

**THE COMPREHENSIVE AND INTEGRAL  
INTERNATIONAL CONVENTION ON  
PROTECTION AND PROMOTION OF THE RIGHTS  
AND DIGNITY OF PERSONS WITH DISABILITIES**



**THE ASIA PACIFIC FORUM  
OF NATIONAL HUMAN RIGHTS INSTITUTIONS**

...a partnership for human rights in our region

**SUBMISSION BY THE ASIA PACIFIC FORUM OF  
NATIONAL HUMAN RIGHTS INSTITUTIONS  
TO THE AD HOC COMMITTEE**

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## 1. EXECUTIVE SUMMARY

### Asia Pacific Forum

1. This paper has been prepared by the Asia Pacific Forum of National Human Rights Institutions (APF). The APF is a regional organisation comprised of the following independent national human rights institutions:

- **Afghanistan** Independent Human Rights Commission
- **Australian** Human Rights and Equal Opportunity Commission
- **Fiji** Human Rights Commission
- National Human Rights Commission of **India**
- **Indonesian** National Commission on Human Rights
- **Malaysian** Human Rights Commission
- **Mongolia** National Human Rights Commission
- National Human Rights Commission of **Nepal**
- **New Zealand** Human Rights Commission
- **Palestinian** Independent Commission for Citizens Rights
- **Philippines** Commission on Human Rights
- National Human Rights Commission of the **Republic of Korea**
- Human Rights Commission of **Sri Lanka**, and
- The National Human Rights Commission of **Thailand**.

See [www.asiapacificforum.net](http://www.asiapacificforum.net) for further details on the APF and each of the above institutions, including their powers, functions and composition.

2. The purpose of this paper is to assist in the development of a new international Convention on disability. It specifically focuses on the following six areas that are the subject of ongoing discussions in the Working Group (WG) and Ad Hoc Committee

process – (i) Definitions; (ii) Monitoring; (iii) Existing Normative Principles; (iv) State Obligations; (v) International Cooperation and (vi) ‘What’s missing from the Convention’. A brief executive summary of the main points under each of the above headings is provided below:

### **Definitions**

3. The use of the Convention is likely to be easier if a definitions section at the front only contains definitions which apply to several articles. Definitions which only apply to one substantive article should be contained within that specific article.

### ***General Principles***

4. The draft Principles are appropriate to support for inclusion in a Convention, but attention needs be given to ensuring that the Principles are reflected more directly in operative provisions. The principles, as placed in the working group draft, may be more likely to be picked up in this manner than if left within the preamble structure.

5. There could, however, be clearer linkages provided between the rest of the body of the draft Convention and the Principles, so as to make it clearer (i) which of the principles is to be applied within the context of a specific article and (ii) to provide clear guidance on the application and implementation of rights and obligations specified. Optimally, operative articles would be drafted throughout to articulate the principles as they apply to a particular right.

### ***Disability***

6. It is important that the Convention includes a definition of disability. The definition of disability should be broad and inclusive, along the lines of the Chair’s Draft. Without a definition, or some other form of clear statement on what is meant by disability for the purposes of a Convention, it is likely that:

- some States would refuse to ratify the Convention on the grounds that its meaning and the obligations it generates are too uncertain;
- the Convention would fail to fulfil its potential in providing a template for development of national law and policy and for guiding awareness of disability in society; and
- States which lack legal protection or policy for some types of disability (whether through a lack of awareness or more active forms of disapproval or prejudice) will not receive any stimulus from the Convention towards more inclusive approaches.

### *Accessibility*

7. The Chair's Draft provides a definition of 'accessibility' which is an important attempt to state a number of significant concepts concisely. The drafting, however, may not be instantly understood by people not already familiar with the concepts. This could be helped by providing examples. This would also assist in ensuring that understanding of accessibility issues is not confined to physical access and that information and communication issues are not restricted to technology related issues.

8. The instances provided of areas where accessibility is required appear designed to be comprehensive but, while important, are not the only areas relevant in this respect. A list of areas where accessibility is required would also need to include areas such as employment, education, goods and services, housing and accommodation and social and cultural life.

### *Communication*

9. The Working Group report questions whether there is a need for a definition of communication separate from draft substantive article 19. One respect in which there may be merit in retaining a separate definition of communication is that this may provide substance to the meaning of 'accessibility', since this uses, but does not define, the term communication.

### ***Discrimination on the ground of disability***

10. The Chair's Draft provides a superior formulation compared to that provided in the Working Group draft. The WG draft makes it slightly clearer that States will need to consider a wider range of approaches than simply passing legislation, while the Chair's draft perhaps makes it clearer that disability discrimination law needs to address the issue of reasonable accommodation.

11. Any limitations of the Chair's Draft definition in emphasising positive obligations may be unimportant if other articles on general obligations are accepted as being sufficiently clear for States to take all appropriate measures to remove discrimination.

12. Alternatively, limitations of the WG Draft in this area might be addressed by modifying this draft to require States to take measures to "ensure" as well as "provide", so as to make clear that taking appropriate measures will include legislative and other measures to ensure that non-State actors provide reasonable accommodation.

### ***Special measures***

13. There are a number of issues that the concept of 'special measures' might appropriately address in a Convention, but which this draft does not currently do so, including the following:

- Some measures to ensure access for people with disabilities involve the balancing of competing needs of people with different disabilities. In such a situation, authorities require some degree of protection rather than being constrained in their ability to act. A special measures provision should provide that protection so long as decisions are reasonably intended as beneficial;
- It may be necessary to make it clear that in addressing disability related needs States and other responsible authorities are permitted to adopt reasonable priorities rather than being required to address all needs at once or face claims of discrimination as between different levels or types of disability;

- Most importantly, in the context of disability a special measures provision needs to address issues of segregation of services for people with disabilities and access to the facilities and services available to the general community and ensure that services intended to benefit people with disabilities are not regarded as immune from all scrutiny on human rights grounds.

14. This issue is addressed among the draft guiding principles for the Convention, but text on this issue also needs to appear in any provision on special measures, to ensure that such a provision is not interpreted as a blank cheque for segregation or other limitations on rights.

***Discrimination against associates or based on past future or imputed disability***

15. Coverage of discrimination against associates is important both for the persons affected and in recognition that disability discrimination is a social phenomenon rather than being concerned wholly with individual pathology. Coverage of discrimination based on imputed or future disability is likely to increase in social importance with further developments in relation to human genetic information.

***Language***

16. The need to include a separate definition of language is not overtly obvious. However the convention needs to consider:

- whether it is clear enough that ‘accessibility’, as it applies to various rights covered by the draft Convention, includes issues of communications and language access; and
- what obligations ought to be included regarding making information and communication accessible to people with intellectual disabilities including whether and how ‘plain language’ ought to be defined for this purpose.



### ***Reasonable accommodation***

17. Issues relevant to ‘reasonable accommodation’ are discussed above in the context of paragraphs 10 to 12 on the definition of discrimination.

### ***Universal Design and Inclusive design***

18. There is a need for an appropriate definition of ‘universal design and inclusive design’ notwithstanding proposals for a separate substantive article on this issue since the concept of universal design may also be used in the concept of accessibility and/or into State obligations in a range of areas. Established usage regards universal design as part of accessibility. This involves goods, services, equipment, facilities, processes and systems being designed to be directly accessible to people with disabilities as far as possible, and for the widest range of people possible, without any adaptations having to be made.

19. ‘Adaptability’ should be considered as a related and important but distinct concept. If it is not feasible to make, for example, a facility directly accessible to a person with a disability, it should at least be made adaptable. The concept of universal design is not restricted to technical features of goods, services, equipment and facilities, but may also usefully be applied in considering accessibility of social systems and processes more generally.

### **Monitoring**

20. The Convention should not simply replicate existing treaty monitoring structures. The formulation of this new Convention is an opportunity to engage with the treaty reform agenda for an effective monitoring system. For example, one option is that States could be obliged to develop, in consultation with the disability community, a strategic implementation plan that identifies key areas of performance for submission and review. The States would be required to report against developments in the key performance areas. This would create a proactive response to treaty obligations at a national level and

give a clearer focus to the work of treaty monitoring bodies. The Convention could also establish a new specialist committee to monitor State implementation which contains a majority of members of persons with disabilities who have expertise in human rights. The Committee will need a clear programme of work and rules of procedure with provide it with a focus for interpretation and jurisprudence to facilitate implementation and manage compliance.

21. The Convention could develop and strengthen the relationship to regional mechanisms, where they exist, and this would provide an opportunity to encourage regional planning and implementation as well monitoring procedures. The current informal relationship that committees have established with competent bodies could be formalised. As this is the first Convention negotiated since the adoption of the General Assembly endorsed Principles Relating to the Status of National Human Rights Institutions (the Paris Principles), the role of national human rights institutions should be formally recognised. For example they could provide a treaty body with a reference point for monitoring State action.

### **Existing Normative Principles**

22. The drafting process needs to consider the role of existing normative principles such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in informing and guiding the nature and structure of proposed text. The Standard Rules provide an illustrative template for developing draft text. Drafting needs to recognise the nature of a thematic Convention and the need for an applied focus to support State implementation. It is how these fundamental principles are applied that provides the ‘value adding’ within a thematic Convention. The Standard Rules provides a substantial body of knowledge in a framework that applies these principles within a disability context and, as such, is well placed to inform the development of a thematic Convention.

### **State Obligations**

23. It is important to include a general provision on State obligations to address, in general terms, issues that may not be addressed elsewhere in the Convention. Draft article 4 of the WG text is in general satisfactory, but the Convention needs to address explicitly (as did the Chair's draft text):

- (a) the question of whether some or all of the rights (and which ones) are to be guaranteed immediately or realized progressively;
- (b) the obligation to make available appropriate remedies;
- (c) the obligations of States in relation to private or non-State actors. This should clearly define the responsibility of States when State functions are delegated or subcontracted to private entities.

24. The Convention needs to address the question of permissible limitations on rights (as do both the ICCPR and ICESCR). No greater limitation on any existing right should be permitted than is already permitted under other treaties or under general international law.

### **International Cooperation**

25. The inclusion of international cooperation needs to be an explicit provision worded in a broad sense as suggested by members of the Working Group (i.e. annex 2 paragraph 4). A broad understanding of international cooperation is an essential requirement for successful implementation. Possible elements include the harmonisation and development of standards and incorporating the principle of non-discrimination to the provision of aid and services. The UN and its agencies should have a central role in promoting cooperation. The objectives of the Convention could be pursued through member States agreeing to ensure priority in trade liberalisation agendas for measures to improve access to facilities and services for people with disabilities. The promotion of stronger regional and international relationships and cooperation between national human rights institutions and with other relevant agencies should also be explored as a means to developing capacity and facilitating implementation.

## **What's Missing**

26. The final section of this paper discusses some topics identified as “missing” from the WG draft prepared at its January 2004 meeting in New York. It also includes topics identified by national human rights institutions in various regional and national consultations. Issues addressed include (i) particular sub-groups of people with disabilities (ii) immigration (iii) access to the right to health and (iv) formal aspects of the Convention such as reservations, entry into force etc. This section of the paper is intended to provide a basis for further consideration and discussion.

## 2. ASIA PACIFIC FORUM AND DISABILITY

### Asia Pacific Forum

27. The Asia Pacific Forum of National Human Rights Institutions (APF) is a regional organisation comprised of the following independent national human rights institutions:

- **Afghanistan** Independent Human Rights Commission
- **Australian** Human Rights and Equal Opportunity Commission
- **Fiji** Human Rights Commission
- National Human Rights Commission of **India**
- **Indonesian** National Commission on Human Rights
- **Malaysian** Human Rights Commission
- **Mongolia** National Human Rights Commission
- National Human Rights Commission of **Nepal**
- **New Zealand** Human Rights Commission
- **Palestinian** Independent Commission for Citizens Rights
- **Philippines** Commission on Human Rights
- National Human Rights Commission of the **Republic of Korea**
- Human Rights Commission of **Sri Lanka**, and
- The National Human Rights Commission of **Thailand**.

See [www.asiapacificforum.net](http://www.asiapacificforum.net) for further details on the APF and each of the above institutions, including their powers, functions and composition. The above institutions have a direct responsibility for the protection and promotion of the human rights of people with disabilities.

## 7<sup>th</sup> APF Annual Meeting

28. In response to the decision of the Ad Hoc Committee on a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities (the Ad Hoc Committee) to invite the participation of national human rights institutions in its work, the APF placed this issue on the agenda its 7<sup>th</sup> Annual Meeting.<sup>1</sup> At that meeting, APF member institutions adopted the following recommendations:

*That Forum member institutions consider the recommendations of the Ad Hoc committee that:*

- *Human rights institutions make available suggestions and possible elements to be considered in proposals for a convention;*
- *Organisations' views be sought on proposals for a convention including*
  - *Questions relating to its nature and structure;*
  - *Elements to be considered including the work done in the field of social development, human rights and non-discrimination;*
  - *Follow-up and monitoring issues;*
  - *The complementarity between a new instrument and existing instruments.*
- *That Forum member institutions consider what role they can play in responding to recommendations of the Ad Hoc committee in relation to the development of a convention (a) at the national level and (b) in the regional forums within the UN system;*
- *That Forum member institutions consider how they can best respond to recommendations that national institutions should consult with NGOs in their respective countries in relation to the development of a convention;*

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<sup>1</sup> See [http://www.asiapacificforum.net/activities/annual\\_meetings/7.htm](http://www.asiapacificforum.net/activities/annual_meetings/7.htm) for further details.

- *That Forum member institutions adopt reasonable efforts to facilitate the participation of persons with disabilities in the course of NGO consultations;*
- *That the APF take steps to develop a disability rights component within its work programme;*
- *That Forum member institutions request that the Forum secretariat provide support, as requested and to the extent possible, for the activities of its member institutions in responding to the Ad Hoc Committee's recommendations.*
- *That Forum member institutions request that the Forum secretariat, in cooperation with its member institutions, develop and advocate proposals for a possible new convention for the consideration of the Ad Hoc Committee.<sup>2</sup>*

## **New Delhi Workshop**

29. In line with the decision of APF member institutions to respond positively to the invitation of the Ad Hoc Committee to participate in the development of the possible new convention, from 26-29 May 2003, a workshop was organised by the APF, the National Human Rights Commission of India, the British Council and the Office of the United Nations High Commissioner for Human Rights (OHCHR) to discuss the contribution of national human rights institutions to the development of the proposed Convention. Additional financial support for the workshop was provided by the United Kingdom Foreign and Commonwealth Office.

30. Participants at the workshop included national human rights institutions (NHRIs), representatives from the Commonwealth and the Asia Pacific region, NGOs working in the field of disability from India, government officials and the OHCHR. Particular efforts were made to facilitate participation of people with disabilities themselves. 39

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<sup>2</sup> Discussion paper, Seventh Annual Meeting of the APF, [http://www.asiapacificforum.net/activities/annual\\_meetings/seventh/meeting\\_papers.htm](http://www.asiapacificforum.net/activities/annual_meetings/seventh/meeting_papers.htm)

participants took part (excluding the delegation from the National Human Rights Commission of India, which was represented by the Chairperson, Commissioners and supported by senior staff members). NHRIs represented at the workshop included those from Afghanistan, Australia, Fiji, Ghana, Iran, Korea, Malawi, Malaysia, Mauritius, Mongolia, Nepal, New Zealand, Nigeria, Northern Ireland, Philippines, South Africa, Sri Lanka, Thailand and Uganda.

31. The workshop held nine working sessions relating to various aspects of the rights of persons with disabilities. It considered, inter alia, country papers on the impact of national legislation and administrative practice; the role of NHRIs in promoting the rights of persons with disabilities; “mainstreaming disability” – experiences of UN Conventions (hard instruments); existing (soft) UN instruments relevant to disability; international monitoring mechanisms and complaints procedures; the nature and key elements of the proposed new Convention on disability – perceptions of NHRIs and NGOs; and partnership strategies for action in the lead up to the new UN Convention. Following discussion, a consensus outcome was achieved and the ‘Conclusions and Recommendations’ of the workshop were finalised and adopted.<sup>3</sup>

32. At the second session of the Ad Hoc Committee, held from 16 to 27 June 2003, Commissioner Dayal of the National Human Rights Commission of India represented the APF and presented the Conclusions and Recommendations adopted at the New Delhi workshop to the members of the Ad Hoc Committee.

### **8<sup>th</sup> APF Annual Meeting**

33. In addition to the above, APF member institutions have participated in both regional and national meetings to assist in the development of the Convention.<sup>4</sup> As a result of these activities, at the Eighth Annual Meeting of the APF, held in Kathmandu, Nepal from 16 to 18 February 2004, APF member institutions “welcomed progress to

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<sup>3</sup> See <http://www.asiapacificforum.net/activities/thematic/disability/disability.htm>

<sup>4</sup> Further information on these activities can be obtained from [http://www.asiapacificforum.net/activities/annual\\_meetings/eighth/disability.doc](http://www.asiapacificforum.net/activities/annual_meetings/eighth/disability.doc)



develop a new international convention on the rights of people with disabilities, as advocated by national institutions at the workshop held in New Delhi, India in 2003. Forum institutions agreed to establish a working group to assist in the development of the proposed convention.”<sup>5</sup>

### **APF Working Group on Disability**

34. The APF working group on disability was comprised of the national human rights institutions from Australia, India and New Zealand. The APF working group developed this paper for the consideration of the broader APF membership and for submission to the Ad Hoc Committee.

35. The purpose of this paper is therefore to assist in the development of the Convention. It specifically focuses on the following six areas that are the subject of ongoing discussions in the United Nations Working Group (WG) and Ad Hoc Committee process – (i) Definitions; (ii) Monitoring; (iii) Existing Normative Principles; (iv) State Obligations; (v) International Cooperation and (vi) ‘What’s missing from the Convention’.

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<sup>5</sup> See paragraph 20 of the Concluding Statement of the 8<sup>th</sup> Annual Meeting, [http://www.asiapacificforum.net/activities/annual\\_meetings/eighth/concluding.htm](http://www.asiapacificforum.net/activities/annual_meetings/eighth/concluding.htm)

### 3. DEFINITIONS

#### **Background**

36. This section of the paper discusses the definitions provided in the WG draft and Chair's draft. There are of course many other draft texts also available from States and other organisations, and more will emerge as the process continues. In the time available it is not possible to provide comments on each draft text currently available. It is hoped however that these comments will assist in providing a framework for the assessment of such proposals.

#### ***General Principles***

37. This section begins by discussing the General Principles contained in the WG draft. These Principles, although not part of the definitions section of the draft Convention, are discussed here since they similarly have or could have significance flowing across a number of other provisions of the Convention.

38. The WG text includes draft Article 2 which states:

The fundamental principles of this Convention shall be:

- dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- non-discrimination;
- full inclusion of persons with disabilities as equal citizens and participants in all aspects of life;
- respect for difference and acceptance of disability as part of human diversity and humanity;
- equality of opportunity.

39. This section recommends the draft Principles as appropriate to support for inclusion in a Convention, while also recommending that in the drafting process from this point on attention be given to ensuring that the Principles are reflected more directly in operative provisions.

40. The principles may perform an important role in ensuring that some specific concepts from the disability context are included in and applied within this Convention. The identification of specific principles to aid in the interpretation and implementation of a treaty and establish its overall aims is a well-recognised practice.

41. Principles are more commonly contained in the Preamble to an instrument rather than in an article within the body of a Convention. The inclusion of the General Principles as an article is a welcome innovation noting that in practice preambular material may often be overlooked, or regarded as formulaic recitals having little connection with the substantive text, indicating what negotiating parties wish to be seen as having done rather than reflecting what the agreement between them has actually done, or at best regarded as purely aspirational.

42. In particular, one of the major benefits of an international Convention in many countries may be to serve as a template for national legislation and policy. Principles placed as they are in the working group draft may be more likely to be picked up in this manner than if left within the more normal preamble structure.

43. There could, however, be clearer linkages provided between the rest of the body of the draft Convention and the Principles, to make it clearer which of the principles is to be applied within the context of a specific article and to provide clear guidelines in the application and implementation of rights and obligations specified. Optimally, operative articles would be drafted throughout to articulate the principles as they apply to a particular right – with text stating a right based on the principles of equality, non-discrimination and dignity and then applying that concept to the right concerned within a disability context.

44. A short discussion of each of the draft principles is provided below for reference, drawing on the Discussion Paper on Founding Principles of Convention on Rights of Persons with Disabilities submitted to the 2nd 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 New York, 16-27 June 2003 by the Danish Institute for Human Rights.

***Dignity, individual autonomy and independence***

45. Human dignity is a crucial concept with regard to human rights in general and in the context of people with disability specifically. The human rights model focuses on the inherent value of human beings and subsequently, only if necessary, on the person's medical characteristics. The limitation or disablement is not to be found within the person with a disability, but in the response of society to impairment or disability.

46. The principle of autonomy has clear relevance to the situation of people with disabilities. People with disabilities continue to have less than equal opportunities in seeking self-realisation and inclusion in community and political life. Issues of privacy are important in the context of disability as dependence on technical and personal aids may lead to situations of vulnerability. The rights to integrity and liberty are also highly relevant with regard to people with disabilities, for example in the context of treatment or incarceration. The principle of autonomy bridges both civil/political rights and socio-economic rights. Civil and political rights derived from the principle of autonomy are *e.g.* the right to privacy and freedom of thought. Socio-economic rights derived from the same principle are *e.g.* the right to accessibility and support services enabling an independent life.

47. The right to independence or an independent life embodies one (very important) aspect of the principle of autonomy. It underlines the right to live a life outside of

institutions, where barriers for full social inclusion are removed and the necessary technical aids and personal assistance are provided.

### ***Non-discrimination***

48. Where equality is the positively formulated principle and ideal, non-discrimination is the corresponding legal standard as it has been commonly formulated in national legislation.

49. Non-discrimination and equality before the law is sometimes taken to imply that the role of the state should be reduced to prohibiting less favourable treatment of individuals who are similarly situated and to bestowing individuals with identical rights.

50. Even within the context of national discrimination laws however, this formal understanding of non-discrimination fails to reflect the widespread recognition of the concept of indirect discrimination which recognises that uniform treatment, rules, practices or features of physical or other environments can be (and in the context of disability often are) discriminatory in effect, and should be modified so far as this can reasonably be done. While anti-discrimination legal measures are clearly not the only measures necessary for achieving or promoting equal enjoyment of human rights (in particular for people with a disability) neither should they be approached as necessarily confined to addressing issues of purely formal equality.

51. An important clarification, or translation for the disability context, of non-discrimination models in this respect is the concept of *Reasonable Accommodation*. A duty to provide reasonable accommodation is imposed within a range of national laws on social institutions with regard to physical and social environments, which unchanged would constitute a discriminatory barrier preventing persons with disability from full participation. As discussed below in relation to definitions of discrimination it is appropriate for the Convention to reflect this principle. Whether this is done within the

definition of discrimination or as a distinct provision appears to be of secondary importance.

***Full inclusion of persons with disabilities as equal citizens and participants in all aspects of life***

52. The notion of human rights elaborated in international and regional instruments is one of *inclusion*. Inclusion describes the ideal situation in which equality and respect for the inherent dignity of all human beings has been realised. This incorporates the concept of *participation* that is directed both towards the majority who should allow for participation and the minority wanting to participate actively. Full inclusion is not just based on passive acceptance by the majority but requires social structures that ensure active participation of people with disabilities. An ideal of equal partners living side by side in an integrated, inclusive society where all are equally entitled and enabled to the exercise of rights and obligations.

***Respect for difference and acceptance of disability as part of human diversity and humanity***

53. This principle is based on, and states quite effectively, the concept that disability is a universal feature of the human condition and that legislation, social policies and environments should accordingly reflect the full range of diversity of abilities that exist in society.

***Equality of Opportunity***

54. This concept gives appropriate acknowledgement to the importance of *'difference'* and takes account of both personal and environmental barriers, which may restrict participation. According to this understanding of equality, ignoring differences may result in invalid differentiation. Thus positive actions may be required to accommodate differences. Implicitly, the end goal is understood to be a society that is genuinely inclusive, a society that values difference and respects the equality of all human beings regardless of difference.

55. Unlike other common grounds of discrimination such as race or gender, equality of opportunity for people with disabilities may necessarily only be achieved through continuous accommodation, technical and personal assistance services. Disability does not become irrelevant once past discrimination has been remedied. Even after a person has, for example, been employed, he or she may continue to require technical and personal assistance. This point is discussed further below in relation to special measures but is also relevant more broadly to concepts of equality for the purposes of this Convention.

### ***Disability***

56. The WG did not agree on a definition of disability. Its Report contains the following footnote:

12: Many members of the Working Group emphasised that a convention should protect the rights of all persons with disabilities (i.e. all different types of disabilities) and suggested that the term "disability" should be defined broadly. Some members were of the view that no definition of 'disability' should be included in the convention, given the complexity of disability and the risk of limiting the ambit of the convention. Other delegations pointed to existing definitions used in the international context including the World Health Organisation's International Classification of Functioning, Disability and Health (ICF). There was general agreement that if a definition was included, it should be one that reflects the social model of disability, rather than the medical model.

57. NHRIs have to date supported the Convention containing a definition of disability (including in the context of the Bangkok workshop for the Asia Pacific and the New Delhi workshop for the Commonwealth and the Asia Pacific) and that definition being a broad one, reflecting a social model of disability.

58. The WG Chair's draft is consistent with views put forward by NHRIs on these issues. This draft is as follows:

"Disability" is the loss or limitation of opportunities to take part in the life of the community on an equal level with others due to physical, social, attitudinal and cultural barriers encountered by persons having physical, sensory, psychological, developmental, learning, neurological or other impairments (including the presence in the body of an organism or agent causing malfunction or disease), which may be permanent, temporary, episodic or transitory in nature

59. Important features of this definition are that:

- it recognises that disability may be episodic or transitory rather than needing to be permanent;
- it does not include a “substantially limited in major life activity” component of the kind that has caused significant problems in applying disability discrimination laws in the United Kingdom and United States (such as denial of protection against discrimination to cancer survivors because they were not impaired enough);
- it adopts a social model in referring to barriers to opportunity and participation while also making clear that this concept of disability retains an objective connection with a person having an impairment.

60. The Bangkok meeting also provided several alternative draft definitions having similar features to commend them.

61. This paper recommends that NHRIs maintain support both for including a definition of disability, and for that definition being broad and inclusive, along the lines of the Chair’s Draft, and also suggests some means by which concerns of participants opposing a definition might be met.

62. Without a definition or some other form of clear statement on what is meant by disability for the purposes of a Convention, it is likely that:

- Some States would refuse to ratify the Convention on the grounds that its meaning and the obligations it generates are too uncertain



- The Convention would fail to fulfil its potential in providing a template for development of national law and policy and for guiding awareness of disability in society
- States which lack legal protection or policy for some types of disability (whether through lack of awareness or more active forms of disapproval or prejudice) will not receive any stimulus from a Convention towards more inclusive approaches.

### *Arguments against defining disability*

63. The principal opposition to the Convention defining disability has been expressed by the European Union. Most other States and other participants have supported a definition, albeit in various terms.

64. Arguments against defining disability have focused on dangers of limiting the concept of disability by defining it. This argument of course can also be, and has been, used to oppose codification of substantive rights in national laws and constitutions (including in debates over the United States Bill of Rights). The same arguments apply to substantive rights as to definitions affecting their application. A decision to proceed with a Convention on human rights and disability seems necessarily to involve rejection of the argument that to define rights and their application is to inappropriately limit them. Arguments raised against a definition therefore seem more appropriate to consider as arguments affecting the kind of definition that should be used.

65. One set of arguments concerns the danger of inappropriately fixing the development of the concept of disability in time. Approaches to disability in international standards and in national law and policy and discussion have obviously undergone considerable development in recent decades. It is entirely possible that this process of development is not yet complete and so, it is argued, a Convention should not freeze the concept of disability in its current state.

66. A related point is that it may be difficult to secure agreement to a single definition of disability, as illustrated by the range of proposed definitions which have been put forward. (A converse view of course would be that the range of definitions put forward both for disability and for other important terms and concepts represents a wealth of experience which should be used appropriately rather than discarded by abandoning the task of definition altogether.)

67. In particular, some states may be reluctant to support a Convention if it includes disabilities which are seen as closely associated (either as cause or consequence) with behaviour which is disapproved of officially and /or socially – such as addictive disorders and psychiatric disabilities or other disabilities which may result in inappropriate behaviour.

68. A number of contributions to date (including the contribution from the Government of Japan and the report of the African Regional Workshop) have supported the Convention providing a definition of disability but also emphasised the need to provide for flexibility of application over time and between different national circumstances.

69. Clearly, a complete lack of definition provides maximum flexibility in both respects, but at the expense of providing ascertainable obligations or guidance to development of law and policy. Such an approach, while it may be appealing as a matter of academic or theoretical discourse or in national or regional circles where a broad approach to disability is already well understood and accepted, does not appear appropriate in an instrument intended to have worldwide application. More bluntly, European participants in particular may need to be reminded that their perspectives are not universally appropriate or applicable. NHRIs in view of their independence may have a particularly important role in such a discussion. A number of other mechanisms for flexibility over time and to ensure appropriate application in different circumstances can however be suggested.

***No definition but refer to ICD or other international standard***

70. If a definition within the Convention itself cannot be agreed, an obligation within the Convention at least to have regard to some international standard – such as the International Classification of Disorders – in applying the Convention and in developing national law and policy would mean that the Convention did not completely fail to give guidance.

71. The ICD has several advantages for this purpose, being an existing international standard, which is subject to ongoing updating, and which is broad and inclusive and despite its medical context does incorporate important elements of a social model of disability. Its main disadvantage as a model for implementation in national law and policy is that it is not concise.

72. This approach is presented as a fallback position (as one step better than no definition at all) rather than a preferred model. If this approach were adopted there could still be questions in this case for some States regarding whether the obligations created by the Convention were sufficiently definite in law to permit ratification. A Convention which does not itself contain a definition also seems likely to be less effective as a template for national law, policy and awareness raising than a Convention which states what it means by disability within the text.

***Capacity for national and regional mechanisms to expand on provisions of Convention***

73. Although the WG text does not provide as clear a statement on this point as may be desirable (the Bangkok draft providing a better model in this respect), in any event the position would be that nothing in the Convention would prevent national or regional provision applying more favourable standards or applying the Convention to a more broadly defined group of people with disabilities. So, for example, if European Union member States considered now or in future that a broader concept of disability were appropriate to apply than that specified in the Convention they would remain free to act

accordingly. A more formal procedure for applying a developing understanding of disability to the Convention itself may also be possible as discussed below.

***Possible capacity to expand Convention meaning of disability over time***

74. If in future, or for some States, the meaning of disability adopted for the purposes of the Convention were found to be unduly restrictive, it would be possible to adopt a broader meaning by subsequent negotiation of an optional protocol.

75. A less cumbersome model however is also available, and one which allows the Convention itself to provide for its own expansion, rather than relying on an entirely separate and subsequent process. This model would follow the provision of the International Labor Organisation's *Discrimination (Employment and Occupation) Convention 1958* (ILO Convention 111) for parties to expand the application of that Convention to them by declaring additional grounds of discrimination to be covered (after consultation with national representative bodies of employers and employees).

76. A similar provision might usefully be included in a Convention on human rights and disability, providing a means by which development of concepts and policy on disability over time could flow into the operation of the Convention. In association with this, the Committee or other monitoring mechanism established by the Convention could be given a function of making recommendations on concepts of disability to be adopted by States in their national laws and policies and for the purposes of the Convention.

77. This is not, however, an argument for NHRIs to accept a definition of disability in the Convention which leaves protection of particular groups of people with disabilities who can be identified now as particularly needing protection, such as people with psychiatric disabilities, entirely to the discretion of States. The African Workshop recommendation for States to be able to build on a foundation provided by the Convention also very clearly supports an inclusive approach to definition of disability

rather than a flexible drafting approach being used to cover an effective abandonment of protection of people with “less favoured” disabilities.

78. NHRIs should take the same principled approach, continuing to support the core definition of disability being as inclusive as possible, while pursuing other means for addressing concerns of States which could otherwise lead to adoption of a definition which excludes groups whose inclusion could be seen as presenting difficulties. Some approaches in this respect are discussed below.

***Addressing concerns regarding behaviour and public/personal risk***

79. Most difficulties in gaining support for a broad definition of disability are likely to arise in relation to disabilities which affect a person’s behaviour and capacity to make decisions, or which are associated with behaviour which is subject to social and/or official disapproval.

80. These same factors however may mean that people with these types of disabilities – including intellectual disabilities, mental illnesses or psychiatric disabilities and infectious diseases such as HIV/AIDS or leprosy, are in particular need of human rights protection.

81. This paper recommends that these issues be addressed by appropriate limitations on the concept of discrimination rather than by exclusion of classes of disability from protection.

82. States will clearly not support, ratify or implement a Convention which they consider prevents them responding appropriately where a person’s behaviour (which occurs because of disability) impinges on the rights of other people or endangers that person. For example, people with addictive disorders would clearly be within a definition of disability based on the International Classification of Disorders and are also clearly subject to stigma and social exclusion in many countries.

83. However, when in Australia a court decision confirmed that people addicted to prohibited substances were covered by the Disability Discrimination Act in that country, the response of government has been to prepare amendments to the legislation to exclude addicts from coverage – because of concerns that employers and others would otherwise have to tolerate illegal and unacceptable behaviour such as drug use and intoxication at work. Australia’s NHRI does not consider that this is in fact the effect of the legislation, but the debate highlights the need, if these issues are not to be dealt with by exclusions from the concept of disability, for clear provisions preserving the capacity of States to make legitimate responses where a person’s disability affects their behaviour or otherwise affects the rights of other people.

84. This will need to include an approach to issues of impaired capacity which is more consistent with State practice (and relevant human rights “soft law”) in the areas of mental health and guardianship law in particular than the current draft on those issues. For example, the current draft – providing in absolute terms that there shall be no detention on grounds of disability – simply does not appear sustainable if the Convention is to cover psychiatric disabilities, or infectious diseases (noting that in some although by no means all such cases quarantine or other detention measures may be justified on public health grounds and thus be within the “ordre public” exception within the existing Covenants).

85. In the area of discrimination, WG draft article 7 does include the following:

3. Discrimination does not include a provision, criterion or practice that is objectively and demonstrably justified by the State Party by a legitimate aim and the means of achieving that aim are reasonable and necessary.

86. This provision is very sweeping and in legal terms should provide more than sufficient assurance to States in relation to discrimination – although the words “by the State Party” may cast some doubt on whether this provision also applies to legitimate limitations applied by other actors in society.

87. The Chair's Draft provides alternative text in this respect and as discussed below in relation to the definition of discrimination appears superior in this and other respects to the WG draft.

### *Accessibility*

88. The Bangkok meeting supported a definition of accessibility being included in the Convention.

89. As noted in the WG report, the approach to be taken to defining accessibility will depend on the outcome of discussions on substantive articles in this respect. In principle, if a definition only relates to one article then it should for ease of reference be contained within that article.

90. The Chair's Draft provides the following:

"Accessibility" means the measure or condition of things and services that can readily be reached or used by people including those with disabilities, which could be achieved, through inclusive and universal design or adaptation and by legal and programmatic means, in order to promote their access to the physical environment, public transportation and information and communication, including information, communication and assistive technologies, and to societal structures and decision- and policy-making processes.

91. This definition represents an important attempt to state a number of significant concepts concisely. The drafting, however, may not be instantly understood by people not already familiar with the concepts. This could be helped by use of the technique (increasingly popular in seeking to make legislative drafting more readily understood) of providing examples. This would also assist in ensuring that understanding of accessibility issues is not confined to physical access and that information and communication issues are not restricted to technology related issues.

92. The instances provided of areas where accessibility is required appear designed to be comprehensive but while important are not the only areas relevant in this respect – a list of areas where accessibility is required would also need to include areas such as employment, education, goods and services, housing and accommodation, and social and cultural life.

### ***Communication***

93. The WG report provides the following definition:

"Communication" includes oral-aural communication, communication using sign language, tactile communication, Braille, large print, audio, accessible multimedia, human reader and other augmentative or alternative modes of communication, including accessible information and communication technology

94. It notes, however, that the Ad Hoc Committee may wish to consider whether there is a need for a definition of communication separate from draft substantive article 19.

95. One respect in which there may be merit in retaining a separate definition of communication is that this may feed into the meaning of accessibility, since this uses but does not define the term communication.

### ***Discrimination on the ground of disability***

96. The recommendation of this paper on this issue is that the Chair's Draft provides a superior formulation compared to that provided in the Working Group draft. Other available proposals provide further material on some issues but as noted earlier detailed comments on these proposals are not included here.

97. The WG notes that this issue is addressed in draft Article 7 and invites consideration of the best placement of this definition. As already noted, use of the Convention is likely to be easier if a definitions section at the front only contains



definitions which apply to several articles, with definitions only applying to one substantive article being contained within that article in each case.

98. Both the Chair's Draft and the WG draft address discrimination in several articles (including general obligations as well as obligations specifically regarding equality and non-discrimination, indicating a need for a separate definition.

99. Working Group draft article 7 reads as follows:

**Draft Article 7**

**EQUALITY AND NON-DISCRIMINATION**

1. States Parties recognise that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. States Parties shall prohibit any discrimination on the basis of disability, and guarantee to all persons with disabilities equal and effective protection against discrimination. States Parties shall also prohibit any discrimination and guarantee to all persons with disabilities equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, source or type of disability, age, or any other status.
2.
  - a. Discrimination shall mean any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by persons with disabilities, on an equal footing, of all human rights and fundamental freedoms.
  - b. Discrimination shall include all forms of discrimination, including direct, indirect and systemic, and shall also include discrimination based on an actual or perceived disability.
3. Discrimination does not include a provision, criterion or practice that is objectively and demonstrably justified by the State Party by a legitimate aim and the means of achieving that aim are reasonable and necessary.
4. In order to secure the right to equality for persons with disabilities, States Parties undertake to take all appropriate steps, including by legislation, to provide reasonable accommodation, defined as necessary and appropriate modification and adjustments to guarantee to persons with disabilities the enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.

5. Special measures aimed at accelerating de facto equality of persons with disabilities shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; those measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

100. The Chair's Draft provides an alternative formulation of a definition of disability as follows:

1. "Discrimination on the ground of disability" includes:
  - (1) any distinction, exclusion, restriction on the ground of disability which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field;
  - (2) any act, criterion, provision, practice, policy, rule or arrangement which, although not explicitly based on disability-
    - (a) has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of their human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field; and
    - (b) cannot be objectively justified as a reasonable and proportionate means of achieving a legitimate aim;
  - (3) a failure to make reasonable accommodation,
  - (4) less favourable treatment of an associate of a person with a disability because of that other person's disability or because of the association, and a reference to disability includes a suspected, imputed, assumed or possible future disability, perceived disability, a past disability or the effects of a past disability, or the characteristics of a disability.

The WG draft will be taken as the starting point for discussion here.

101. The first paragraph of this draft is operative rather than definitional and is not commented on here.

102. Part (a) of paragraph 2 is based on the well established definition of discrimination in the Convention on the Elimination of All Forms of Racial Discrimination. The only comments here are that it would be better to refer to

impairment of “any” rather than “all” human rights; and that the formulation of this paragraph in the Chair’s Draft is slightly clearer.

103. Part (b) refers to direct, indirect and systemic discrimination. The concepts of direct and indirect discrimination have established meanings in a number of legal systems which have adopted these concepts from United States jurisprudence. However, it may be questioned whether these terms are of sufficiently universal applicability to be suitable for use in an international instrument. As discussed below, the Chair’s Draft appears to provide a more appropriate model in this respect by stating the applicable concept of discrimination more fully.

104. Systemic discrimination, although a term frequently used in academic writings does not have a clearly established legal meaning. Proponents of this term could usefully be asked to provide examples for use here of what States would be undertaking to prohibit by prohibiting systemic discrimination. Again, the Chair’s Draft definition of discrimination seems less dependent on a specific legal or theoretical context and thus more suitable for use in an international instrument.

105. Paragraph 3 of the WG draft as already noted provides an exception for measures which are justifiable, reasonable and necessary but appears to restrict the benefit of this exception to measures by States, and thus may not be adequate as a template for national discrimination laws. The Chair’s Draft provides a broader formulation in this respect.

106. Paragraph 4 provides a positive obligation on States to undertake measures of reasonable accommodation, defined as “necessary and appropriate modification and adjustments to guarantee to persons with disabilities the enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.” This definition appears adequate but NHRIs may wish to consider the additional material in this respect provided in a number of contributions including from India and from the seminar of Quito, to include “failure to eliminate environmental or attitudinal barriers or the creation of new barriers that impede

access to services and to full participation in the activities of civil, cultural, economic, political and social life”.

107. Instead of creating a separate obligation to make reasonable accommodation, the Chair’s Draft takes the approach of defining failure to make reasonable accommodation as part of the concept of discrimination.

108. The difference between the two drafts may be more a matter of theoretical interest than practical significance. The WG draft perhaps makes slightly clearer that States will need to consider a wider range of approaches than simply passing legislation, while the Chair’s draft perhaps makes clearer that disability discrimination law needs to address the issue of reasonable accommodation.

109. Any limitations of the Chair’s Draft definition in emphasising positive obligations may be unimportant if other articles on general obligations are accepted as providing sufficiently clearly for States to take all appropriate measures to remove discrimination.

110. Alternatively, limitations of the WG Draft in this area might be addressed by modifying this draft to require States to take measures to “ensure” as well as provide, so as to make clear that taking appropriate measures will include legislative and other measures to ensure that non-State actors provide reasonable accommodation.

### ***Special measures***

111. The WG draft uses the same concepts in relation to special measures as are used in the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women, in that:

- special measures are seen as measures “aimed at accelerating de facto equality”;
- maintenance of unequal or separate standards is prohibited; and
- special measures are to be discontinued when objectives of equality of opportunity and treatment have been achieved.

112. The special measures provisions in CERD and CEDAW are intended to address the possibility of claims, or the actuality, of reverse discrimination: that is, to protect beneficial measures for disadvantaged groups from being struck down through complaints by people outside those groups, while preventing those measures from become a source of injustice or denial of human rights if broader than or maintained longer than needed to offset the effects of past discrimination. The effect of race-based quotas in particular, in areas such as employment and education, has been controversial in a number of countries. Neither of these issues is relevant in the disability context.

113. A discrimination law would have to be very badly drafted to allow people without a disability to complain about beneficial measures for people with that disability, and the prospect of privileged status for people with versus without disabilities does not seem a real world proposition.

114. Racial discrimination and sex discrimination laws in principle protect a person of any race or either gender against discrimination. Disability discrimination in all national laws and in all drafts of the proposed convention is not status neutral in this way. There is simply no suggestion that the Convention will or should protect people against discrimination because they do *not* have a disability. People who do not have a disability are addressed only insofar as they may acquire a disability in future, or may have a disability imputed to them, or may be family members or other associates of people who do have a disability. There is no need accordingly for a special measures provision to defend beneficial measures for people with disabilities against claims that these measures are discriminatory against people who lack the “privileged” status of having a disability.

115. As a practical matter, while instances of “reverse discrimination” on grounds of race or sex may be accepted as real although rare, it defies credibility to suggest that (notwithstanding a few reserved parking spaces and priority seats on buses or trains) there is any significant issue anywhere in the world of disability being a privileged status, and

lack of disability being a source of disadvantage, such as to require limitation on scope and duration of positive measures for the benefit of people with disabilities.

116. It may indeed be hoped that as accessibility and universal design are increasingly built into social systems, facilities and technologies, and as attitudes and awareness regarding disability progress, the need for specific positive measures to redress disadvantage and accommodate disability issues may diminish, but this is not the same thing as a Convention in effect requiring that positive measures be time limited from the outset.

117. Not all needs for positive measures in the disability area are concerned with redressing disadvantages resulting from past or current discrimination. Many important needs relate to the realities of impairments which are more disabling if appropriate social responses are not made.

118. For the foreseeable future, many people with disabilities affecting communication, mobility, or decision making will require various forms of human assistance to participate in society and exercise their civil, political, economic, social and cultural rights on a basis of equality or at all. Provision of such assistance where and if it is provided offends no-one else's rights to non-discrimination and there is no coherent basis, in particular in human rights law, for requiring such measures to be time limited.

119. There are, however, a number of issues which the concept of special measures might appropriately address in a Convention but which this draft does not address:

- Some measures to ensure access for people with disabilities involve balancing competing needs of people with different disabilities. For example, tactile ground surface indicators which assist blind and vision impaired people in finding direction and avoiding hazards (such as knowing when a footpath reaches a road crossing) present a barrier to smooth passage for people using wheelchairs and some other people with mobility disabilities; but a lack of such indicators may (in

the absence of other appropriate cues) present a barrier to blind and vision impaired people being able to use the area safely. In such a situation, authorities require some degree of protection rather than being damned whatever they do or do not do. A special measures provision should provide that protection so long as decisions are reasonably intended as beneficial.

- It may be necessary to make clear that in addressing disability related needs States and other responsible authorities are permitted to adopt reasonable priorities rather than being required to address all needs at once or face claims of discrimination as between different levels or types of disability.
- Most importantly, in the context of disability a special measures provision needs to address issues of segregation of services for people with disabilities and access to the facilities and services available to the general community, and ensure that services intended benefit people with disabilities are not regarded as immune from all scrutiny on human rights grounds.

120. This issue is addressed among the draft guiding principles for the Convention, but text on this issue also needs to appear in any provision on special measures, to ensure that such a provision is not interpreted as a blank cheque for segregation or other limitations on rights.

121. For example, the most unsatisfactory institutional accommodation with a lack of any recourse against abuse or neglect could still be said to be a measure taken to ensure equal opportunity to enjoy the right to housing. Some reference to concepts of “most integrated setting possible” and/or “least restrictive alternative” seems necessary – noting that these concepts are given some recognition in the Declaration on the Rights of Disabled Persons (principle 9) and Declaration on the Rights of Mentally Retarded Persons (principle 4) and still more in more recent documents – as well as requiring more generally that special measures be consistent with the human rights and dignity of people with disabilities.

***Discrimination against associates or based on past future or imputed disability***

122. The other features of the Chairs Draft definition of discrimination which are more comprehensive than the Working Group draft are the coverage of discrimination against associates and coverage of discrimination based on disability which is not current but may be past, imputed or future. Coverage of discrimination against associates is important both for the persons affected and in recognition that disability discrimination is a social phenomenon rather than being concerned wholly with individual pathology. Coverage of discrimination based on imputed or future disability is likely to increase in social importance with further developments in relation to human genetic information.

***Language***

123. The Working Group draft includes a definition as follows:

"Language" includes oral-aural language and sign language.

124. The Chair's Draft and Bangkok drafts are the same on this point. The WG report indicates that:

Some delegations were of the view that the separate draft articles of the Convention specify that language included sign language, and questioned the need for this definition in the present article. Others expressed the view that the definition was needed.

125. This paper does not express any view on whether a separate definition of language has any work to do beyond what is provided in other, substantive articles. Obviously, needless repetition should be avoided.

126. More significant issues to consider may be:

- whether it is clear enough that accessibility as it applies to various rights covered by the draft Convention includes issues of communications and language access; and



- what obligations ought to be included regarding making information and communication accessible to people with intellectual disabilities including whether and how plain language ought to be defined for the purpose of possible provisions in this respect.

### ***Reasonable accommodation***

127. Issues in this respect are discussed above in the context of definition of discrimination.

### ***Universal Design and Inclusive design***

128. The WG and Chair's drafts do not provide separate definitions of these terms. There appears to be a need for consideration of an appropriate definition notwithstanding proposals for a separate substantive article on this issue since, depending on the further course of negotiations, the concept of universal design may feed also (or instead) into the concept of accessibility and/or into State obligations in a range of areas (in particular if it is decided that obligations to implement or promote universal design in specified respects may have more operational effect than a "right to universal design").

129. The Chair's draft article 28 on right to universal design recognises:

“the right of all persons with disability to universally/inclusively designed goods, services, equipment and facilities, which require the minimum possible adaptation and cost to meet the specific needs of an individual with disability.”

130. It is not clear from the face of this text whether the intention here is to define universal or inclusive design as being design which requires minimum possible adaptation and cost; or whether two concepts (universal or inclusive design, and adaptability) are being presented but with the first of these not defined.

131. It appears more helpful and more consistent with established usage including in national law and policy to regard universal design as part of accessibility. This involves goods, services, equipment, facilities, processes and systems being designed to be directly accessible to people with disabilities as far as possible, and for the widest range of people possible, without any adaptations having to be made.

132. The Centre for Universal Design for example (<http://www.design.ncsu.edu>) provides the following definition:

“The design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”

133. Adaptability should be considered as a related and important but distinct concept, such that if it is not feasible to make a facility etc directly accessible to a person, it should at least be made adaptable (whether that involves modification to the facility or requires ensuring compatibility with adaptive equipment or other adaptations which the person with a disability brings with them).

134. For example, the Telecommunications Act in the United States requires telecommunications equipment and services to be accessible to and usable by individuals with disabilities so far as this is readily achievable. Where the primary goal of direct accessibility and useability is not readily achievable, there is a requirement that the equipment or service is compatible with adaptive devices or specialised equipment commonly used by people with disabilities to achieve access, if that is readily achievable.

135. Another example is that access requirements for premises open to the public emphasise universal design, while standards for private housing in many cases aim for the less inclusive but still important concept of adaptability. For example universal design for a public building entrance will feature level or ramp access from the outset. Adaptability for a private house by contrast involves design such that access can be achieved reasonably cheaply if a family member or friend acquires a disability or if a person with a disability buys the house.

136. It should also be noted that the concept of universal design is not restricted to technical features of goods, services, equipment and facilities, but may also usefully be applied in considering accessibility of social systems and processes more generally.

## 4. MONITORING

137. International monitoring was not considered by the WG and as such the WG draft text does not contain any provisions. Whilst monitoring mechanisms are best dealt with once the nature of State obligations and the format of the instrument is established it is useful to explore the issues in light of focused drafting discussions to come. As this section is not in response to a specific recommendation it provides a more general discussion of international monitoring as it relates to a thematic convention on human rights and disability within in the context of treaty body reform. It raises some issues for consideration and includes a more detailed background paper to assist in the negotiations.

138. This section considers monitoring within the context of treaty body reform and the main areas of focus that have been identified, reporting and engagement of the non-government sector. There are legitimate concerns that the current treaty monitoring system has failed to deliver an effective strategy in achieving compliance. The gap between the articulation of universal rights and compliance by States has become significant and threatens the integrity of the international human rights legal regime. To date there have been two key reports *The UN Human Rights Treaty Process: Universality at the Crossroads* (Bayefsky) and *Enhancing the long-term effectiveness of the United Nations human rights treaty system* (Alston).

139. Two key themes have emerged from these reports:

A reduction in the reporting burden and effective engagement of civil society.

- To make the reporting obligations on States more efficient and effective in monitoring compliance. More focused reports by member states to reduce the volume of repetitive and duplicate work and allow monitoring bodies to focus on key identified areas of concern.

- The role and engagement of the non-government sector has been a central focus. The call is for a more transparent process that develops partnerships rather than an adversarial approach.

140. The development of a thematic convention on human rights and disability has the opportunity to not just replicate existing structures but engage the treaty reform agenda for an effective monitoring system. It needs to be recognised that the strength of thematic conventions is the application of rights within a specific context so as to guide State action in implementing their obligations. This concept is demonstrated through the existing normative non-binding international frameworks – the World Programme of Action and the Standard Rules – of which both focus on planning and implementation. There has been substantial work at the international level on the development of non-binding normative principles. This process has actively engaged the disability community and taken a different approach to implementation than the treaty system.

141. The current treaty monitoring emphasis is on reporting against outcomes whereas the WPA and Standard Rules focus on planning. An option is that States could be obliged to develop – in consultation with the disability community – a strategic implementation plan that identifies key areas of performance for submission and review. The States would be required to report against developments in the key performance areas. This would create a proactive response to treaty obligations at a national level and give a clearer focus to the work of treaty monitoring bodies.

142. This focus would create a clearer emphasis on dialogue rather than judgment as a means to encouraging and managing compliance. It would enhance the facilitation of the exchange of information and development of capacity in the area of disability.

143. It recognises the prime importance of implementation planning and accountability at the national level and the importance of the national NGO role.

144. The Convention could establish a new specialist committee to monitor State implementation. A specialist Committee with a clear programme of work and rules of procedure would create a central focus for interpretation and jurisprudence to facilitate implementation and manage compliance. A specialist Committee with the majority of members being people with disabilities who have expertise in human rights and international law would be in recognition of the need for capacity building at the international level.

145. The development of a new thematic convention has the potential to develop and strengthen the relationship to regional mechanisms where they exist. For example the framework of the Inter American Convention, the African Decade Plan and West Asia regional meeting declaration, this would provide an opportunity to encourage regional planning and implementation as well monitoring procedures.

146. The current informal relationship that committees have established with competent bodies could be formalised. This is the first convention negotiated since the adoption of the Paris Principles relating to the status of National Human Rights Institutions (NHRI). NHRIs established in accordance with the Principles provide a treaty body with a reference point for monitoring State action.

## **Background**

147. In December 2001, the United Nations General Assembly (UNGA) voted to establish an ad hoc committee to consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of people with disabilities. The move towards a Convention is happening within a context where there are demands for the reform of the UN committee process and where States are claiming that they are reluctant to adopt yet another thematic human rights treaty. The concern is that the level of current human rights treaty obligations has created “treaty fatigue” in member States and that the existing committee process is not working. States claim they are already burdened by, and unable to fulfil, their existing reporting obligations.

148. Operating within this context any proposed instrument will need to respond to the reform agenda. This paper considers the nature of a thematic convention on human rights and disability what it implies for monitoring and compliance in the context of treaty reform. In recognition of the nature of disability and the need for reform, the paper advocates for a convention which establishes a collaborative planning framework for States upon which to base their domestic policy responses. This would create a framework based on a coherent plan that establishes a set of key performance areas for policy implementation. The central element is the collaborative nature in developing a transparent process that builds capacity and understanding.

### ***Compliance***

149. The strength in having a convention is the binding nature of the obligations on States and the legal rights it accords people with disabilities. It is this relationship between States and their citizens that means that compliance through domestic implementation is an essential feature of an effective convention. The various developments in soft law at the international level have provided a significant framework of principles that have not necessarily delivered reform and social change. The normative nature of a convention means compliance is fundamental and that domestic application and implementation are essential goals. The binding nature gives credibility to the intentions of States and clearly establishes a role for international governance.

150. If treaties are at the centre of the cooperative regimes by which states and their citizens seek to regulate areas of concern then, there must be some means of assuring that the parties perform their obligations at an acceptable level. To provide this assurance what tends to be sought are treaties with ‘teeth’, that is, they have some enforcement measures. In part this reflects an easy but incorrect analogy to domestic legal systems, where the application of the coercive power of the state is thought to play an essential

role in enforcing legal rules<sup>6</sup>. Chayes and Chayes have suggested that it is not about the enforcement of obligations but the management of compliance<sup>7</sup>.

151. The principal source of noncompliance is not willful disobedience but the lack of capacity, clarity or priority hence the idea of enforcement is misguided as a means for compliance<sup>8</sup>. A more sophisticated strategy that directly addresses these deficiencies is needed to deal with compliance problems. Strategies that include elements such as transparency and capacity building are more effective in generating compliance.

Transparency – the generation and dissemination of information about the requirements of the regime and the parties' performance under it – is an almost universal element of management strategy. Transparency influences strategic interaction among parties to the treaty in the direction of compliance. Capacity building – or international co-operation, addresses deficits of technical and bureaucratic capability and limited financial resources<sup>9</sup>.

### ***The Treaty System***

152. Each Convention has its own treaty monitoring system. The implementation of the core human rights conventions is monitored by committees, or "treaty monitoring bodies". The legal basis for the establishment of most treaty bodies can be found in the treaties themselves; in the case of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the monitoring body, the Committee on Economic, Social and Cultural Rights, was established by a subsequent resolution of the Economic and Social Council. Treaty bodies are composed of independent experts of recognised competence in the field of human rights who are elected by States parties.

153. In addition to the Committee on Economic, Social and Cultural Rights, there are currently five other treaty bodies functioning today: the Human Rights Committee, which

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<sup>6</sup> Chayes, Abram and Chayes, Antonia. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge. Page 12

<sup>7</sup> Ibid, page 21

<sup>8</sup> Ibid, page 22

<sup>9</sup> Ibid page 22



monitors the implementation of the *International Covenant on Civil and Political Rights* (ICCPR); the Committee against Torture; the Committee on the Elimination of All Forms of Racial Discrimination; the Committee on the Rights of the Child; and the Committee on the Elimination of Discrimination against Women. All treaty bodies are serviced by the Office of the High Commissioner for Human Rights in Geneva, with the exception of the Committee on the Elimination of Discrimination against Women, which is serviced by the Division for the Advancement of Women in New York. Treaty bodies meet periodically throughout the year in either Geneva or New York. The treaty bodies fulfill their monitoring function through one or more of three different methods.

154. All states parties are required by the treaties to produce state reports on the compliance of domestic standards and practices with treaty rights. These reports are reviewed at various intervals by the treaty bodies<sup>10</sup>, normally in the presence of state representatives. Concluding observations, commenting on the adequacy of state compliance with treaty obligations, are issued by the treaty bodies following the review.

155. Individual complaints of violations of rights are accepted under four treaties (ICCPR, CERD, the CAT, and CEDAW). These complaints are considered by the treaty body which expresses a view as to the presence or absence of a violation. The individual complaint systems allows for individual cases to be heard by the Committee provided all domestic remedies have been exhausted. It is through individual complaints that human rights are given concrete meaning. In the consideration of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to specific cases, the standards contained in international human rights treaties find their most direct application. The resulting jurisprudence provides States, non-

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<sup>10</sup> Each of the core human rights treaties incorporate periodic reporting: ICCPR, Article 40 (1) (b) ... whenever the Committee so requests. ICESCR Article 17(1) ... in accordance with a programme to be established by the Economic and Social Council. CERD, Article 9 (1)(b) ... every two years and whenever the Committee so requests. CEDAW, Article 18 (1)(b) ... at least every four years and further whenever the Committee so requests. CRC Article 44 (1) (b) ... every five years. CAT, Article 19 (1) ... supplementary reports every four years.

governmental organizations (NGOs) and individuals the contemporary meaning of the texts concerned<sup>11</sup>.

156. The *Convention Against Torture* (CAT) and the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), include an inquiry procedure which provides for missions to states parties in the context of concerns about systematic or grave violations of treaty rights.

157. In addition, the treaty bodies contribute to the development and understanding of international human rights standards through the process of writing General Comments or Recommendations. These are commentaries on the nature of obligations associated with particular treaty rights and freedoms. The specialist Committees contribute significantly to international jurisprudence. The various working methods – individual complaints, inquiry procedures and general comments – of the Committees create a focal point for ongoing discourse and interpretation of areas of concern.

### ***Monitoring & Reporting***

158. The human rights treaties are the core instruments of the international system for the promotion and protection of human rights. There is extensive coverage with every UN member state being a party to one or more of the six major human rights treaties. Eighty per cent (80%) of states have ratified four or more<sup>12</sup>. The Universal Bill of Human Rights and the five thematic conventions is a universal human rights legal system which applies throughout the world. Participation in the treaty system has expanded enormously. The number of ratifications, acceptance of individual communication procedures, the number of reports produced and considered, the individual cases decided, and the meeting time of six different treaty bodies has increased dramatically. This participation and the assumption of legal obligations by states has been voluntary, with

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<sup>11</sup> See for example; Communication No 941/2000 : Australia. 18/09/2003. CCPR/C/78/D/941/2000. (Jurisprudence) The Committee considered Article 26 of the ICCPR and confirmed the principle of non-discrimination relates to same sex couples in relation to superannuation.

<sup>12</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. pp1-2 [online] <http://www.bayefsky.com/reform/>

treaty rights generating corresponding legal duties upon states, to protect against, prevent, and remedy human rights violations<sup>13</sup>. The treaty system establishes limitations on sovereignty and underlines the validity of international supervision, accountability and governance.

159. Effective information sharing is central to a transparent monitoring process. The quality and validity of information is critical in an effective monitoring system. The current treaty monitoring system of the core human rights treaties is structured around a dialogue between State and the various treaty monitoring bodies<sup>14</sup>. Reporting is central to the compliance systems in international human rights regimes, with its aim to generate information about the policies and programmes of the parties to the treaty in complying with treaty obligations. The transparency of the regime as a whole is crucially dependant on the nature and scope of the reporting requirements and the quality of the response to them<sup>15</sup>. Effective reports are developed in collaboration with the non-government sector in a transparent process.

160. The current treaty monitoring process has failed to be an effective mechanism through which to achieve compliance. The gap between the articulation of universal rights and compliance has become significant and threatens the integrity of the international human rights legal regime. There are overwhelming numbers of overdue reports, untenable backlogs, and widespread refusal of states to provide remedies when violations of individual rights are found<sup>16</sup>.

161. For several years one specific reform discussion within the United Nations organisation (UN) has been related to the monitoring mechanisms established under the six major international human rights treaties<sup>17</sup>. How do these mechanisms function and

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<sup>13</sup> Ibid page 1

<sup>14</sup> Ibid page 76

<sup>15</sup> Chayes, Abram and Chayes, Antonia. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge. Page 155

<sup>16</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. page 12 [online] <http://www.bayefsky.com/reform/>

<sup>17</sup> International Covenant on Economic, Social and Cultural Rights (CESCR), International Covenant on Civil and Political Rights (CCPR), International Convention on the Elimination of All Forms of Racial

how should they be developed? There have been extensive discussions conducted both within academia and between governments<sup>18</sup>. Among others, the governments of Australia, Canada and New Zealand have been active in looking for reform ideas on the political level<sup>19</sup>. The treaty bodies themselves have contributed to the debate, both in the form of developing their own working methods within the current normative framework and by participating in the discussion on long-term reforms<sup>20</sup>.

162. Some of the identified problem areas in the work of the treaty bodies, calling for reform are:

- Non-submission of periodic reports by States, or long delays in submission.
- Duplication of work due to overlapping provisions in the six treaties: duplication in reporting by States and duplication in the work of the treaty bodies.
- Further delays in the consideration of submitted reports, partly due to the editing and translation of the report before it is issued as a UN document, partly due to a backlog in the work of the treaty bodies themselves.
- The problem of “a reporting burden” as experienced by many governments: governments of small countries, governments of poor countries and governments

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Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and Convention on the Rights of the Child (CRC).

<sup>18</sup> See the Alston report to the Commission on Human Rights (“Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty Regime”, UN Doc. E/CN.4/1997/74, 7 March 1997); Philip Alston & James Crawford, (2000) *The Future of UN Human Rights Treaty Monitoring*, Cambridge; Anne Bayefsky, (2000) *The UN Human Rights Treaty System in the 21st Century*, Kluwer; Anne F. Bayefsky, (2001) *The UN Human Rights Treaty System; Universality at the Crossroads*, Transnational Publishers and [online] <http://www.yorku.ca/hrights/>; Christof Heyns & Frans Viljoen, (2000) *Impact Study of the United Nations Human Rights Treaties in Twenty UN Member States*, Pretoria (electronic version). and Heli Niemi and Martin Scheinin (2002) *Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective*. Institute for Human Rights. Åbo Akademi University. [online] [http://www.abo.fi/institut/imr/publications\\_online.htm](http://www.abo.fi/institut/imr/publications_online.htm)

<sup>19</sup> See; Fifty-Fourth Session Of The Commission On Human Rights (16 March - 24 April 1998) Statement On Behalf Of Australia, Canada And New Zealand On Improving The Functioning Of The Human Rights Treaty Bodies. Item 14c : Improving The Functioning Of The Human Rights Treaty Bodies; See also an article written by Daryl Williams, the Commonwealth of Australia Attorney-General, in *Australian Human Rights Journal* in 1999, *Reforming human rights treaty bodies*.

<sup>20</sup> A/58/123 A Report of an international meeting of experts on the theme of treaty body reform, held at Malbun, Liechtenstein, from 4 to 7 May 2003. The meeting was organised jointly by the Office of the United Nations High Commissioner for Human Rights and the Government of Liechtenstein.

of federal States.<sup>21</sup>

### ***The Role of Non-Government Organisations***

163. The treaty bodies have become heavily dependent on information from non-government organizations (NGO) in preparing for the dialogue with states parties. State reports can be self-serving documents which rarely knowingly disclose violations of treaty rights<sup>22</sup>.

164. NGOs have played a significant role within the international human rights regime and the work of treaty monitoring bodies<sup>23</sup>. NGOs from the national level have unique information on the application of the treaties in the domestic context<sup>24</sup>. The treaty bodies have been heavily dependent on information from NGOs in preparing for the dialogue with states parties. This dependence has led to a close working relationship between NGOs and most of the treaty bodies. It is important to note that working relationships between NGOs and most of the Treaty Monitoring Bodies have evolved on an informal basis. It has also drawn criticism from States. They claim that adequate recognition is not being given to the primary role of democratically elected governments. They contend that the role of NGOs should be subordinate<sup>25</sup>, whereas, commentators believe for a successful and transparent reporting process NGOs should be recognized as key partners<sup>26</sup>. NGOs should have a central role in a process of (a) understanding and

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<sup>21</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. page 16 [online] <http://www.bayefsky.com/reform/>

<sup>22</sup> Ibid p.11

<sup>23</sup> Ibid p.55 see also Chayes, Abram and Chayes, Antonia. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge. Page.21

<sup>24</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. page 16 [online] <http://www.bayefsky.com/reform/> see also IMADR (International Movement Against All Forms Of Discrimination And Racism). *NGO Participation in The Work of UN Human Rights Treaty Monitoring Bodies*. A paper submitted to: The 14th Meeting of Chairpersons of the Human Rights Treaty Bodies. Geneva, June 2002.

<sup>25</sup> Joint News Release: Attorney-General, The Hon Daryl Williams AM QC MP and Minister for Foreign Affairs, The Hon Alexander Downer MP. *Australia At Forefront Of Un Human Rights Reform*. 3 July 2003. [online] [http://www.dfat.gov.au/media/releases/foreign/2000/fa097\\_2000.html](http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html)

<sup>26</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. page 46 [online] <http://www.bayefsky.com/reform/> see also Chayes, Abram and Chayes, Antonia. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge.

awareness of the standards (b) review of laws, policies and practices against those standards (c) planning or the creation of action plans to improve the shortfalls revealed; and (d) monitoring the implementation of those plans<sup>27</sup>.

165. The discourse around the reform process has been extensive. Broad ranging recommendations have come from the two key reports *The UN Human Rights Treaty Process: Universality at the Crossroads* and *Enhancing the long-term effectiveness of the United Nations human rights treaty system*. Two key themes have emerged from these reports: a reduction in the reporting burden and effective engagement of civil society. An over-arching aim of reform is to make the reporting obligations on States more efficient and effective in monitoring compliance. Various reports have called for more focused reports by member states to reduce the volume of repetitive and duplicate work and allow monitoring bodies to focus on key identified areas of concern<sup>28</sup>. Secondly the role and engagement of the non-government sector has been a central focus. The call is for a more transparent process that develops partnerships rather than what is often perceived as an adversarial approach<sup>29</sup>.

## **Disability and the Reform Agenda**

166. Disability as an area of human rights concern presents an interesting challenge for compliance and treaty reform. The very nature of disability – and the inherent systemic discrimination and social exclusion that is an element of it – means that many governments have very limited expertise in disability. People with disabilities have been excluded from key social institutions which has isolated them and issues that disability

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<sup>27</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. Section 18 [online] <http://www.bayefsky.com/reform/>

<sup>28</sup> E/CN.4/1997/74 27 March 1997 Commission On Human Rights. Fifty-third session. *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system*. and Bayefsky 2001, *ibid*.

<sup>29</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. [online] <http://www.bayefsky.com/reform/> In particular recommendations for sections 18, 21 & 24 see also E/CN.4/1997/74 27 March 1997 Commission On Human Rights. Fifty-third session. *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system*.

raises from mainstream public policy. This was repeatedly demonstrated through the failure of successive treaties to specifically recognise disability as an area of concern. The dominance of the medical model has meant disability has been a clinical issue within medicine and rehabilitation. Further segregation in education has meant historically low levels of academic achievement which have kept people with disabilities out of key professions and public administration<sup>30</sup>. This has meant people with disabilities have not been represented in the decision-making process. Disability has not been an area for academic concern in the areas of law, policy, public administration, planning and architecture which has led to limited understanding of the issues raised by disability<sup>31</sup>. This has meant that even since disability emerged as a significant human rights issue governments have been slow in implementing remedial programmes<sup>32</sup>.

167. In recognition of the call to more tightly focus the reporting by States, combined with the need to develop capacity within policy processes in the area of disability, it is suggested that this Convention consider a more overt planning process. Bayefsky has suggested that the theory behind the existing reporting structure is about planning and dialogue. The production of a report, in theory, is intended to generate a dialogue within civil society about the requirements of the treaty, the application of the standards to local conditions, the shortfalls in compliance, priorities for redress, and the design of a plan of action. A cycle of pre-report consultation followed by post-report planning at the national level is supposed to be created via the periodic drafting of State reports<sup>33</sup>. In practice this has not always happened and the development of a report in itself has become the focus. This singular focus on the reporting element may be seen as a natural consequence as the particular articles within each of the treaties do not mention planning and focus on the production of a report<sup>34</sup>.

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<sup>30</sup> Linton, S. (1998) *Claiming Disability: Knowledge and Identity*. NYU Press. New York. Chapter 3.

<sup>31</sup> *Ibid* Chapter 4 see also Barnes, C., Mercer, G. and Shakespeare, T. 1999. *Exploring Disability: A Sociological Introduction*, Polity Press, Oxford.

<sup>32</sup> Leandro Despouy *Degener Human Rights & Disability* pp 63 -68

<sup>33</sup> Professor Anne F. Bayefsky (2001) *The UN Human Rights Treaty System: Universality at the Crossroads*. pages 12 & 77 [online] <http://www.bayefsky.com/reform/>

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights (CESCR) Articles 16, 17 & 18, International Covenant on Civil and Political Rights (CCPR) Article 40, International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 9, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Article 18, Convention against Torture and Other

168. There has been substantial work at the international level on the development of non-binding normative principles. This process has actively engaged the disability community and taken a different approach to implementation than the treaty system. Planning and national implementation mechanisms, are a central focus of the existing normative principles or soft law approaches at the international level. Both the World Programme of Action Concerning Disabled Persons<sup>35</sup> (WPA) and the Standard Rules<sup>36</sup> place significant importance on national planning and implementation. The WPA and Standard Rules evolved from the extensive policy discourse generated through the International Year of Disabled Persons (IYDP) and the International Decade. This discourse was significant in that it brought together the voice of the emerging disability movement and the lived experience of people with disabilities. This process was supported by the General Assembly through the Commission on Human Rights by adopting resolution 1984/31 recommending that a Special Rapporteur under take a thorough study of the causal connection between serious violations of human rights and fundamental freedoms and disability<sup>37</sup>.

169. The report *Human Rights and Disabled Persons (1993)* encapsulated the significant conceptual shift in how ‘disability’ is conceived. It highlighted the systemic nature of disability discrimination and the disabling barriers within social structures. The report concluded the ultimate responsibility to remove obstacles impeding or hindering

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Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Article 19, and Convention on the Rights of the Child (CRC) Article 44.

<sup>35</sup> The World Programme of Action concerning Disabled Persons was adopted by the United Nations General Assembly at its 37th regular session on 3 December 1982, resolution 37/52.1/. Its three chapters provide an analysis of principles, concepts and definitions relating to disabilities; an overview of the world situation regarding persons with disabilities; and set out recommendations for action at the national, regional and international levels. [online] <http://www.un.org/esa/socdev/enable/diswpa00.htm>

<sup>36</sup> Adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, 20 December 1993. The Standard Rules consists of 22 rules summarizing the message of the [World Programme of Action](#). The Rules incorporate the human rights perspective which had developed during the Decade. The 22 rules concerning disabled persons consist of four chapters - preconditions for equal participation, target areas for equal participation, implementation measures, and the monitoring mechanism - and cover all aspects of life of disabled persons. [online] <http://www.un.org/esa/socdev/enable/dissre00.htm>

<sup>37</sup> On 29 August 1984, in response to a request by the Economic and Social Council and the Commission on Human Rights, the Sub-Commission adopted resolution 1984/20 in which it decided to appoint Mr. Leandro Despouy as Special Rapporteur to conduct a comprehensive study on the relationship between human rights and disability.



the integration and full participation of disabled persons lies with Governments<sup>38</sup>. The UN response to this shift in focus was the adoption of the Standard Rules that provides States with a set of normative principles to inform national policy development. The Rules are designed to provide Governments with policy guidelines and options, which can be incorporated into national legislation. The long-term strategy presents a framework for collaborative action at the national, regional and international levels to achieve the aim of a society for all. The Standard Rules are guided by application of core principles within a framework that recognises the effects of social exclusion and systemic disadvantage and hence the need for capacity building. The Standard Rules emphasise the importance of incorporating the expertise of people with disabilities and their organisations<sup>39</sup>.

## **Options for a Thematic Convention**

### *Process*

170. The current treat monitoring emphasis is on reporting against outcomes whereas the WPA and Standard Rules focus on planning. Similar in focus to the African Decade plan where the structure adopted in the document is centred round planning and

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<sup>38</sup> Despouy, L. (1993) Human Rights and Disabled Persons. Report to the Economic Social Council and the Commission on Human Rights.

[online]<http://www.un.org/esa/socdev/enable/dispaperdes4.htm>

<sup>39</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Implementation Measures, Rule 14 – Policy-Making & Planning. [online]

<http://www.un.org/esa/socdev/enable/dissre00.htm>

States will ensure that disability aspects are included in all relevant policy-making and national planning. States should initiate and plan adequate policies for persons with disabilities at the national level, and stimulate and support action at regional and local levels.

States should involve organizations of persons with disabilities in all decision-making relating to plans and programmes concerning persons with disabilities or affecting their economic and social status.

The needs and concerns of persons with disabilities should be incorporated into general development plans and not be treated separately.

The ultimate responsibility of States for the situation of persons with disabilities does not relieve others of their responsibility. Anyone in charge of services, activities or the provision of information in society should be encouraged to accept responsibility for making such programmes available to persons with disabilities.

States should facilitate the development by local communities of programmes and measures for persons with disabilities. One way of doing this could be to develop manuals or check-lists and provide training programmes for local staff.

implementation. The objectives, which articulate a particular right, are then applied through planning measures and a process for implementation<sup>40</sup>.

171. An option is that States could be obliged to develop - in consultation with the disability community – a strategic implementation plan that identifies key areas of performance for submission and review. The States would be required to report against developments in the key performance areas. This would create a proactive response to treaty obligations at a national level and give a clearer focus to the work of treaty monitoring bodies.

172. This focus would create a clearer emphasis on dialogue rather than judgment as a means to encouraging and managing compliance. It would enhance the facilitation of the exchange of information and development of capacity in the area of disability. It recognises the prime importance of implementation planning and accountability at the national level and the importance of the national NGO role.

173. In this process plans will be highly context-specific. The key value of developing plans collaboratively is that the disability community works together to determine the measures for progress toward their goals starting from the abstract relationship within disability rights and the complexity of how the applied nature of rights manifests across the disability spectrum. It facilitates the disability community to become informed about the resources required and constraints confronted. This then links directly to policy and

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<sup>40</sup> For example Objective 4 of the African Decade Plan reads:

Objective 4

1. To enhance support services for disabled persons.

2. To achieve this objective, Member States should:

(a) Facilitate the provision of technical aids, assistive devices and equipment, personal assistance and interpreter services (including sign language and tactile interpretation), free of charge or at a cost related to their means, to persons with disabilities to facilitate mobility, communication and activities of daily living;

(b) Support the design, development, production, distribution and servicing of assistive devices and equipment for people with disabilities, adapted to local conditions, and dissemination of knowledge about them;

(c) Design and implement personal assistance programmes in such a way that the persons with disabilities using the programmes have a decisive influence on the way in which the programmes are delivered.

Continental Plan Of Action For The African Decade Of Persons With Disabilities 1999 – 2009 [online] [http://www.disability.dk/site/viewdoc.php?doc\\_id=798](http://www.disability.dk/site/viewdoc.php?doc_id=798)

governance, in that both institutional systems and the disability community need to understand and address these complexities<sup>41</sup>.

174. The critical element of the development of national plans is the importance of *process*. The broad consultative process to develop the strategic plans, benchmarks and identify key areas of performance, and the process to facilitate and implement, must be carried out with integrity and openness<sup>42</sup>. Plans and benchmarks are primarily a means, not an end in themselves: they are best regarded as a tool to improve governance. The paramount importance of the overall process of participation in the development of the strategy and benchmarks is the partnership and agreement on strategy. The acceptance of strategic approach significantly increases the advocacy value of the instrument. If there is not agreement within the sector the reporting process is discredited. More time is spent contesting or defending the measures than engaging in analysis and policy development. It also contributes to the transparency of process and creates a working partnership as opposed to an adversarial one.

### ***Structure***

175. In light of current discussions around treaty body reform the development of a new thematic convention provides an opportunity to explore new monitoring structures and mechanisms.

176. The Convention could establish a new specialist committee to monitor State implementation. A specialist Committee with a clear programme of work and rules of procedure would create a central focus for interpretation and jurisprudence to facilitate implementation and manage compliance. A specialist Committee with majority of members being people with disabilities who have expertise in human rights and international law would be in recognition of the need for capacity building at the international level.

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<sup>41</sup> Mike Salvaris, David Hogan, Roberta Ryan and Terry Burke Tasmania Together: Benchmarking Community Progress. Final Report, March 2000. page 18 [online]  
<http://www.sisr.net/programesp/cspublishedpapers.htm>

177. Alternatively a convention could make use of existing structures. The members of existing human rights treaty bodies could establish a disability sub-committee to undertake the work programme of monitoring compliance by Member States. This would in a sense be creating a specialist Committee by default. What would need to be considered with this approach is the role of disability expertise.

178. The existing panel of experts convened to assist the Special Rapporteur in monitoring implementation of the Standard Rules could be given committee status under a thematic convention. This would ensure a continued focus on disability expertise. By adopting this structure the role of and the Committee's relationship to Special Rapporteur would need to be considered.

179. The development of a new thematic convention has the potential to develop and strengthen the relationship to regional mechanisms where they exist. For example the framework of the Inter American Convention<sup>43</sup>, the African Decade Plan<sup>44</sup> and West Asia regional meeting declaration<sup>45</sup>, this would provide an opportunity to encourage regional planning and implementation as well monitoring procedures.

180. The current informal relationship that committees have established with competent bodies could be formalised. This is the first convention negotiated since the adoption of the Paris Principles relating to the status of National Human Rights Institutions (NHRI). NHRIs established in accordance with the Principles provide an

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<sup>42</sup> Ibid page 19

<sup>43</sup> Inter American Convention [online] <http://www.summit-americas.org/Disabled-Convention.htm>

<sup>44</sup> Continental Plan Of Action For The African Decade Of Persons With Disabilities 1999 – 2009 [online] [http://www.disability.dk/site/viewdoc.php?doc\\_id=798](http://www.disability.dk/site/viewdoc.php?doc_id=798)

<sup>45</sup> Section 3(a)(v) Governments are urged to establish local, national and regional monitoring mechanisms responsible for establishing the extent to which persons with disabilities are accorded their rights and for monitoring acts of discrimination against such persons, with a view to taking the appropriate legal measures to end such practices and condemn and penalize their perpetrators.

Economic and Social Commission for Western Asia. Arab Regional Conference on Norms and Standards Related to Development and the Rights of Persons with Disabilities Beirut, 27-29 May 2003. [online] <http://www.worldenable.net/beirut2003/finalreport.htm>

independent body with pluralist representation<sup>46</sup> which could provide a treaty body with a reference point for monitoring State action. The Principles establish NHRIs competence and responsibilities under section A and clause (3)(d)(e) provides a mechanism through which a formal process of dialogue with a specialist committee could be established<sup>47</sup>.

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<sup>46</sup> Paris Principles: Principles Relating to the Status of National Institutions. See section B Composition and guarantees of independence and pluralism. [online] <http://www.unhchr.ch/html/menu6/2/fs19.htm>

<sup>47</sup> Paris Principles: Principles Relating to the Status of National Institutions. See section A Competence and Responsibilities. 3. A national institution shall, inter alia, have the following responsibilities: d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence; e) To cooperate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights. [online] <http://www.unhchr.ch/html/menu6/2/fs19.htm>

## 5. EXISTING NORMATIVE PRINCIPLES

### Background

181. This section of the paper discusses the role of existing normative principles such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in informing and guiding the nature and structure of proposed text. Much of the focus with the development of a draft text has so far been on the existing core human rights instruments and much of the extensive existing disability specific ‘soft law’ has been sidelined. This paper suggests that the Standard Rules provide an illustrative template for developing draft text. It considers the nature of a thematic convention and the need for an applied focus to support State implementation. It is hoped that these comments will assist in providing a basis for considering proposed text.

### *Abstract v Applied*

182. Through a convention the language of rights would frame contemporary policy debate, but that should not be where the link ends. The link between rights and any legislative framework needs to be clearly asserted. What needs to be recognised is that human rights are first and foremost a lived experience that should be realised in practice in communities, societies and the daily lives of people. The characteristic approach is that rights through international conventions are developed at a fairly high level of abstraction, without considering the concrete forms and practices implied in human rights in social policy and community life. This provides treaties the flexibility to be living documents with a longer period of policy relevance. The down side of an abstract framework is that there tends to be little or no connection to the lived experience as a reference point for implementation.

183. Rather than simply duplicating rights guaranteed by existing instruments, a new Convention should ensure that people with disabilities can effectively exercise and enjoy

those rights. It is only through implementation at the national level that such an objective can be achieved. A Convention needs to be structured so as to clarify State obligations. It needs to provide the required clarity to ensure the instruments and hence State obligations are coherent and meaningful. The text needs to articulate rights and apply them within a disability context. By articulating rights in line with the general principles and providing guidance for the practical application. A framework that provides policy guidelines for States to develop an implementation strategy could lead to more effective compliance and monitoring mechanisms. A focus on guidelines could remove prescription and achieve more principle based ongoing implementation.

### ***Draft Text Structure***

184. Much of the focus with the development of a draft text has been on the existing core human rights instruments. There seems to be consensus that the rights exist but that there has been a failure to clearly articulate how they apply within a disability context. The existing human rights instruments provide the full range of fundamental human rights whereas a thematic convention provides an opportunity to develop those legal norms within a disability specific context. The two universal human rights instruments the *International Covenant on Civil, and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* were written to have general applicability and as such an argument could be borne out in that in some respects a treaty is not really necessary. As such, the existing instruments provide a wealth of principles and normative context – the rights exist – yet people with disabilities continue to be excluded from full and equal participation in community life. This continual violation demonstrates that what has been lacking is the application of fundamental rights for people with disabilities. The strength of a thematic convention is the tailoring of the existing rights to support their application.

185. The structure needs to recognise the fluid nature of disability in the context of a convention being a living document. Any instrument would need to be able to allow for interpretation across a variety of contexts – temporal, cultural and resource. The

challenge for the Convention is to articulate a framework of human rights and their application in the disability context in such a way that the instrument is a coherent interpretative tool that elaborates the principles and concepts that should underpin State action but it needs to also be able to allow for divergent contexts in relation to resources, culture and the temporal relationship.

186. The very nature of disability and the inherent systemic discrimination and social exclusion that is an element of it means that many governments have very limited expertise in disability. People with disabilities have been excluded from key social institutions which has isolated them and the issues that disability raises from mainstream public policy. Segregation in education has meant historically low levels of academic achievement which have kept people with disabilities out of key professions and public administration. As a result people with disabilities have not been represented in the decision-making process. This has meant that even since disability emerged as a significant human rights issue, governments have been slow in implementing remedial programmes.

187. The existing normative framework in a disability context has been an extensive development process the culmination of a significant paradigm shift and reflective of the voice of people with disabilities and their experiences.

### ***International Normative Principles***

#### 188. World Programme of Action

- International policy framework
  - Prevention of mental, physical and sensory impairments;
  - Rehabilitation to assist people with disabilities
  - Equalisation of opportunities for people with disabilities
- Extensive consultation and research: *Study by Special Rapporteur Leandro Despouy on the relationship between human rights and disability.*

#### 189. Decade of Disabled Persons

- On-going international policy focus



190. Standard Rules on the Equalization of Opportunities for Persons with Disabilities

- Provides States with a set of normative principles to inform national policy development and implementation with a focus on capacity building and planning
- The Standard Rules consists of 22 rules in four major sections: 1) Preconditions for equal participation; 2) Target areas for equal participation, 3) Implementation measures; and 4) Monitoring mechanisms.

191. Comprehensive discourse

- People with disabilities were central to the process
- Based within the experience of disability
- Applied in nature

192. The Standard Rules are not comprehensive and have a limited coverage that focuses on access, de-institutionalisation and the promotion of mainstreaming, and as such could not supplant a new convention but they provide a sound framework from which to build on.

193. The fundamental principles as contained in the draft text have emerged from and have been central to the discourse surrounding the development of the non-binding international normative principles.

- dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- non-discrimination;
- full inclusion of persons with disabilities as equal citizens and participants in all aspects of life;
- respect for difference and acceptance of disability as part of human diversity and humanity;
- equality of opportunity.

194. It is how these fundamental principles are applied that provides the value adding within a thematic convention. The Standard Rules provides a substantial body of

knowledge in a framework that applies these principles within a disability context and as such is well placed to inform the development of a thematic convention.

***Living Independently and being included in the Community - Draft Article 15***

195. States Parties to this Convention shall take effective and appropriate measures to enable persons with disabilities to live independently and be fully included in the community, including by ensuring that:

- persons with disabilities have the equal opportunity to choose their place of residence and living arrangements;
- persons with disabilities are not obliged to live in an institution or in a particular living arrangement;
- that persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance, necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- community services for the general population are available on an equal basis to persons with disabilities and are responsive to their needs;
- persons with disabilities have access to information about available support services

196. The core principle behind this treaty is to articulate rights and apply them within a disability context.

- A structure whereby you state the right based within the principles of equality, non-discrimination, dignity & personal autonomy then you apply that right in a disability context.
- The article is really about housing & accommodation and that the disability context is about appropriate housing & accommodation that is reflective of cultural norms and standards, provides choice, facilitates participation in community life etc, etc.
- It's not about independence per se but about opportunities to 'live' in the community on an equal basis and hence the notion of 'independence' is context specific.

## 6. STATE OBLIGATIONS

### Introduction

197. The purpose of this section is to discuss a number of issues concerning the general provisions on the obligations of States parties under the draft Convention, in particular to identify areas in which the Working Group's draft text<sup>48</sup> needs strengthening or close monitoring to ensure that its provisions are not diluted. While the note makes a number of specific suggestions relating to drafting, it is important to keep in mind that the APF delegation will need to be flexible in the negotiations, and the specific suggestions are not necessarily the only way of bringing about a satisfactory outcome.

### General approach

198. The approach to be adopted in the drafting of the new convention should reflect a number of factors, including:

- (a) the desirability of formulating clear and specific obligations on States parties which require them to take identifiable and verifiable steps to give effect to the rights recognised in the convention (as opposed to vague, open-ended and self-judging obligations);
- (b) the generally accepted position that the new convention should not in any way dilute existing standards of human rights protection under other UN human rights treaties;

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<sup>48</sup> Draft comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities, in Report of the Working Group 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/WG/1Annex I (2004), available at <http://www.un.org/esa/socdev/enable/rights/ahcwgreport.htm> [hereafter Working Group draft].

- (c) the desirability of expressing the obligations in language which recognises the important symbolic role of the convention in raising national and international awareness of disability issues;
- (d) the fact that some of the measures required to ensure the full enjoyment of human rights without discrimination on the ground of disability will require to be implemented progressively, and may require significant resources to achieve that goal - at the same time recognising that many rights can be given effect to without delay or significant additional resources;
- (e) that the problems to be addressed and most effective way of doing so may vary from society to society, although the goals and overall standards of human rights protection remain the same; and
- (f) that excessively detailed and prescriptive treaty provisions may act as an inhibiting factor for governments in their decisions to support the adoption of the treaty and to become a party to it.

### **Structure of the Convention and the obligations of States parties**

199. The January 2004 WG Draft (as well as the Chair's draft text<sup>49</sup> and the Bangkok draft<sup>50</sup>) contains a general provision on state obligations to eliminate discrimination on the basis of disability and to take measures to ensure the full enjoyment of human rights by persons with disabilities (Draft article 4). While this provision refers to some matters not specifically addressed elsewhere (for example an obligation to include a specific

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<sup>49</sup> Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (December 2003) can be found at: <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm>.

<sup>50</sup> That Bangkok Draft, adopted by the Regional Workshop towards a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 14-17 October 2003, Bangkok, Thailand, can be found at <http://www.worldenable.net/bangkok2003a/bangkokdraftrev.htm>

guarantee of equality in a State's constitution or other appropriate legislation), it is largely general in character, applying to the rights set forth in the draft convention.

200. The inclusion of a provision of this type is important for a number of reasons, in particular because:

- (a) it is a catch-all provision which may cover areas which are not addressed in specific terms in other provisions of the draft Convention; and
- (b) it addresses issues such as the obligations of the State parties in relation to the act of non-State actors.

201. Draft article 4 of the Working Group draft is in general a satisfactory provision. However, there are a number of respects in which it needs to be improved:

- (a) by the addition of a provision which addresses the issue of whether some or all of the rights guaranteed are to be implemented without delay or progressively;
- (b) by the addition of a provision on remedies; and
- (c) by some minor changes to the existing draft to strengthen and clarify State obligations in relation to the actions of private persons and other matters.

### **The obligation to implement immediately or progressively**

202. It has frequently been said in the past that obligations relating to civil and political rights are as a category capable of immediate implementation, while economic, social and cultural rights can only be implemented progressively and are not justiciable in the same way as civil and political rights. This view, based in part on the perceived nature of the rights and the assumption that economic and social rights (unlike civil and political rights) need significant resources for their fulfilment, is reflected in the language of the two International Covenants, in particular in the language of the ICESCR setting out the

obligation of States parties to ensure those rights progressively and taking into account the available resources.<sup>51</sup>

203. However, in the last 20 years much more sophisticated approaches to the nature of the two categories of rights have emerged, in particular through the work of the Committee on Economic, Social and Cultural Rights, but also through the work of various special rapporteurs of the UN Commission on Human Rights and other bodies. In brief, current thinking posits that most rights have a number of dimensions, some of which can be given effect to immediately, with little or no drain on resources, and which are capable of enforcement by a judicial body, while others may require longer-term strategies and the allocation of considerable resources. These dimensions of rights have been capable in the formulation of States' obligations as obligations:

- (a) to *respect* rights (that is, for governments and public officials both to refrain from taking any steps which might directly impinge on the enjoyment of rights, and in general to endeavour to build observance into their practices);
- (b) to *ensure* the enjoyment of rights (in particular to provide protection against the violation of those rights by private persons); and
- (c) to *promote* or *fulfil* the rights (by creating or contributing to conditions under which it is possible for persons to enjoy to the full the rights guaranteed).

204. The Committee on Economic, Social and Cultural Rights stated in its *General comment No 1* in relation to the nature of States Parties' obligations under the ICESCR:

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<sup>51</sup> Article 2 of the ICESCR provides that:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

"1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate General Comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage ... agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. ...

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any

suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain."

205. The WG's report simply reiterates this outmoded thinking (note 19). However, it seems appropriate in a convention drafted nearly 50 years after the two Covenants were adopted to reflect the advances in thinking about economic and social rights, and not to rely on analyses which have been shown to be limited and out of date.

206. The Chair's draft text contained a provision which sought to clarify in general terms that the nature of the rights concerned is more complex than the simple directly enforceable/aspirational dichotomy suggests:

"(4)3. In relation to the rights set forth in Part III of this Convention,<sup>52</sup> States Parties undertake to give immediate effect to the aspects of those rights which are capable of immediate implementation (including, but not limited to obligations of non-discrimination in the enjoyment of those rights) and in relation to other aspects of those rights, to take steps to the maximum of their available resources with a view to achieving progressively the full realization of those rights by all appropriate means, including particularly the adoption of legislative measures."

207. It is suggested that something along these lines be included in the Convention so that it does not simply reflect the thinking of 50 years ago without regard to the significant advances in the understanding of the nature of economic, social and cultural rights in the last decades.

208. However, it might be appropriate to proceed even further. Remedies for violations of rights do not always have to be judicial-type remedies enforcing "justiciable" obligations/rights – there may be appropriate forms of remedy for failure to carry out obligations even of progressive implementation (eg a failure to take steps at all to move towards the achievement of a stated right). There are at least two ways this might be approached: (a) by requiring States to provide appropriate remedies for violations of all rights guaranteed in the convention and leaving it to States to determine

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<sup>52</sup> These were traditional economic, social and cultural rights, as well as the right to accessibility.



the appropriate remedies under domestic law for failure to carry out particular obligations (it may be that the only appropriate remedies might be a political one that cannot be enforced through a national judicial or administrative mechanism); and (b) to provide for an remedial mechanism at the international level for all rights, through an individual/group complaint procedure or an inquiry procedure.

## **The need for a provision on remedies**

209. The Working Group draft text does not contain a specific provision on remedies. In a footnote the report states:

"Both the Bangkok draft and the Chair's draft included in this section a paragraph on remedies. Some members of the Working Group noted that while the International Covenant on Civil and Political Rights included such a provision, the International Covenant on Economic, Social and Cultural rights did not. It may be difficult, therefore, to include such an article in a convention that elaborates the rights contained in both Covenants. The Ad Hoc Committee may wish to consider this issue further."<sup>53</sup>

210. It will be seen that the hesitation about including a provision on remedies stems in part from the fact that the International Covenant on Economic, Social and Cultural Rights does not provide a specific provision on remedies, while the ICCPR does (article 2(3)).

211. This concern is based once again on older, oversimplified understandings of the nature of economic, social and cultural rights, as well as of civil and political rights. It also fails to reflect development of the jurisprudence of the Committee on Economic, Social and Cultural Rights, which has shown that these rights are in important respects capable of judicial or similar remedies. Finally, it also reflects a notion of remedies which is somewhat confined, viz to judicial or similar remedies, rather than including broader systemic remedies which may be appropriate in a given case.<sup>54</sup> The complete

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<sup>53</sup> Working Group draft, *supra* note 48, at n 18. See also n 19.

<sup>54</sup> For example, the Human Rights Committee has noted in General comment on article 2 (adopted on 29 March 2004) that, with regard to the obligation under article 2 of the ICCPR, "the purposes of the

omission of a provision on remedies due to concerns about economic, social and cultural rights also means that there is no explicit obligation to provide for effective remedies for breaches of civil and political rights.

212. The Committee on Economic, Social and Cultural Rights has set out its views on the nature of the obligations under the ICESCR and their susceptibility to judicial or other traditional remedies in a number of its *General comments*. *General comment No 9* is of particular importance:

"9. [T]here are some obligations, such as (but by no means limited to) those concerning non-discrimination, <sup>3/</sup> in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

#### *Justiciability*

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). ***While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.*** It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the

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Covenant would be defeated without an obligation integral to article 2 to take measures to prevent an recurrence of a violation of the Covenant", noting the Committee's practice of frequently including in its views under the Optional Protocol reference to "the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question", including changes in laws and practices: CCPR/C/74/CRP.4/Rev. 6, at para 17.

various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

### ***Self-executing***

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered "non-self-executing" were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. ***It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.*** " (emphasis added)

213. This understanding has been shared by a number of Special Rapporteurs of the Commission on Human Rights (for example, the special rapporteur on the right to housing, who collected many examples of the judicial enforcement of aspects of the right to adequate housing. Some national courts – for example the Swiss Federal Supreme Court – have accepted that some of the provisions of the ICESCR are judicially enforceable,<sup>55</sup> and many national courts have given effect to economic, social and cultural rights guarantees over the years (South Africa is one well-known example). Further, anti-discrimination laws in many States provide important equality protection (a

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<sup>55</sup> See Byrnes, "Jumpstarting the Hong Kong Bill of Rights in Its Second Decade: The Relevance of International and Comparative Jurisprudence" paper presented at conference A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects, organised by the Centre for Comparative and Public

feature of both Covenants) in significant areas of economic, social and cultural rights such as work, housing, education, and the provision of government services.

214. In short, it should not be assumed that no aspect of any economic, social or cultural right is capable of immediate implementation or of being enforced by way of judicial remedy – much will depend on the aspect of the right involved and the type of violation or non-fulfilment alleged.

215. The principle that the convention should provide no less a level of protection that is provided for under existing conventions means that at the very least there should be such a provision relating to civil and political rights,<sup>56</sup> and this might be combined with a provision which requires remedies for those economic, social and cultural rights which are capable of enforcement in this way. The fact that the convention will undoubtedly be looked to by many disabled persons as a means of last resort after exhaustion of local remedies against discrimination justifies serious consideration being given to its incorporation of remedies.<sup>57</sup>

216. The Chair's draft text contained the following provision on remedies:

**Article 5**

**Obligations in relation to remedies**

1. Each State Party to this Convention undertakes:
  - (a) To ensure that any person or class of persons whose rights or freedoms recognized in the Convention are violated shall have an effective remedy, whether the violation has been committed by persons or entities acting in an official capacity or by private persons or entities;

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Law, Faculty of Law at the University of Hong Kong, Hong Kong, 12 January 2002 (copy of paper at [www.hku.hk/ccpl/pub/conf/index.html](http://www.hku.hk/ccpl/pub/conf/index.html))

<sup>56</sup> The Human Rights Committee in General comment on article 2 stressed the importance of States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. It noted the importance of administrative mechanisms for giving effect to the obligation to investigate allegations of violations, and the role that national human rights institutions can play in this process: CCPR/C/74/CRP.4/Rev. 6, at para 15.

<sup>57</sup> Article 8 of the Universal Declaration of Human Rights provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

- (b) To ensure that any person claiming such a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, including as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination; and
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

2. States Parties recognize that access to effective remedies may require the provision of free legal assistance to persons with disabilities and the modification or flexible application of existing laws and practice regulating matters of procedure and evidence."

217. A text along these lines, perhaps with the addition of the word "appropriate" in paragraph (a), so that the obligation would be to provide an "effective and appropriate remedy", which would provide some flexibility in the fashioning of a suitable remedy.

### **Obligations in relation to the actions of private parties/non-State actors**

218. It is important that both in an article on general obligations as well as in articles dealing with specific areas that the role of the State in protecting against violations of rights by private parties be clearly recognised, as well as the obligation to the State to require or encourage private actors to take steps which will help to eliminate systemic discrimination and inequality (for example, by adopting mandatory accessibility standards in building codes). It is also important to recognise that in many countries disability services are now controlled by private corporations. These organisations also control access in many cases to equipment and services necessary to improve the lives of persons with disabilities. Further, given that employment by private persons and corporations may be one of the most significant areas for complaints under the convention, its capacity to reach into such a field is vital to its effectiveness.<sup>58</sup>

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<sup>58</sup> The Committee on Economic, Social and Cultural Rights has commented in its General comment No 5, para 11:

“Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to

219. A convention should make clear that it is not only government agencies which are obliged to observe rights, but that private bodies acting as government agents or to which public functions are delegated or subcontracted should be held to the same high standard. Finally, the obligation of the State to take steps to eliminate private discrimination should be stated at least as strongly as in Draft Article 4(1)(e), but could be further strengthened by a reference to "all necessary" rather than simply "all appropriate measures".

### **Formulation of specific obligations**

220. There are many provisions in the Working Group text under which States will assume obligations to take specific steps and/or to bring about specified results. The stringency of that obligation will be determined in part by the language used - for example, an obligation to take "all necessary measures" is arguably stronger than an obligation to take "[all] appropriate measures",<sup>59</sup> while to take "effective measures"<sup>60</sup> may fall somewhere in between, and an obligation simply to "promote" a particular approach or outcome may be even weaker. It will be important to monitor the choice of language in the individual provisions, in order to see that the strongest level of obligation appears in the individual articles.

221. Similarly it will be important to note the choice of language in setting out what States undertake to do, in particular whether a State has assumed an obligation of means (to take steps towards a particular goal) or an obligation of result (actually to achieve the

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regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to "take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution (Standard Rules, Rule 1)".

<sup>59</sup> E.g. Draft article 21 (right to health)

<sup>60</sup> E.g. Draft article 20 (personal mobility)

specified outcome). For example, Draft Article 21 provides that "States Parties *shall strive to ensure* that no person with a disability is deprived of" the right to the highest attainable standard of health without discrimination, not simply to *ensure* that result. This may be related to the issue of progressive implementation of rights, which is specifically provided for in some draft articles, for example in relation to education (Draft Article 17).

### **Permissible limitations and restrictions on rights**

222. The current Working Group draft does not deal with the issue of restrictions or limitations on the enjoyment of rights, either by explicit limitations clauses included in appropriate rights (the approach adopted in the ICCPR in relation to a number of the rights guaranteed there) or a general limitation clause (the approach adopted in the ICESCR<sup>61</sup>). Whatever approach is adopted, care should be taken to ensure that no greater limitation on any existing right is permitted than is already permitted under other treaties or under general international law.

### **Protection of higher standards**

223. One of the concerns about the drafting of a new convention specifically focusing on the rights of persons with disabilities is that it might undercut existing higher protections under other international conventions or national law. While this danger needs to be addressed by careful analysis of the individual provisions dealing with specific areas, it will also be important to include a standard provision to protect whatever is the higher level of rights protection.

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<sup>61</sup> This approach was adopted in the Bangkok Draft which included appropriate limitations clauses in the rights derived from the ICCPR, and provided in relation to economic, social and cultural rights a provision based on the ICESCR:

"Article 32 Restrictions on economic, social and cultural rights States Parties may subject the rights guaranteed in Part III of this Convention only to such limitations are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

## 7. INTERNATIONAL COOPERATION

### Background

224. The issue of how and whether the concept of international cooperation should be included in a thematic convention on human rights and disability generated a significant level of discussion at the WG meeting. Some delegates felt that it was an integral issue and should be a central tenet, whereas others rejected including the concept at all. The discussions have made limited progress in resolving the issue. Much of the tension around the issue of international cooperation has centred on perceptions of the concept being essentially a bid for North-South resource transfers which are unlikely to be successfully negotiated in a human rights treaty framework. This note discusses the aspects of international cooperation that could be utilised to further the objectives of a thematic convention on disability. It considers international cooperation from a broad perspective as a means to facilitate implementation.

### Existing Precedent

225. International cooperation has been included in a broad range of international instruments and treaties – its inclusion in this Convention would not be without precedent. Existing provisions on international cooperation include:

- a. International Covenant on Economic, Social and Cultural Rights (ICESCR) (articles 2(3), 22 and 23);
- b. Convention on the Rights of the Child (preamble and article 4);
- c. World Programme of Action Concerning Disabled Persons (international action) and The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (rule 22);



- d. General Comment No. 5 of the Committee on Economic, Social and Cultural Rights;
- e. Environmental treaties; the Convention against Corruption; and the Ottawa Convention on prohibition of landmines, among others.

226. The ICESCR expresses international cooperation in terms of economic and technical assistance. In the area of disability the World Programme of Action approach to this issue is essentially in terms of resource transfers and technical assistance to developing countries. If this approach is not supported in the present process, participants in the Working Group meeting have nonetheless advanced aspects of international co-operation which could be pursued productively:

“Several members of the Working Group considered that international cooperation should be analysed in a broad sense, to include elements such as the exchange of information and best practices, scientific research, training, awareness raising, cooperation between organisations of persons with disabilities, development of technology, and capacity building; not interpreting international cooperation as the transfer of economic resources, economic aid or assistance. International cooperation should also be carried out in bilateral, regional and other multilateral fora, including through specialised agencies and financial institutions.”

227. This broad understanding of international cooperation is an essential requirement for successful implementation. With an emphasis on cooperation such provisions could facilitate a productive exchange of resources and knowledge.

## **Possible elements to be included**

### ***Harmonisation and development of standards***

228. Increasingly important issues in accessibility have been presented by barriers arising from inconsistent standards on technology and consequent lack of interoperability of equipment, or needs for additional expense in adaptations (such as in the telecommunications area or in captioning of television programs). A Convention could

usefully require parties to promote development of suitable international standards on accessibility issues, and ensure that relevant international standards address accessibility issues; and to take measures to ensure that development of standards nationally is consistent with international standards.

229. A Convention could also appropriately contain measures to promote access internationally to the benefits of standards development by national authorities (as well as by private sector organisations. This includes addressing issues of technical availability (including publication through the internet) as well as ensuring as far as possible that copyright or other intellectual property issues do not prevent co-operation in this respect.

### ***Principle of non-discriminatory provision of aid, services***

230. People with disabilities are disproportionately represented within developing countries. As such it is essential that a convention should take a role in ensuring development aid is not discriminatory and promotes equality and participation. State obligations both of receiving and donor states should ensure that disability is addressed within all assistance and co-operation measures. At a minimum this involves mainstreaming disability into whatever aid programmes are conducted, whether or not States are prepared to agree to provide new disability specific assistance. Measures could include a requirement on a state party, in its international cooperation activities, to conduct a disability impact assessment for consistency with the provisions of the convention. This could be similar to some current aid agencies' environmental impact assessments<sup>62</sup>.

### ***The UN and its agencies***

231. The UN and its various agencies play a significant role in social development and as such are well placed to encourage and foster cooperation. While it is difficult to see how the legal obligations placed upon states can also be placed directly upon the UN and its agencies (e.g. ILO, UNHCR), indirect approaches to ensuring compliance by them

should be explored. There are possible roles for a Committee/enhanced Rapporteur in advancing disability agenda in collaboration with these bodies. The focus should be on creating a forum for cooperation between states, guidelines for implementing the convention in international agencies, and on the body responsible for monitoring the convention.

### ***Trade liberalisation issues***

232. The objectives of the convention could be pursued through member states agreeing to ensure priority in trade liberalisation agendas for measures to improve access to facilities and services for people with disabilities. For example, in a number of countries which do not themselves produce accessible taxi vehicles importation of vehicles for accessible taxis is nonetheless currently constrained by taxation treatment. There are significant issues of copyright restricting access to material for people with a print disability.

### ***National Human Rights Institutions***

233. NHRIs as independent bodies provide a unique perspective and possess an important knowledge base. The promotion of stronger regional and international relationships and cooperation between these bodies and with other relevant agencies as a means to developing capacity and facilitate implementation. This would require States ensuring their national human rights and disability policy institution are permitted/empowered to co-operate with relevant peer organisations internationally. The development of regional and international cooperation could also apply to NGO's. States through funding representative disability organisations should support participation at the regional and international level.

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<sup>62</sup> The Australian aid agency AusAID incorporates an environmental impact assessment within its programmes.

234. The Working Group discussion also focused on the placement within the treaty document. In terms of placement, the following options were considered:

- In the preamble;
- Among the General Principles;
- In the General Obligations;
- As a separate article;
- As a separate article, along with a provision either in the General Obligations, in the preamble or,
- In the General Principles.

235. Some members suggested that the issue could be included in the purposes of the Convention. The placement is very much dependent on the nature of the inclusion. Is the intention to include a general statement of the principle of international cooperation or are we seeking to have States actively engage. A preambular statement will not give rise to specific obligations whereas an explicit provision within the operative section will give a binding obligation on states to take action. The inclusion of international cooperation should be an explicit provision worded in a broad sense as developed above and suggested by members of the Working Group (i.e. annex 2 paragraph 4).

## 8. WHAT'S MISSING

### **Background**

236. This section discusses some topics identified as “missing” from the Working Group draft prepared at its January 2004 meeting in New York. It includes topics identified in “Matters included in the Chairs Text/Bangkok Draft but not included in Working Group draft” following the workshop on this topic convened by APF at the Europe Centre in Canberra on 25 March 2004, and also a discussion of access to the right to health which on reflection merits inclusion. Reference is made to Bangkok, Mexican and New Zealand documents which were submitted to the Working Group. These are available on [www.rightsforall.org](http://www.rightsforall.org) together with a commentary by the Landmine Survivors Network.

237. This section of the paper is intended to provide a basis for further consideration and discussion. It is certainly not comprehensive. It is fully expected that further issues will be identified as “missing” for consideration by the working group.

### **Particular subgroups**

#### *Introduction*

238. A number of subgroups of people with disabilities often face aggravated or multiple discrimination linked to their status as members of other minority and other groups in need of protection. Examples of such groups of people with disabilities include members of minority population groups, indigenous peoples, ethnic, religious and linguistic communities, women with disabilities, and people who live in remote areas or island communities. Such groups may experience discrimination and lack of equal opportunity in relation to the enjoyment of cultural, religious and linguistic rights in addition to issues around the enjoyment of civil, political and economic rights. Another

typology is people with significant or profound disabilities who face particular problems and issues and require protection.

239. Such groups face particular risks of social exclusion and discrimination. By making specific reference to such groups the Convention promotes the visibility and recognition of such marginalised groups, to prevent stigma and discrimination and to help facilitate the members enjoyment and benefit from human rights. Conversely failure by the Convention to recognise such groups suggests the UN regards such groups with equanimity or indifference or worse.

240. The working group text contains some generic references in the preamble and a specific reference, in relation to the right to social security and an adequate standard of living, to the situations of people with disabilities who are subject to multiple discrimination or to the problems faced by people with severe or profound disabilities. It is not clear why it is only people with disabilities living in poverty are targeted when all people with disabilities may be subject to multiple discrimination. Further, general preambular references to subgroups will be unlikely to be of much practical benefit to subgroups (see comments on the role of the preamble in the “definitions” section of this paper). It is important that the substantive text should not omit subgroups, specifically those which have been recognised by the Committee on Economic Social and Cultural Rights and in the Standard Rules.

241. The substantive text omits a number of groups previously referred to in one or more working drafts submitted to the Working Group (the Bangkok, Mexico and New Zealand drafts). For example, there is no mention of multiple discrimination experienced by members of minority population groups with disabilities or indigenous persons with disabilities.

242. The recognition of such groups in this Convention is supported by and relevant to all convention principles, particularly the notions of equality of opportunity, and respect for difference and acceptance of disability as part of human diversity and humanity.

*Arguments for inclusion of the proposed text*

243. General Comment 5 of the Committee on Economic, Social and Cultural Rights recognises particular subgroups of persons with disabilities, both explicitly and through its identification of the Standard Rules as providing a reference guide in identifying more precisely the relevant obligations of States Parties under the Covenant. At para 19 the Committee refers to the double discrimination suffered by women with disabilities and notes that the neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action. At para 22 the Committee states:

“According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market. For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed”.

244. The situation of particular subgroups of persons with disabilities is recognised under the Standard Rules. In its commentary on the “purpose and content of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities” UNDESA states:

“The equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources. Special attention may need to be directed towards groups such as women, children, the elderly, the poor, migrant workers, persons with dual or multiple disabilities, indigenous people and ethnic minorities. In addition, there are a large number of refugees with disabilities who have special needs requiring attention.”

245. Rule 3 of the Standard Rules refers to the situation of persons with severe and/or multiple disabilities requiring rehabilitation.

246. Rule 4 declares that:

“States should support the development and provision of personal assistance programmes and interpretation services, especially for persons with severe and/or multiple disabilities. Such programmes would increase the level of participation of persons with disabilities in everyday life at home, at work, in school and during leisure-time activities”.

247. Rule 6 states:

“In States where education is compulsory it should be provided to girls and boys with all kinds and all levels of disabilities, including the most severe. Special attention should be given in the following areas: Very young children with disabilities; Pre-school children with disabilities; Adults with disabilities, particularly women

248. There is support for inclusion of references to particular subgroups from Asia-Pacific National Human Rights Institutions, who participated in the preparation of the Bangkok text. The New Delhi workshop of NHRIs from the Asia-Pacific region proposed that the preamble to the Convention should recognise the impact of dual disadvantage and multiple discrimination faced by women, children, or indigenous people with disabilities.<sup>63</sup> The Bangkok text, developed with the assistance of NHRIs from the Asia-Pacific region, provides explicit recognition of (i) the right of disabled persons who are members of an ethnic, religious, linguistic, or indigenous minority to enjoy their own culture, religion and language and (ii) requires positive measures be taken in relation to disabled minorities or indigenous persons to ensure their equal opportunity to enjoy cultural, religious and linguistic rights.

249. Support for inclusion in the Convention of protection for particular groups was expressed by various members of the Working Group at its meeting in New York in January 2004.

- some target groups were not well addressed enough in the draft texts, particularly people with disabilities in urban slums, minority tribes and minority ethnic groups<sup>64</sup>;

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<sup>63</sup> See [www.asiapacificforum.net/activities/disability](http://www.asiapacificforum.net/activities/disability)

<sup>64</sup> P17, vol 3 #1 January 5 2004, LSN summary.



- for the full integration of persons with disabilities a clear distinction providing for the elimination of all forms of discrimination was needed. Some forms of discrimination are masked in cultural practices and put forward as positive discrimination. Others are clear forms of discrimination, like women with mental disabilities who are forcibly sterilised<sup>65</sup>;
- the text should reference the discrimination faced by doubly vulnerable groups: those who are multiply discriminated against on the ground of disability, race and/or poverty<sup>66</sup>
- attention was drawn to the specific experiences of groups such as women and children.<sup>67</sup>

250. Some members of the Working Group opposed inclusion of text recognising vulnerable groups on the basis this added “stigma we don’t need” or that recognition of vulnerability was negative.

251. Inclusion of the proposed text is consistent with and relates to the principles of the Convention in article 2, (a) dignity (b) non-discrimination (c) full inclusion (d) respect for difference and acceptance of disability as part of human diversity and humanity (e) equality of opportunity. Draft provisions should be clearly related to the general principles. The notions of equality of opportunity and the recognition and valuing of difference are of particular relevance.

### ***Proposed text***

#### Rights of women with disabilities

*States Parties recognize that women with disabilities are subject to multiple discrimination and that focused, gender-specific measures (including protective measures) will be necessary to ensure that women enjoy all human rights and fundamental freedoms on the basis of equality with men.*

<sup>65</sup> P4, vol 3 #2 January 6 2004, LSN summary.

<sup>66</sup> P10, vol 3 #4 January 8 2004, LSN summary

<sup>67</sup> P9, vol 3 #2 January 6 2004, LSN summary.

*Each State Party undertakes to take all necessary measures to ensure the equal right of women and men with disabilities to the enjoyment of all rights set forth in this Convention.*

Rights of children with disabilities

*States Parties recognize that children with severe or profound disabilities are subject to multiple discrimination and need special care and supportive services.*

*States Parties shall take all necessary measures to ensure that children with disabilities receive the special care and services they require, and are protected against abuse and neglect.*

Rights of persons living in rural or remote areas, in small island communities or in scattered population

*States Parties shall take into account the particular problems faced by persons with disabilities living in rural or remote areas, in small island communities or in scattered populations and shall take all appropriate measures to ensure the application of the provisions of this Convention to those persons.*

Rights of persons with significant or profound disabilities

*States Parties recognize that persons with severe or profound disabilities are at particular risk of violation of their human rights and fundamental freedoms and need special care and supportive services.*

*States Parties shall take all necessary measures to ensure that persons with such disabilities receive the special care and services they require, and are protected against abuse and neglect.*

Rights of indigenous persons and ethnic, religious or linguistic minorities

*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, persons with disabilities belonging to such a minority or who are indigenous shall not be denied the right, in community with other*

*members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

*States parties shall take all necessary positive measures to ensure that persons with disabilities who are members of minorities or who are indigenous have the equal opportunity to enjoy those rights.*

## **Immigration**

### ***Introduction***

252. There is no reference in the working group text to “immigration”, which is broadly understood to cover migrants, refugees, asylum seekers and internally displaced persons.

253. The Bangkok document, while not providing any text, refers to the need for consideration of the application of guarantees of non-discrimination and equal opportunity for persons with disability in relation to immigration and asylum law and practice. The Mexican document does not have any provisions expressly addressing these rights, although it notes that for people with disabilities in immigration, refugee or asylum settings there may be physical accessibility issues which impact the right to freedom of movement, as well as other barriers, such as restrictions on access to official papers needed for travel, denials of the right to a nationality, needs for access to alternate forms of communication, access to health and rehabilitation, and also the particular needs of people with disabilities who may be internally displaced because of natural, economic or other catastrophes.

254. The issue does not appear to have been expressly considered in the Working Group meeting. In the discussion on “General obligations” one member called for an extension of the obligations of a State Party to non-citizens living in its territory. The Coordinator suggested that people with disabilities who are non-citizens would be treated on the same basis as non citizens generally, noting this was a complex and broader issue

that would be taken up with the AHC. LSN raised the rights of persons with disabilities who are in conflict situations and whose rights are seldom addressed in centres for refugees and for internally displaced persons.<sup>68</sup>

### ***Arguments for including text on immigration***

“All human rights – including the right to health- apply to all people: migrants, refugees and other non-nationals”<sup>69</sup>

255. Whether migration is forced or unforced, migrants and others are often in the most vulnerable population groups facing significant issues of discrimination and exclusion. There are situations of multiple discrimination faced by immigrants with disabilities in relation to employment, access to education, housing, social security, and access to health services. There are particular issues for some subgroups, e.g. refugees and asylum seekers who have experienced severe shock, trauma, and abuses including sexual abuse; and may be experiencing post-traumatic stress disorder; and migrants and others with HIV/AIDS or infectious diseases who experience exclusion on the basis of health status.<sup>70</sup>

256. The human rights aspects of migration are receiving increased attention at the UN, by international organisations, among NGOs and governments, within the context of growing international migration for economic, environmental and displacement reasons linked with conflict and political instability. It is noted that overall data on international migration are scarce.<sup>71</sup>

257. The major UN treaties set out basic human rights for all people including migrants refugees and other non-nationals within a States territory. In General comment 5 the Committee on Economic Social and Cultural Rights has interpreted ICESCR to apply to

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<sup>68</sup> January 13, Intervention by Landmine Survivors Network, Right to life/Armed conflict.

<sup>69</sup> UN Special Rapporteur on the Right to Health; UN Special Rapporteur on the Human Rights of Migrants, December 2003.

<sup>70</sup> International Migration, Health, and Human Rights, WHO, December 2003, p16.

<sup>71</sup> International Migration, Health, and Human Rights, WHO, December 2003, p12.

people with disabilities, further that the UN Standard Rules provide a main source of guidance in interpretation of ICESCR.

258. The Standard Rules make reference to the special attention needed for such groups as migrant workers and refugees:

The purpose of the Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles. Persons with disabilities and their organizations should play an active role as partners in this process. The equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources. Special attention may need to be directed towards groups such as women, children, the elderly, the poor, migrant workers, persons with dual or multiple disabilities, indigenous people and ethnic minorities. In addition, there are a large number of refugees with disabilities who have special needs requiring attention.

259. There is further reference in the Standard Rules to measures to achieve the equalization of opportunities of persons with disabilities, including refugees with disabilities:

**Rule 21. Technical and economic cooperation**

States, both industrialized and developing, have the responsibility to cooperate in and take measures for the improvement of the living conditions of persons with disabilities in developing countries.

1. Measures to achieve the equalization of opportunities of persons with disabilities, including refugees with disabilities, should be integrated into general development programmes.

260. The international human rights framework provides protection for migrants with disabilities in many situations. Nevertheless migrants experience widespread denials of human rights. The UN Special Rapporteur for the Human Rights of Migrants has highlighted the problems faced by female migrant workers, particularly domestic

workers, including acts of physical and sexual violence; IOM reports that a high number of Ethiopian women die while working in Arab states as temporary workers and refers to women returning home with “broken limbs and back, acid burns and other physical abuse.”<sup>72</sup>

261. Inclusion of the proposed text is supported by the principles of the Convention in article 2, particularly 2 (a) dignity, 2(d) respect for difference and acceptance of disability as part of human diversity and humanity and 2 (e) equality of opportunity. It is argued that the notions of dignity, equality of opportunity and the recognition and valuing of difference are of importance.

“Human rights law, mechanisms and approaches require migration policies that safeguard human dignity and ensure humane and just approaches. As countries are grappling with how to handle increased migration, therefore, it is important that the human rights framework is considered an important pillar for policy-making.”<sup>73</sup>

### ***Proposed text***

*States Parties shall take into account the particular problems faced by persons with disabilities in relation to immigration and asylum law and practice and shall take all appropriate measures to ensure the application of the provisions of this Convention to those persons.*

### **Access to Right to Health**

262. Article 21 provides for the Right to health and rehabilitation, that States Parties recognize that all persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability, and providing that States Parties “shall take all appropriate measures to ensure access for people with disabilities to health and rehabilitation services”. Sub articles (a) to (m) elaborate this right.

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<sup>72</sup> IOM, Ethiopia interview with victims of trafficking IOM News 2001.

263. What is missing is elaboration of three components of the concept of “access”, economic accessibility, information accessibility, and physical accessibility.

264. Article 12 of ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the right to health is also provided for in CERD, CEDAW, and CROC). General comment 14 of the Committee on Economic, Cultural and Social Rights is aimed towards assisting States Parties to implement article 12. According to the Committee, the right to health includes the following inter-related elements: availability; accessibility; acceptability and quality.

“Accessibility has four overlapping dimensions:

*Non-discrimination:* health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. (7)

*Physical accessibility:* health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

*Economic accessibility (affordability):* health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

*Information accessibility:* accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

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<sup>73</sup> International Migration, Health, and Human Rights, WHO, December 2003, p29.

265. Further, General comment 14 states that the Right to Health imposes three types or levels of obligations on countries: the obligations to respect, protect and fulfil. The obligation to respect obliges countries to refrain from interfering directly or indirectly with the enjoyment of the right to health; the obligation to protect requires States parties to take measures to prevent third parties from interfering with article 12 guarantees; the obligation to fulfil contains obligations to facilitate, provide and promote.

266. Footnote 75 to the Working Group text, appended to provisions relative to the Right to Health indicates that “some members suggested that affordability...should be addressed in the Convention”. It is noted that affordability issues and issues of access to clean water, are raised in the context of access to social security and an adequate standard of living. Article 23 (1) (c) ensures access by persons with severe and multiple disabilities, and their families, living in situations of poverty, to assistance from the State to cover disability-related expenses. There were suggestions that the provisions of this subparagraph should apply to persons with disabilities generally (footnote 103). Article 23 (2) provides that State parties recognise the right of all persons with disabilities to an adequate standard of living...including access to clean water, and to the continuous improvement of living conditions, and will undertake appropriate steps to safeguard and promote the realisation of this right”. Footnote 7 states that some members of the Working Party considered this should be deleted as it is not a right guaranteed under ICESCR; others considered the reference was critical to the treatment and prevention of disabilities and should be strengthened to include “basic services”.

### ***Proposed additional subparagraphs***

#### *Article 21*

*(n) recognise the right of all persons with disabilities, including in rural areas, to access health facilities, goods and services that are within safe physical reach and to the continuous improvement of living conditions, and will undertake appropriate steps to safeguard and promote the realisation of this right*



*(o) recognise the right of all persons with disabilities, including in rural areas, to access medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, that are within safe physical reach and to the continuous improvement of living conditions, and will undertake appropriate steps to safeguard and promote the realisation of this right*

*(p) ensure that payment by persons with disabilities for healthcare services and for the determinants of health is based on the principle of equity, to enable such services to be affordable for all*

*(q) protect and promote the right for persons with disabilities to seek, receive and impart information and ideas concerning health issues*

### **Formal aspects such as Reservations, Entry into Force, etc.**

267. It appears that this aspect of the Convention was not addressed by the Working Party. The Bangkok and Mexican documents (available at [www.rightsforall.org](http://www.rightsforall.org)) contain draft articles on signature, ratification and accession, on entry into force of the Convention, on amendments or revisions, reservations, settlement of disputes and authenticity of text. Acknowledgement: The following comments are taken or adapted from the commentary by Landmine Survivors Network at the above website, which compares and contrasts the Bangkok and Mexican documents (there was no relevant New Zealand text on this topic).

#### ***Depositary, Signature, ratification and accession***

268. The Bangkok draft provides separate provisions on designated depositary and signature/ratification/accession.

#### ***Entry into force***

269. The Bangkok document requires 20 States parties (the Mexican referred to 10). 20 ratifications were required also for the Convention on the Elimination of all Forms of Discrimination Against Women (1981) the Convention on the Rights of the Child (1990). The recent Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003) required 40 signatories.

### ***Amendment or revision***

270. The Bangkok text has been supplemented by provision for the participation of observers in all conferences convened by States Parties.

### ***Reservations***

271. Although some treaties disallow the filing of reservations which have the effect of limiting the scope of a treaty's application in relation to the reserving States Party, many do permit this practice as long as the reservation in question does not contravene the essential object and purpose of the treaty. (Reservations that contravene the object and purpose of the treaty are never allowed). The Bangkok text specifically disallows reservations that limit the scope of application of the treaty (and mirrors the reservations provision in the Rights of the Child Convention)

### ***Settlement of Disputes***

272. Treaty provisions on dispute settlement provide a mechanism for the resolution of disputes between States Parties pertaining to the meaning or application of treaty obligations. A variety of dispute settlement mechanisms exist under international law. The Bangkok provisions on dispute settlement refer to negotiations as the first means of resolution, then provide for compulsory arbitration if negotiation fails. The Bangkok document allows States Parties to opt out of the compulsory arbitral clause by making a declaration to that effect at the time of signature or ratification of the convention. Neither provision references the broader array of diplomatic dispute settlement procedures (e.g., good offices mediation or conciliation) which are standard references in many multilateral treaties.

### ***Authentic texts and transmittal***

273. The Bangkok text provides standard provisions concerning authenticity of convention text according to language, significant for interpretation of the convention, and for the standard requirement that the UN Secretary General transmit certified copies of the convention to States Parties in order to ensure that they possess the same, finalized and official text.

274. The Bangkok draft adds a paragraph that might appear to relate not to authenticity, but more to publicity of the convention in accessible formats. It is important that such alternative formats are accurate and authentic.

### ***Proposed text***

#### **Depositary**

*The Secretary-General of the United Nations is designated as the depositary of this Convention Signature, ratification and accession*

1. *This Convention shall be open for signature by all States. It is subject to ratification.*
2. *This Convention shall be open to accession by any State.*
3. *Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.*

#### **Entry into force of the Convention**

1. *This Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.*
2. *For each State ratifying or acceding to the Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.*

### **Amendment or revision of the Convention**

1. *After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.*
2. *Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.*
3. *When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of This Convention and any earlier amendment that they have accepted.*
4. *States not Party to this Convention, as well as specialized bodies, non-governmental organizations, and other competent agencies may be invited to attend the Amendment Conference as observers, in accordance with the agreed rules of procedure.*

### **Reservations**

1. *The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.*
2. *A reservation incompatible with the object and purpose of the Convention shall not be permitted.*

3. *Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.*

### **Disputes between States Parties**

1. *Any dispute between two or more States Parties concerning the interpretation or application of the Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.*

2. *Each State Party may at the time of signature or ratification of the Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.*

3. *Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.*

### **Authentic Texts**

1. *This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.*

2. *The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.*

3. *The United Nations shall publish the text of the Convention in the official languages of the United Nations in formats which are accessible for persons with disabilities, including Braille, large print, audio, multimedia, easy to understand versions for persons with cognitive disabilities, and other alternative formats, as well as on an accessible website.*