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Aiming for Inclusive Sport: the Legal and Practical Implications of the United Nation's Disability Convention for Sport, Recreation and Leisure for People with Disabilities

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ABSTRACT

Although sport and disability are not new subjects to the United Nations, the Convention on the rights of Persons with Disabilities serves as the first legally binding instrument for protecting those with disabilities in the sporting realm. Article 30.5 is specifically devoted to addressing the rights of people with disabilities in the sport, recreation, play and leisure realms. The Convention requires all countries ratifying it to take proactive measures, including changes and/or additions to policy and legislation to enable individuals with disabilities to realize their human rights in the sporting realm. The paper discusses relevant United Nations instruments in existence before the Convention and addresses the difference between prior instruments and the new Convention. An analysis of Article 30.5 and relevant other Articles of the Convention is offered. Practical applications of the Article in the field are provided, as are suggestions on how it can be used to as a tool for implementation, development and the securing of rights in the sporting realm for people with disabilities.

KEYWORDS

Convention on the Rights of Persons with Disabilities - Disability - Sport - United Nations - International Law - Human Rights

INTRODUCTION

Sport (which throughout this paper denotes all levels of physical activity – sport, recreation, play, and leisure) is often viewed as a luxury and not as a human right (U.N. Task Force Report, 2003, p.1). 'Sport' conjures images of professional football players who get paid millions to play in front of millions, but if one moves beyond all this glamour, at the most basic level, sport embodies many fundamental human rights such as freedom of movement, freedom to gather, and the right to rest and leisure. Sport provides a tool to achieve vital human development such as psychological and physical rehabilitation. In addition, it facilitates peace, and social mobilization (U.N. Task Force Report, 2003, p. 2-3) by providing a physical focal point where relationship building can occur amongst teammates and competitive adversaries alike.

Many people do not realize that the benefits of participation in sport are typically more crucial to those with disabilities than those without disabilities. Although those without disabilities may be able to access sport to a greater degree - because those with disabilities are often denied the benefits sport brings in other realms of life - the tools that sport offers are even more important.

For example, many people with disabilities throughout the world are denied access to the educational system, or if they do have access, are often isolated socially from their peers (Degener and Quinn, 2002, p.1). However, the socially conducive atmosphere of sport, where one learns teamwork, communication, confidence, leadership, cooperation and respect, offers persons with disabilities a realm where they can develop these vital skills – skills that are important in order to be contributing members of society (U.N. Task Force Report, 2003, p.3; Roy, 2006). Sport also acts as an inexpensive form of physical therapy that is often vital for many people with physical disabilities who need to retain as much movement as possible (Roy, 2006). Without this exercise, many individuals with mobility disabilities experience atrophying muscles, losing what little amounts of movement they had left (Cooper, 1999). Sport is also a powerful psychological rehabilitator: when those who are recently disabled, perhaps through war or other traumatic events, are placed in the sport realm, they might gain a sense of normalcy which enables them to see that they can still score a goal, albeit differently.

Recently, the United Nations underscored the immense value of sport for people with disabilities by adopting the

the Convention on the Rights of Persons with Disabilities, Article 30(5) of which specifically protects the rights of people with disabilities to actively participate in sport, recreation, play, and leisure (A/Res/10554, 13 December 2006). The adoption of the United Nations Convention on the Rights of Persons with Disabilities (hereafter 'the Convention') was a historic occasion as it was the first legally binding international Convention specifically protecting the rights of persons with disabilities, as well as, the first International Human Rights Convention of the 21st century (United Nations, 2006). On March 30th, 2007 eighty-three nations signed and ratified this Convention; by May of that year there were 95 signatories. The adoption of the Convention was the culmination of five years' work on behalf of state delegations (the term used to refer to U.N. country representatives) and disability advocates across the world. This Convention potentially will affect the human rights of over 650 million people living with disabilities across the world (United Nations, 2006). The remainder of this paper will provide a review of U.N. instruments addressing disability in sport prior to the Disability Convention, as well as an analysis of its implications and applications.

THE STATUS OF DISABILITY IN SPORT AT THE UNITED NATIONS BEFORE THE CONVENTION

Disability and sport are not foreign issues to the United Nations. As early as 1978, the United Nations Economic Scientific and Cultural Organization (UNESCO) drafted the International Charter on Physical Education and Sport (UNESCO, 1978) [http://www.unesco.org/education/information/nfsunesco/pdf/SPORT_E.PDF#search=%221978%20UNESCO%20charter%20on%20sports%20and%20physical%20education%22]. This charter explicitly states that 'The practice of physical education and sport is a fundamental human right for all' (UNESCO, 1978). Also in Article I, the charter delineated that this right extended to women, children and youth, the elderly *and those with disabilities*. In 1982 the United Nations drafted the 'World Programme of Action Concerning Disabled Persons' [<http://www.un.org/esa/socdev/enable/dissre00.htm>] and in 1993 produced 'The Standard Rules on the Equalization of Opportunities for Persons with Disabilities' [<http://www.un.org/esa/socdev/enable/dissre00.htm>], '0 both of which contained Articles that recognized people with disabilities' right to sport. 5

On November 17, 2003 the United Nations declared 2005 to be the Year of Sport through General Assembly Resolution 58/5. Although a focus on disability in the organization of events surrounding the U.N. Year of Sport was largely absent, non-governmental organizations, such as the International Paralympic Committee, Special Olympics and Northeastern University's Center for the Study of Sport in Society, did succeed in bringing disability sport into the consciousness of the year's organizers and the newly created U.N. Office of Sport and Development. The office is currently collaborating with Northeastern University to create a publication discussing Article 30.5 of the Disability Convention. 6

THE LEGAL IMPLICATIONS OF THE CONVENTION

With all this activity, one may ask why the Convention is significant. The primary rationale given is that none of the instruments and activities mentioned above created *legally binding* international law. Existing international instruments that are legally binding such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (CESCR), *theoretically* extend to those with disabilities, as they do to all people, regardless of sex, race, or national origin. However, as New Zealand commented in its statements made on the adoption of the Convention in the General Assembly, 'the reality...has not followed the theory. The existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities' (<http://www.un.org/esa/socdev/enable/convstatementgov.htm#nz>). For example, Theresa Degener and Gerard Quinn's paper (2002) on the need for the Convention examined reports submitted by State Delegations addressing the status of women in their country (as required under the Convention on the Elimination of Discrimination Against Women (CEDAW) in order to monitor compliance) found that mention of the progress or status of women with disabilities was strikingly absent. This despite the fact that under General Recommendation 18 of CEDAW, countries are expected to provide information on the situation of women with disabilities. Specifically, Degener and Quinn stated that 'ideally these reports should contain information on the situation of women with disabilities under each right (outlined in CEDAW), including their current de facto and de jure situation, measures taken to enhance their status, progress made and difficulties and obstacles encountered.' However, none of the countries which submitted reports in accordance to this recommendation met the reporting guidelines as specified under General Recommendation 18. The authors further noted that in their sampling of reports, the CEDAW committee tended to ask for additional information about the status of women with disabilities only when the country volunteered information about their citizens with disabilities. This is significant because State reports are the main mechanisms used to compel countries into compliance with the rights outlined in CEDAW. However, if the country failed to give any information about people with disabilities, the committee did not follow-up and inquire about people with disabilities in their country. 7

In addition, the right or deprivation of rights that people with disabilities experience is unlike those addressed in past conventions. People with disabilities experience a unique kind of discrimination which differs from discrimination women or racial minorities experience This is because people with disabilities may also need 8

proactive measures to enable them to enjoy their human rights. For example, where women merely need to be allowed to attend school in order to enjoy their right to education, a deaf individual requires access to the school as well as access to a sign language interpreter in order to enjoy that same right. Another example is that in order for those with mobility disabilities to enjoy the basic right to freedom of movement, they need communities to remove architectural barriers and place ramps, for example, in order for them to truly experience the same freedom of movement as their able-bodied peers.

However, many scholars will argue that labeling any international human rights Convention as 'legally binding' is somewhat of a misnomer (Alston & Steiner, 2000; Watson, 1999). In theory, a legally binding Convention means one can prosecute a country, individual, or organization in court to enforce the rights protected under the Convention. However, in reality, human rights Conventions develop no system of dispute resolution in the courts, making court actions often either inappropriate or impracticable (Alston & Steiner, 2000; Watson, 1999, p. 14). 9

Theoretically a Convention may be enforced on three levels – international, regional, or national. At the international level several barriers prevent a Convention from being enforced. First, it is a horizontal system, where there is no legislature or courts with compulsory jurisdiction, but rather 'only primary rules without secondary rules of legislative, adjudicative, and enforcement procedures' (Magnarella, 2004, p.71). In addition, only states may bring actions against other states for violations to the International Court of Justice. Individuals or non-profit organizations have no power to enforce at this level. It is also highly unlikely for a state to be concerned with enforcing the right to sport for citizens of other countries. The main reason is that countries understandably reserve such actions for more gross violations of human rights such as torture or genocide despite the fact that a cornerstone principle in human rights is that all human rights are equal. 10

Regional human right systems, such as the European Convention on Human Rights, the Inter-American Commission on Human Rights, or the African Court on Human Rights, have been labeled by scholars as far more effective than those at the international level. (Magnarella, 2004, p. 74). This is because they operate on a vertical structure rather than the horizontal structure that the United Nations employs. For example, the European Union and the Council of Europe employ legislative, executive and judicial organs. In addition they often entertain both interstate and *individual* complaints. 11

At the national level, the Disability Convention, like all human rights Conventions, requires that States Parties 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities,' (Article 4(b)). Countries must also 'refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention,' (Article 4(d)). 12

However, if a country is intent on violating human rights, it certainly will not create an effective system of enforcement at the national level. Unfortunately the reality is that states tend to act in their own self-interest. For example, Alston and Steiner (2000) explain: 13

In the clear case, the right to political participation declared in Article 25 of the ICCPR will hardly be vindicated by a court within an authoritarian regime that has long violated many provisions of that Covenant. It remains nonetheless a human right, to be vindicated in most cases through paths and strategies distinct from the formal legal system. 14

Another example is the United States' sly steps to bypass its own legislation preventing them from providing 'security assistance ... to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights' (the Foreign Assistance Act, Section 502b, originally passed in 1961). Yet the U.S. tends to grant China, who has a horrible human rights record, its most favored trading partner status (Magnarella, 2004, p.73). 15

With these limitations in mind, the goals of a human rights Convention typically focus on (i) articulating the rights unique to the population addressed in the Convention; (ii) acting as a catalyst for action (whether through willing governments, international governmental organizations or nongovernmental organizations) in developing national 'benchmarks' and devising appropriate mechanisms for establishing accountability, and providing a means of vindication for aggrieved individuals and groups at the national level; and (iii) holding states accountable at the international level through the examination of committee reports (Alston & Steiner, 2000 p. 306). 16

In order to draft the Disability Convention top academics and human rights policy analysts gathered biannually in New York City for over five years to share information and delineate the human rights envisioned in the Convention. This mere *articulation* is significant because many governments, organizations and individuals across the world had not examined disability through a rights-based lens, but rather a charity-based lens. As a result, these conversations have brought the human rights of people with disabilities into the public's 17

consciousness.

As a result of the Convention, many governments, NGO's and IGO's have been encouraged to focus on disability. This has led to earmarking funding for disability and increased research and statistical gathering related to disability. In addition, it encourages governments who otherwise may be slow or reluctant (but not directly adverse) to change to enact laws or start taking other steps towards achieving compliance with the Convention. In addition, under Article 4(e), States Parties are mandated to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.' Thus, the Convention indirectly covers not only the actions of the States, but also those taken by private enterprises, individuals and organizations. 18

Finally and perhaps most importantly, the Convention creates a Committee on the Rights of Persons with Disabilities to monitor the Convention. The committee is charged with collecting and reviewing comprehensive reports (as mentioned in the third goal of the Convention) submitted by States Parties 'on measures taken to give effect to its obligations under the ...Convention and on the progress made in that regard' (Article 35.1). These reports under the Disability Convention are to be undertaken at least every four years (Article 35.1). After a review, the Committee will make general recommendations to the party that submitted the report (Article 36.1). If a State party fails to submit a report, the Committee may make its own examination of the country's status of compliance with the Convention (Article 36.2). Further, these reports are to be made 'widely available to the public in their own countries' (Article 36.4). 19

The optional protocol of the Disability Convention, which State Parties can opt to sign or not sign, created something never before drafted into an international human rights instrument – the ability for individuals to gain redress for rights that have been violated. Previously, the human rights enforcement system only allowed states to bring actions against other states. This was seen as one of the primary reasons that enforcement of international human rights obligation was often extremely weak, ineffective or non-existent (Colwill, 1993). 20

If a country signing the Convention fails to abide by it, or submits reports not accurately portraying the situation of persons with disabilities in the country, in reality, there are typically two recourses. The first is public exposure of the country's practices in an attempt to cause public outrage and pressure for governments to institute change (Reilly, 1997). The second is having non-governmental organisations ('NGO') submit their own 'shadow reports', which are based on research by country investigators who gather information on the status of certain populations that governments often exclude. 21

A few additional things to note about the Convention's legal application: 22

* Article 4.4 ensures that if there is a national, local, or state law that imposes more stringent standards than the Convention, then it supercedes the Convention. Thus, if a national disability law interprets disability to mean additional individuals than those considered having a disability under the Convention, nothing prevents that country from doing so.

* Article 5.4 states that 'Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.' This means that if countries, individuals, organizations, educational institutions, or other organs want to take affirmative measures that may favor athletes with disabilities, they have a right to.

* The Convention is subject to amendment and States Parties when signing onto the Convention have the option to 'opt out' of certain provisions of the Convention. Thus, they could elect to be bound by the entire Convention except for Article 30.5. As a result, sport, recreation, and leisure would be protected only to the extent that other Articles of the Convention overlap with that context.

INTERPRETING THE CONVENTION IN THE CONTEXT OF PHYSICAL ACTIVITY FOR PERSONS WITH DISABILITIES

In interpreting the Convention text, this paper will refer to United Nations 'floor' testimony, draft texts of the Convention, various applications of national disability laws, and comments made during the course of the meetings, although many of these sources are not officially recorded for legal support. Due to a lack of records, some of the Convention text's application must be based solely on a textual analysis rather than legal precedent. Additionally, due to the limiting nature of this paper's length, this analysis serves only as a broad overview of Article 30.5. 23

Article 30.5, 'Participation in Cultural Life, Recreation, Leisure and Sport'
The text governing physical activity in Article 30.5 reads as follows: 24

With a view to enabling persons with disabilities to participate on an equal basis with others in recreational,

leisure and sporting activities, States Parties shall take appropriate measures:

To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activity

During the last two Ad hoc sessions of the Convention, the drafters changed the preamble from, 'States Parties *recognize the right* of persons with disabilities, on an equal basis with others...' (emphasis added) to '*with a view* to enabling persons with disabilities to participate on an equal basis with others ...' This change was the result of a comment made by the European Union during the 6th Ad hoc session. The European Union stated: 25

There is no express 'right' to recreational, leisure and sporting activities in the CESC [Committee on Economic Social and Cultural Rights]. The language in the chapeau of para 4 is ambiguous on this point and should be amended accordingly. The chapeau's wording may have been based on CEDAW Article 10(g), which addresses this issue as a matter of equality between women and men and not as a standalone right (Rehabilitation International, 2005). 26

The Report of the Ad hoc Committee (2005) in its sixth session stated that 'there was general support to amend the chapeau to make it clear that the paragraph does not refer to an existing right to participate in sport and leisure activities.' However, the summaries of the discussion on the floor do not reflect this. In fact, the European Union is the only documented State Party that made reference to this (Rehabilitation International, 2005). 27

This statement is also wrong. The CESC in Article 7 specifically says 'States Parties to the present Covenant recognize the right of everyone to the enjoyment of... (d) rest (and) leisure.' Other Articles of the CESC also recognize rights that essentially embody the right to sport, recreation, play and leisure. For example, Article 15 of the CESC recognizes the 'right of everyone to take part in cultural life,' which universally includes sport. In addition, Article 12 of the CESC discusses the 'right to the highest standard of physical and mental health' and Article 13 recognizes the right to education 'directed to the full development of the human personality and the sense of its dignity.' As discussed above, sport is vital to this development. Article 1 of CESC states: 'all peoples have the right to self determination. By virtue of that right they [have the right to] freely ... pursue their economic, social and cultural development.' The Convention on the Rights of the Child (CRC), also legally binding, recognizes a child's right to play. Access to play is articulated in Article 30.5 (d). The preamble of Article 30.5 should reflect that this is a right. 28

In addition, sport has been recognized as a human right by other United Nations instruments since 1978 (although these are not considered legally binding). The UNESCO International Charter on Physical Education and Sport states, 'Convinced that one of the essential conditions for the effective exercise of human rights is that everyone should be free to develop and preserve his or her physical intellectual and moral powers, and that access to physical education and sport should consequently be assured and guaranteed for all human beings' (UNESCO, 1978 at http://www.unesco.org/education/nfsunesco/pdf/SPORT_E.PDF) 29

The United Nations Inter-Agency Task Force on Sport for Development and Peace report states (2003, pp.1-4), 'Access to and participation in sport is a human right and essential for individuals of all ages to lead healthy and fulfilling lives.' 30

The fact that these instruments are not legally binding does not mean they have no persuasive weight in determining whether something is a human right. 'The interpretation and application of certain provisions of one human rights instrument have at times been resorted to as orientation for the interpretation of corresponding provisions of other –usually newer – human rights instruments' (Cançado Trindade, 1987). 'The fact that many recognized human rights have not yet achieved a level of elaboration so as to render them justiciable does not mean that those rights simply do not exist: enforceability is not to be confounded with the existence itself of a right' (Eide, 1989). 31

Thus, even though the preamble of Article 30.5 was changed to reflect that sport is not a human right, the overwhelming evidence through past U.N. documents lends credibility to the assertion that people with disabilities *do* have a human right to sport, recreation, leisure, and play and that this was a mistake on the part of the drafters of the text. One way to clarify this would be to have a U.N. agency bring the issue before the International Court of Justice via advisory jurisdiction. 32

An additional 'mistake' by the drafters to the preamble was the failure to uniformly apply the preamble to *all* levels of physical activity addressed in the Article. The United Nations recognizes four levels of physical activity – play, leisure, recreation, and sport. The U.N. Task Force (2003, p. 2) report defines them as follows, 'Play, especially among children, is any physical activity that is fun and participatory. It is often unstructured and free from adult direction. Recreation is more organized than play and generally entails physically active leisure activities. Sport is more organized again and involves rules or customs and sometimes competition.' Tourism, addressed in sub-clause (c) is also a subset of physical activity not articulated in this report or in the preamble of Article 30.5. Although delegations repeatedly commented that the drafters needed to create a uniform text, extending the protections of 30.5 to all levels of physical activity, the drafters failed to do so. During the entire drafting process, there was no articulated reason for failing to extend these protections. Further, based on side meetings and discussions, it seems this was merely a matter of simplicity. The drafters did not like the awkwardness of stating ' sport, recreation and leisure' multiple times throughout the text. 33

In moving beyond the preamble, the reader will notice that the first two subsections of Article 30.5 address the two different realms in which individuals with disabilities participate in physical activity– in the 'mainstream' and in 'disability-specific' realms. Mainstream physical activity describes when people with disabilities participate with others who do not necessarily have a disability; the sport is not organized around those with disabilities (Roy, 2004). An example is a deaf athlete playing soccer with other athletes who are not necessarily deaf. Disability-specific physical activity on the other hand, means that individuals with disabilities compete with other individuals with similar disabilities (Roy, 2004). In this realm the sport is organized around the disability. An example is wheelchair basketball where all team members are using a wheelchair to compete. Disability-specific sport would also include what many term as 'allied sports.' In allied sport, the sport is still designed around the disability. However, those without disabilities are also competing, while adopting the changes in the sport imposed on those with disabilities. For example, an able-bodied athlete competes in wheelchair basketball by using a wheelchair even though his legs do not have any limitation of movement. The reason disability-specific and mainstream sport need to be addressed separately is that different protections are needed for athletes in the different realms (Roy, 2004). 34

In the mainstream, the main problems people with disabilities face are discriminatory attitudes that prevent them from being judged, recognized, and given opportunities at a level similar to their able-bodied peers (Roy, 2004). For example, many coaches will assume that a deaf athlete has to be placed in the goal on a soccer team because they believe s/he will never be effective on the field where communication is often important to the game. The coaches fail to realize that many deaf athletes are able to effectively adapt their play to ensure optimal communication and understanding with their teammates, albeit via means other than voice. Another example is a coach who believes that a deaf athlete will never be as good as a hearing athlete because s/he lacks the ability to communicate at the same level as a hearing athlete, even though the deaf athlete's field performance is superior to those without disabilities. 35

Note that in subsection (a) the action verbs, 'encourage and promote' are used. These are much weaker than the action verb of 'ensure,' used throughout the remainder of the text. Although participation in mainstream society is the ultimate goal of the Convention, subsection (a) recognizes that sometimes this cannot happen within sport. There are instances where athletes with disabilities may not be able to integrate with athletes who do not have similar disabilities due to safety concerns or because it results in a fundamental alteration of the game. Take for example, a wheelchair athlete participating in the contact sport of basketball. Here, the wheelchair athlete's participation would be unsafe because the contact nature of the sport would most likely result in injury to able-bodied athletes because of the metal of the wheelchair the disabled athlete must use. 36

It appears that the phrase 'to the fullest extent possible' in subsection (a) is meant to encourage governments to also take *affirmative* measures to enable people with disabilities to participate in mainstream sport that otherwise does not result in a fundamental alteration of the sport or safety risks. These include: 37

giving reasonable accommodations to disabled athletes such as providing interpreters for the deaf to enable them to understand and benefit from their coach;

allowing a golfer who is unable to walk long distances use of a golf cart despite rules that all golfers must walk;

taking measures to eliminate stereotypes held by coaches and others (such as club owners); or

allowing a wheelchair track athlete to compete (but be scored on a separate basis) with able-bodied track

athletes where there are no other wheelchair athletes to create a competition atmosphere for the athlete in the wheelchair.

The use of the word 'promote' denotes steps taken to advance something (Gove, 2002). Thus, countries should be actively encouraging persons with disabilities' participation in the mainstream athletic realm. Countries should place information in policies and notices delineating that *all* participants are welcome and will not be discriminated against on the basis of disability. It has been postulated that, in *McFadden v Cousin et al*, [April 14, 2006 case # 1:D6-CV-00648 AMD], because the school had no defense, they may have been in court merely to obtain protection from the possible legal ramifications (e.g. negligence) of placing her on the same track with able-bodied athletes. Thus, one way of encouraging participation by people with disabilities in the mainstream is to enact laws insulating school officials from liability from actions taken to accommodate people with disabilities so they may participate in the mainstream. 38

Subsection (b) of Article 30.5 addresses disability-specific sport. Under this Article, State governments are charged with ensuring that people with disabilities have the ability to 'organize, develop and participate in disability-specific' activities.' Disability-specific sport is important for a number of reasons. For some, it is the only arena where they can participate in sport. For others, it provides an opportunity to socialize and learn from those with similar disabilities and life experiences. Note that the term 'equal basis with others' is used to reflect the inescapable fact that in the sporting realm (and disability in general) sometimes different treatment is needed to ensure a level of equality. 39

Subsection (b) requires recreational centers, gyms and athletic fields that are open to those without disabilities to similarly be open to hosting disability-specific sports. It arguably requires accessible transportation to be available, as it enables organizing, developing and participating in disability-specific sport. 40

The second part of subsection (b) discusses appropriate instruction, training and resources and was written to give people with disabilities access to coaches trained on how to adapt sport and also to give them access to unique resources needed in order to compete. Significantly, during the drafting process, the authors replaced, 'same' with 'appropriate,' again recognizing that people with disabilities need different resources, coaching, and training to achieve equivalent equality (Ad Hoc Report, 3rd Session). Too often people with disabilities are given ineffective coaching because the coaches, although knowledgeable about able-bodied sports, are not knowledgeable about adapting sport for people with disabilities. As a result, people with disabilities often suffer from inferior coaching. This subsection recognizes this and should be interpreted as calling for the creation of training programs for coaches on how to adapt sport for people with disabilities. It also calls for resources to be made available to these athletes to enable them to compete, including resources often not needed by able-bodied athletes such as a wheelchair or a soccer ball that is three times the size of a normal one. Unfortunately, once again the weak verb 'encourage' was inserted into the second part of this subsection. However, this may have been done because States Parties are conscious of the limited resources of many countries. To 'ensure' here would have enormous potential budget ramifications. 41

Subsection (c) of Article 30.5 focuses on guaranteeing that people with disabilities have access to sport, recreation and tourism venues. Although access is not qualified, it should be interpreted to mean *equivalent* access. Article 9.1 of the Disability Convention, which discusses accessibility, supports this interpretation, mandating States to provide '...access, on an equal basis with others, to the physical environment...' For instance, a stadium provides spectators with various views of the competitions held there. To offer a person with a disability seating only at the worst viewing sections is not equivalent access. Instead, seating for people with disabilities should be available at various vantage points, enabling them to have a comparable experience to those without disabilities. Another example is that gyms should have Braille signs to enable those with visual disabilities to navigate the gym. 42

Note that tourism is included here. Tourism was included here because it is often viewed as a subset of leisure. Further, tourism is often recognized as a human right (see Amman Declaration on Peace Through Tourism, 2000). As a result, subsection (c) should be interpreted as ensuring, *inter alia*, interpretation for the deaf for tour guides, or ensuring that any text used is also available to in Braille. 43

It is important to ensure that subsection (c) is not interpreted as extending only to stadiums, the traditional 'sport venue,' but also to places such as the local gyms, the school yard, the public park and national monuments. In addition, access here should be interpreted not only as the initial access of gaining entrance to the venue but also ensuring for example, that workout areas have space between weight machines so that a wheelchair can maneuver through and access them. See also Article 9. 44

Subsection (d) addresses children with disabilities. Here, children's right to play is explicitly protected. Initially the language only protected their right to play in the school system (Report of the Ad Hoc Committee, third session). However, during the sixth session, the drafters changed the language to encompass all physical activity realms, realizing the self-defeating measure of limiting play to the education setting – a place where 45

many children with disabilities are absent. Too often children with disabilities fail to receive even the most basic access to physical activity – whether it is in physical education class or play in the streets (Longmuir & Bar-Or, 1994). Sport is especially important for children with disabilities because developing vital social skills early on ensures their successful and active participation in society.

Finally, subsection (e) of Article 30.5 ensures that persons with disabilities have access to services from those involved in organizing physical activities, including the tourism industry. For example, a tourist agency cannot refuse to help an individual with a disability because of his/her disability. It also means that if a gym provides massage services, for example, then people with disabilities should also be able to access these services. Thus, it calls for State Parties to ensure that people with disabilities are not discriminated against by those involved in providing services having to do with physical activity. 46

Beyond Article 30.5: The Implications of Other Articles in the Disability Convention for Sport

Although the Convention text outside of Article 30.5 does not directly address physical activity, it provides guidance on how to apply the main principles embodied in 30.5 and has important implications for the sport realm. The following is an overview of the pertinent principles and their application to the sport realm. 47

'Purpose' and 'Disability' Defined

Article 1 states that the purpose of the Convention 'is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.' It defines 'Persons with Disabilities' as including 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. 48

Non-Discrimination and Reasonable Accommodation

Nondiscrimination is a guiding principle of the Convention (Article 3(g)). Article 2, defines 'discrimination on the basis of disability' as: 49

Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms... It includes all forms of discrimination, including denial of reasonable accommodation.

'Reasonable accommodation' is defined as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights' (Article 2). The Convention further requires State Parties to 'take all appropriate steps to ensure that reasonable accommodation is provided,' (Article 5.3). 50

Many will ask, 'how do we apply the principles of nondiscrimination and reasonable accommodation to the mainstream sporting realm, especially in competition arenas, where individuals are evaluated on the basis of their abilities? Does this mean we have to provide a slow runner with a head start?' Two cases brought in the United States under the Americans with Disabilities Act ('ADA') and the Rehabilitation Act of 1973 – the two primary disability laws in the United States - tested these principles. These were *McFadden* and *Martin v. PGA Tour* [2001] 532 U.S. 661. 51

Women with Disabilities

Equality between men and women is also a guiding principle of the Convention. Article 6 highlights that women and girls with disabilities are often 'subject to multiple discrimination' – discrimination not only because they have a disability but also because they are female. It directs States Parties to take 'all appropriate measures to ensure full development, advancement and empowerment of women.' 52

In the sporting context, this is especially important as it is a realm where women, as well as men, with disabilities have traditionally been excluded on a singular basis (Roy, 2004). Everyone is familiar with the struggle women have had to fight in order to have comparable access and treatment in the sporting realm as their male counterparts. Female athletes have worked hard to dismiss unfounded notions of frailty, unfounded conclusions that they are not as interested in sport as men, and religious teachings that women should not function in their communities in such a way. Because of this pattern of inequality, the United Nations Convention on the Elimination of Discrimination Against Women ('CEDAW') contained a specific provision devoted to ensuring equality between men and women in the sporting realm (Article 10(g)). This challenge to 53

gain inclusion in the sports realm is only exacerbated when the female has a disability. Noticing that this risk of inequality was especially rampant in the sports realm, delegates suggested including specific protection of women within Article 30.5 (Report of the Ad Hoc Committee, third session). However, the drafters opted to create one Article that extended special protections on the basis of sex and applied it throughout the Convention rather than adopt a streamlined approach.

Mobility Aids

The general obligations contained in Article 4, section (f) mandate state that delegations, 54

undertake or promote the research, development, availability and use of...(i) Universally designed goods, services, equipment and facilities ...[and] (ii) new technologies, including information and communication technologies, mobility aids, devices, assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.

In the context of physical activity for people with disabilities, this provision often determines if an individual with a disability is able to participate in sport. Many times large populations of people with disabilities are excluded from participation in physical activity merely because they are unable to obtain appropriate prosthetics or other adaptive equipment that enable them to move. For example, an electric wheelchair enables a quadriplegic to compete in quad soccer. Without such assistive technology, the quadriplegic would not be able to compete in quad soccer or any other sport. Although this is a high cost example and not as likely to be a reality in less developed nations, the second section of Article 4 mandates that countries promote the development of low cost adaptive equipment. The more research that is undertaken, the more likely it will lead to the development of low-cost mobility aids that will help those in less developed countries gain access to the sport realm. 55

Article 20 also addresses mobility. Subsection (b) mirrors Article 4 (discussed *supra*), while in subsection (c) the Convention mandates that States Parties provide 'training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities.' These trainings are a significant first step towards the development of an individual's physical skills. Sport can facilitate the goals of 20(c) by acting as a tool for training the mobility skills of persons with disabilities. Subsection (d) 'encourages entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.' Thus, advocates can use this section to urge entities involved in producing mobility aids to consider the fact that persons with disabilities want and are active individuals who often choose to participate in physical activities. This Article also calls for universally designed facilities and services. This means construction of gyms, recreation centers, and even playgrounds in counties which have ratified the Convention must be done in a universally designed way allowing access for all people, regardless of disability. 56

Training of Professionals

Article 4 also mandates that 'States Parties ... promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.' Examined in the sporting context this requires States Parties to promote the training of physical education instructors and coaches in adaptive sport techniques. Thus it reinforces the interpretation of Article 30.5 (b) as requiring this. Although Article 30.5 (b) addresses only the disability-specific realm, Article 4 should be read as mandating that mainstream coaches are also trained in how to assist their athletes with disabilities. Further, the article should be read as requiring those providing services to individuals with disabilities within sport, be trained on how to make those services accessible. 57

International Cooperation

The Convention embodies a spirit of international cooperation in achieving the ideals it envisions. Article 4.2 specifically mandates that State delegations take measures 'to the maximum of its available resources and, where needed, within the framework of international cooperation.' Thus, it recognizes that underdeveloped nations may have particular difficulty in complying with certain ideals contained the Convention merely because they lack the resources to do so, not necessarily because they intend to ignore the Convention's mandates. In addition, it calls on states that are parties to the Convention to provide support to those with fewer resources. As a result, richer countries are obligated to help the poorer countries to come into compliance with the Convention's mandates. 58

Inclusion During the Process of Inclusion

Article 4.3 voices a theme that drove the Convention process. It instructs States Parties to 'closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.' Throughout the Convention, banners were raised and bumper stickers passed out that urged, 'Nothing about us without us.' Frequently people with disabilities are excluded from the process of remedying 59

their rights. However, the drafting of this Convention was unique as it marked the first time non-governmental organizations had an opportunity to actively participate in the drafting process. It was also the first time that NGOs could address the State Delegates on the floor of the United Nations, officially inserting their statements into the Convention record.

This concept of inclusion is especially important in the sport realm, because in adapting sport it is important to gain knowledge directly the athletes who are playing, especially since they are the 'experts' on their capabilities. Further, a coach may hold, albeit benevolent, but wrong, impressions as to the limitations of his or her athletes. Some coaches may also be especially protective of those with disabilities because he or she views the athletes as frail because they are in a wheelchair and seem less able to protect themselves. Ensuring those with disabilities are actively involved in the process, including at administrative levels, ensures sport is appropriately tailored to their needs. 60

Public Awareness

It is foreseeable that field workers, although able to gain the resources necessary to develop sport for those with disabilities, will encounter difficulty merely getting individuals with a disability out of their homes and onto the athletic field. This can be due to a number of reasons, including discriminatory attitudes of family members who view those with disabilities as an embarrassment, shutting them away in homes where they are deprived of access to their communities. In Haiti, for example, individuals with disabilities are seen as tokens of bad luck (Jacobson, 2003). No one wants to associate with them for fear it will bring a bad omen to their own lives. One mechanism to compel state parties to take steps toward getting these children out of their homes and onto the fields is through Article 23.3 which provides, 'with a view to realising these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.' Thus it would require the Haitian government to take proactive steps to change these attitudes whether through the media or educational campaigns. 61

Article 8.1 of the Convention complements Article 23.3 by calling on: 62

States Parties [to] undertake to adopt immediate, effective and appropriate measures (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for their rights and dignity; (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; (c) To promote awareness of the capabilities and contributions of persons with disabilities.

Note that the sport realm is an excellent arena to raise awareness. Not only does sport bring large groups of people together in a fun way, it also is typically low cost. Further, sport itself serves as the advertisement (U.N. Task Force Report, 2003, p. 17). In the sport arena, focus shifts off of the athletes' disabilities and onto their abilities (DePauw and Gavron, 1995). Sport also provides spectators the opportunity break their stereotypical beliefs about those with disabilities because the spectators constantly see those with disabilities surpassing their low expectations. 63

Respect in the Educational System

Article 8.2 (b) requires that State Parties foster, 'at all levels of the education system... an attitude of respect for the rights of persons with disabilities.' Many times those with disabilities are targeted for harassment by their peers. However this Article compels States Parties to take an active role in reducing this. Again, sport can play an integral role in achieving these goals. Many schools in the United States have developed 'adopt a disability day' where those without disabilities try going through a school day with an adopted one. For example, one child may wear a blindfold all day to experience what it would be like to be blind. Another may wear ear plugs to experience a day being deaf or another may use a wheelchair. This makes those with disabilities seem less foreign to those without disabilities and educates them on how they can assist the disabled. 'Allied sports' also are especially adept at for changing attitudes. 64

Physical Access

Article 9.1 provides a supplement to Article 30.5 (c), which ensures that persons with disabilities have access to venues. Specifically, it calls for access, 65

on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas... These include buildings, roads, transportation and other indoor and outdoor facilities.

Importantly, this section mentions access to transportation (which is not included in 30.5 (c)). One of the hardest things a fieldworker encounters is getting everyone to the place of practice because they often are dealing with a population that does not congregate at one location and is dependent on accessible transportation. Article 9.1 is an extremely important enabler. It requires State Parties to make existing public transportation accessible for people with disabilities. Further, it is significant that there is mention of accessibility in both indoor and outdoor facilities as many athletic activities take place outdoors. This means not only must architectural barriers be removed but also landscaping barriers. 66

Enabling the Business of Sport

Article 12.5 is significant to those with disabilities who want to start sports related businesses or organizations. It calls on countries to ensure persons with disabilities have equal access to bank loans, mortgages and other forms of financial credit rather than denying facilities on the basis of unfounded stereotypes about disabled people. This provision will help ensure this barrier to obtaining credit and financial help is removed. 67

Statistics

In advancing, advocating for, and achieving the ideals contained in the Convention, it is important to have access to statistical evidence to support any stated assertions. Article 31 requires States Parties to undertake statistical data collection 'to enable them to formulate and implement policies to give effect to the... Convention.' It further establishes safeguards to ensure data is collected appropriately. This will be a significant tool for the sporting realm as there is currently an almost total lack of statistics on disability in sport and without these statistics, advocating for change becomes difficult, if not impossible. 68

CONCLUSION

The United Nations Convention on the Rights of Persons with Disabilities is an important step toward articulating and realizing the rights of people with disabilities in the sporting realm across the world. However, because the Convention is a human rights based provision and because the right at issue is sport, it is highly unlikely that Article 30.5 will be enforced in an international court. Rather, this Convention should be seen as an inducer and a set of standards advocates can pressure State governments with to create change. The wider the Convention's application is interpreted for disability in sport, the better, as the Convention is only as effective as advocates apply it. The next step is for advocates and organizations to create indicators to monitor the status of sport for individuals with disabilities across the world. From these indicators shadow reports can be produced to compel State governments into compliance with the Convention and slowly progress will be achieved in bringing this powerful tool to individuals with disabilities. 69

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