitarian law,]⁷⁴

This language was destined never to be accepted, because by referencing specific legal obligations it was language that belonged in an operative article and not the preamble.

⁷³ *Report of the Ad Hoc Committee*, above note 68.

⁷⁴ "Contribution by Governments: Bosnia and Herzegovina", available at: www.un.org/esa/socdev/enable/rights/ahc7bh.htm.

But it was consistent with Qatar's call for a reference to the Geneva Conventions to be included in Article 11, and helped to nudge the idea along that the preambular paragraph and Article 11 would ultimately be considered together as a package.

The Bosnian proposal was supported by Serbia, Croatia, Iran, Jordan and the International Disability Caucus. It was opposed, however, by Canada, and the United States expressed caution about the interface between human rights law and IHL, stating that it needed further study. Japan also reserved its position.⁷⁵ The debate was otherwise largely repetitive of the debate on Article 11, with many of the same points being made.⁷⁶

Noting that all the proposals for the preambular paragraph had come up in the context of Article 11, the chair suggested that the issue be referred to informal consultations. Those consultations were carried out hurriedly in the margins, and resulted in a new paragraph that added in the idea of natural disasters, but with language that was clumsy and had not been a part of the discussions up until that point. Nevertheless, it was adopted into the working text in the report of the meeting. The paragraph read:

Concerned that situations of armed conflict and the occurrence of natural disasters have considerably increased the experience of disability in war-stricken and disaster-prone countries, as well as having especially devastating consequences for the human rights of persons with disabilities,⁷⁷

The final reading

Common purpose falters

The eighth and final meeting of the Ad Hoc Committee was scheduled for August 2006. Progress during the second and third readings had been quite remarkable – discussions had been collegial and non-political, and the overall atmosphere was one of common purpose. Hopes were high that all remaining issues could be concluded at the eighth session, but there were fears that if this did not happen, momentum would stall and positions would entrench.

The Committee had a difficult task ahead of it. Several complex issues remained to be concluded where positions were still quite far apart, including how to ensure protection of legal capacity; ending or restricting forced interventions; how to guarantee accessibility and equal access to health and education; and the monitoring provisions of the Convention.

Not on the priority list for disabled persons' organizations were the references to armed conflict and foreign occupation, which had always been a

75 It is interesting to note that this was the first and last time in the debate that any delegation had made an explicit reference to the interface between the two bodies of law.

76 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 8, No. 14, 2 February 2006.

77 *Report of the Ad Hoc Committee*, above note 68, preambular para. (s).

second- or third-tier priority for them.⁷⁸ Article 11 had been left until the end with the other difficult issues, because compromise on references to foreign occupation in UN negotiations, if it is to be found at all, generally comes at the very end of a process and only when every delegation is prepared to accept everything else in the text.

The will to find a compromise took a serious blow just weeks before the meeting, with the outbreak of conflict between Israel and Hezbollah forces in southern Lebanon in July 2006. Tensions ran high and immediately cast a pall of doubt over the proceedings. New York-based delegates worried about a possible hardening of Arab Group positions, and Mexico's delegates expressed fear to the chair that at least one delegation had informed them that it planned to "make trouble".

In addition, the general agreement on the working text adopted at the end of the previous session appeared to be on shaky foundations anyway. Prior to the meeting, the International Disability Caucus released its own version of the working text with its preferred amendments. It reopened the same debate on Article 11 from the previous session, and its preferred text for the preambular paragraph deleted the reference to natural disasters that had only just been added, and re-proposed the text on IHL obligations. The Caucus's preferred text read:

Concerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities, and reaffirming that in such situations parties to armed conflict must abide by their obligations under international humanitarian law,⁷⁹

In its amendment to Article 11, the Caucus suggested language that demonstrated that it was still not happy with the reference to vulnerability, despite the earlier attempts to improve it, and it was deleted from their preferred text. Seeking a solution on specific references to IHL obligations, the Caucus suggested instead the innovative compromise of referring to "major or complex humanitarian emergency". Its preferred text read:

States Parties shall, in situations of major or complex humanitarian emergency, take all feasible measures for the protection of the rights of persons with disability and guarantee their rights on an equal basis with others.⁸⁰

The explanatory text accompanying the proposal noted that these were terms with clear definitions set by the Inter-Agency Standing Committee, a UN senior officials' coordinating body responsible for humanitarian issues. "Complex emergency", for example, was defined partly as a "humanitarian crisis ... where there is a total or

78 For example, a resolution of the International Disability Caucus Steering Committee Meeting in Madrid, dated 8 July 2006 (on file with author), set out the priorities of the Caucus for the final session of the negotiations, and this issue was not on the list.

79 *Working Text as Amended by the International Disability Caucus*, 18 August 2006, preambular para. (s), available at: www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8idcwtam18augf.doc.

80 *Ibid.*, Art. 11.

considerable breakdown in authority resulting from internal or international conflict”. But while this may have been an innovative attempt to refer to IHL obligations via a roundabout route, it was perhaps a bit naive. Firstly, the definitions cited were more relevant to the coordination of humanitarian assistance and did not purport to identify legal obligations. Secondly (and most importantly), States tend to be loath to accept definitions drafted by UN officials, preferring to negotiate definitions between themselves. The proposal therefore sank without a trace.

With the conflict in the Middle East still under way when the meeting started, Arab delegations had hardened their positions. The Arab Group again proposed the addition of “foreign occupation” into the preambular paragraph.⁸¹ For Article 11 the Arab Group went further, circulating a letter as a formal document with an entirely new proposal, with the focus squarely on foreign occupation:

States parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the safety and protection of persons with disabilities under foreign occupation and that institutions which provide them with care and rehabilitation are not targeted or placed in danger.⁸²

The EU sought to go in the other direction, requesting that the article be pared down to a succinct statement of principle:

In situations of risk to the general population, States Parties shall take all feasible measures for the protection of persons with disabilities.⁸³

It was quite clear during the first week of the meeting that positions on the wording of both the preambular section and Article 11 were moving apart, and statements were becoming heated, threatening to derail progress being made on other outstanding issues. Sudan raised the stakes by taking the floor in the plenary to challenge the chair’s impartiality on the issue,⁸⁴ and with time running out in the second week of the meeting it began to block the adoption of any further articles until progress was made on Article 11.

81 *Compilation of Proposals Received from Government Delegations Electronically by Friday 18 August 2006, Midnight*, working document compiled by the Secretariat for the chair (on file with author).

82 *Letter Dated 10 August 2006 from the Deputy Permanent Representative of the Sudan to the United Nations Addressed to the Secretariat*, UN Doc. A/AC.265/2006/3, 15 August 2006.

83 *Points and Proposals the EU Will Take Up in the Plenary*, 18 August 2006, working EU document shared with the chair (on file with author).

84 This was a provocative move designed to raise the stakes and increase pressure on delegations. There were no real doubts about the chair’s impartiality, and Ambassador MacKay was known in New York as one of the most neutral and skilled chairs available. He was widely credited for keeping the negotiations focused and on track, and lauded among the disability community for ensuring that disabled persons’ organizations had equal opportunities to speak.

The compromise package and the final text

The New Zealand delegation had not voiced much of an opinion on these questions up until this point, but it had invested considerable diplomatic efforts in securing a credible outcome to the negotiations, and came to the meeting with specific instructions from the New Zealand government. Those instructions were to try to prevent references to foreign occupation from politicizing the negotiations and holding up the conclusion of the Convention.

The delegation's negotiating brief instructed it to find a way to secure a reference to foreign occupation in the preamble, and avoid it in Article 11, as the core of a compromise package. It suggested that the delegation hold back initially but then seek an appropriate time to suggest replacing the preambular paragraph entirely with one from the preamble of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. That paragraph included a reference to foreign occupation, and it was already agreed language from a human rights treaty. It read:

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflict and foreign occupation,⁸⁵

The New Zealand delegation approached Sudan and Finland, as chairs of their respective groups, to propose that language as the core of a deal between the Arab Group and the EU, and requested that those two parties negotiate bilaterally to narrow their differences.

The overall package pulled together by Sudan and Finland was based on that idea. By defaulting to previously used language for the preamble, it increased the chance of achieving a quick consensus in the short time remaining, and it allowed them to focus their efforts on getting to a common position on Article 11.

In the final days of the meeting, the compromise on Article 11 took shape. The Arab States agreed to drop their insistence on a second reference to foreign occupation, and the EU agreed to drop its insistence on a succinct and streamlined text. This allowed the other outstanding suggestions to be brought in, including a reference to IHL, but also the wider references to situations of risk and natural disasters, both of which still had a lot of support in the room. Article 11 was also reordered to mirror the structure of Article 38(4) of the CRC (again, to use previously agreed language as closely as possible), and the reference to vulnerability was dropped, bringing the International Disability Caucus on board.

The final text of Article 11 to emerge from the corridor discussions was considerably different from the working text at the beginning of the meeting:

85 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (entered into force 12 February 2002), Preamble.

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure [the] protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.⁸⁶

At the last minute, the obligation on States was changed from a requirement to take “all feasible measures” to a requirement to take “all necessary measures”. Sudan insisted on this change, asserting that “all necessary measures” was the stronger obligation. Finland attempted to retain “all feasible measures” in order to ensure consistency with the CRC and the use of the term “feasible measures” in Articles 57 and 58 of AP I.⁸⁷ Had the ICRC’s excellent smartphone application containing the Geneva Conventions, the Additional Protocols and the ICRC Commentaries been available at the time, it would have been easy for the delegates to look up the commentary on the use of that phrase in Articles 57 and 58. If they had done so, they would have seen that the ICRC regarded “feasible measures” to be a high standard⁸⁸ – but in the absence of that information, the delegates acted on the belief that they were strengthening the obligation, agreeing to sacrifice consistency for that purpose.

Once the compromise wording was agreed between the Arab Group and the EU, the remaining holdout was the United States, which was still not prepared to accept any reference to foreign occupation. US participation in the negotiations, particularly the latter half, had been engaged, constructive and helpful. At a point when the relationship between the United States and the multilateral system was elsewhere coming under strain, New Zealand delegates privately leaned hard on their US counterparts to persuade Washington to find a way to preserve the goodwill they had earned, and to avoid blocking the adoption of a human rights treaty that Washington saw as partly inspired by the 1990 Americans with Disabilities Act.

Raising the pressure on the Americans a little more, New Zealand further stressed that Israel’s engagement throughout the negotiations had also been informed, constructive, and well received by all the other delegations. Israel had kept a studiously low profile on Article 11, but in many other places it had made an important contribution to the Convention, as had Arab Group delegations, with both sides respectfully engaging with each other’s points, free of politics or rancour. The American delegates were urged to stress to Washington that the disabilities negotiations were the one bright spot in the UN human rights agenda

86 *Interim Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Eighth Session*, UN Doc. A/AC.265/2006/4, 1 September 2006, Annex II, Art. 11. The “the” in square brackets above was not in the adopted text and does not appear in the report from the meeting, but it was added in later during technical revisions before the final adoption by the General Assembly in December 2006. It is included here for clarity.

87 References to these articles from AP I are scribbled on handwritten notes attached to the draft from that meeting, along with a question mark as to which was the stronger obligation (on file with author).

88 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 56.

where Israeli positions were being welcomed, and that this was the wrong time to object to a delicate compromise.

On the final afternoon of the negotiations the United States indicated privately that it could accept the package, but Washington still needed a formal record that it disapproved of the inclusion of the reference to foreign occupation. A deal was quickly arranged in which the United States would call a vote from the floor on the specific phrase “and foreign occupation”, calling for its deletion. Expecting to lose that vote, the United States would then join consensus on the entire text, allowing the preambular paragraph and the Convention to be adopted without a vote.

This arrangement held, and the Ad Hoc Committee approved the inclusion of the reference to foreign occupation by 102 votes to five, with eight abstentions – the only vote that was taken during the entire process.⁸⁹ Article 11 was adopted by consensus a few minutes later.

Conclusions

Despite the drastic last-minute changes to Article 11, its final formulation is a solid outcome. It is largely consistent with its predecessor in the CRC, but expands its scope to cover a wider range of issues of relevance to persons with disabilities. Where the CRC refers only to obligations under IHL, the CRPD expands this to refer also to international law generally and international human rights law specifically. This expansion makes logical and legal sense given that the obligations apply in the CRC to children affected by an armed conflict, but in the CRPD they apply more broadly to persons with disabilities in a range of situations of risk, including armed conflict, humanitarian emergencies and natural disasters. The applicable legal obligations could therefore be humanitarian or human rights-based, depending on the situation.

The restriction on States’ ability to derogate from the protections of the ICCPR “provided that such measures are not inconsistent with their other obligations under international law”⁹⁰ now needs to be read together with Article 11.⁹¹ States Parties’ obligations under international law now explicitly extend to protecting persons with disabilities in any scenario where Article 4 of the Covenant could be invoked.

The drafting of Article 11 nearly tripped up the entire negotiations, but its inclusion in the text is an important acknowledgement that States have legal obligations to persons with disabilities under both international human rights law and IHL, even in times of a public emergency which threatens the life of the nation.

89 *Interim Report of the Ad Hoc Committee*, above note 86, para. 11. Voting against the phrase were Australia, Canada, Israel, Japan and the United States. Abstaining were Cameroon, Côte d’Ivoire, Gabon, Kenya, Niger, Nigeria, the Republic of Korea and Serbia. Every other delegation voted in favour.

90 ICCPR, above note 11, Art. 4(1).

91 It is worth noting that it is doubtful that delegates consciously considered the implications of the effect Article 11 would have on Article 4 of the ICCPR.