

**Expert Group Meeting and Seminar on an International
Convention to Protect and Promote the Rights and Dignity of
Persons with Disabilities**

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**Reflections on the proposed international convention on the
human rights of persons with disabilities in the light of existing
international human right standards: form, process and substance**

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INTRODUCTION

The decision by the United Nations General Assembly in December 2001¹ to establish the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (the Ad Hoc Committee) represents an important step on the path towards the adoption of a new convention on the human rights of persons with disabilities. While building on previous work within the United Nations in the fields of disability and human rights and responding to the calls of disability groups,² the possibility of the adoption of a new treaty focusing specifically on issues of disability has enormous potential to bring

¹ GA Res 56/168 (2001)

² For the background, see Clinton Rapley, "Note: select review of background and issues associated with elaboration of an international convention on the rights of persons with disabilities", Expert Group Meeting and Seminar on an International Convention to Protect and Promote the Rights and Dignity of Persons with Disabilities, Bangkok, 2-4 June 2003, www.worldenable.net/bangkok2003/paperrapley.htm.

disability rights firmly and visibly into the mainstream of the United Nations work on human rights, and to provide an impetus to international and national efforts to ensure the enjoyment of human rights and fundamental freedoms by persons with disabilities on the basis of equality with others.

Since the decision to establish the Ad Hoc Committee was taken, there has been a considerable amount of activity: governments and non-governmental organisations have identified many of the issues that need to be addressed in process of formulating and adopting any convention, and there have been many thoughtful examinations of the possible format and content of a convention, including a number of draft conventions or lists of desirable elements for a convention which have been proposed.³ The process is, of course, still at a relatively early stage, and there is very likely a long and arduous journey ahead.

The purpose of this paper is to examine some of the issues of strategy, substance and procedure that will need to be addressed during the process of working towards a convention. Not only are there complex and contentious issues of definition, orientation and scope to be addressed on their merits, but there is still much political and advocacy work to be done in order to persuade those who may not yet be convinced of the need for a disability-specific convention and who may believe or suggest that the preferable way forward lies in drawing on the resources we now have in the UN human rights system.

My perspective is primarily that of the international human rights lawyer (rather than a disability rights lawyer or activist). While sympathetic to the argument that a disability-specific convention is highly desirable, in my view it is necessary to address satisfactorily not just the many difficult substantive issues, but also a number of questions about how such a convention would fit into the existing system of human rights treaties and whether the devotion of resources to the establishment of a new instrument and supervisory body

³ See in particular the Expert Group Meeting on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, Mexico, June 2002, background papers at <http://www.sre.gob.mx/discapacidad/home.htm>. See also Proposal for a Comprehensive and Integral International Convention on Promotion and Protection of the Rights and Dignity of Persons with Disabilities by the United Nations Economic and Social Commission for Asia and Pacific (UNESCAP), <http://www.worldenable.net/bangkok2003/proposal.htm>.

is justified, at a time when the UN human rights treaty system has been criticised for its inefficiencies and duplication and the onerous reporting burdens it already imposes on States.

The issues I consider in the paper are the following:

- The case for a new thematic convention on disability rights
- How the convention might be conceived against the background of existing human rights and disability-specific instruments
- Some important structural and substantive issues
- The options for a monitoring and enforcement mechanism.

Much has already been written on these topics and I am indebted to those on whose work I have drawn in this paper.

A NEED FOR A NEW CONVENTION?

While there is enthusiastic support within the disability community for a new convention -- a support clearly shared by a number of governments which have taken the initiative in moving the process forward --- it is important to recognise that there are still significant sections of the international community who are not yet convinced of the need for a new convention. Underpinning this agnosticism (or in some cases opposition) are arguments that the best way forward is to mainstream disability concerns in the interpretation and application of existing human rights treaties and not to duplicate unnecessarily the existing extensive array of treaty committees.

There are a number of responses to this treaty-skepticism, some general and some directly responsive to the mainstreaming and avoidance of duplication perspectives.⁴ The importance of a disability-specific treaty in increasing the visibility of disability issues at the international and national levels, its empowering of disability groups and persons

⁴ For a concise statement of the case for a new thematic convention, see Gerard Quinn, *Submission to the Oireachtas Joint Committee on Foreign Affairs Sub-Committee on Human Rights, Hearing on the Proposed UN Treaty on the Human Rights of Persons with Disabilities*, 24 April 2003

with disabilities, its provision of a framework for analysis and for stimulating discussion and change at the national level, and its potential for encouraging mainstream institutions to take greater notice of disability issues in their work have all been noted as significant reasons for supporting the adoption of a new thematic convention. Similarly positive developments have been seen in the case of other thematic conventions, such as the Convention on the Rights of the Child (the CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention).

But these arguments would probably not prevail if the existing treaties and procedures either dealt with disability rights issues satisfactorily or had the potential to do so. Therefore it has been important to assess the extent to which the existing UN human rights treaty bodies have addressed disability issues in their work and whether their theoretical or practical ability to do so is limited. Some of those issues have been examined in earlier writing,⁵ and the conclusion reached that, even though the other treaties applied to persons with disabilities as to all other humans, the attention given to the particular problems faced by disabled persons in actually enjoying their rights was fairly limited. There have been some important advances (and the regional systems have also done quite well in this regard), but overall disability issues have limited visibility and priority.⁶

Those views have been confirmed in large part by the landmark study prepared by Gerard Quinn and Theresia Degener (and their co-contributors) for the Office of the High Commissioner for Human Rights.⁷ That wide-ranging examination of the practice of the existing UN human rights treaty bodies in relation to disability confirms that the existing treaty bodies have devoted some, but not an enormous amount of attention to disability

⁵ See, e.g., *Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability*, 8-12 December 1998, <http://www.un.org/esa/socdev/enable/disberk0.htm>

⁶ See Byrnes, "Disability rights and human rights: plunging into the 'mainstream'?", paper prepared for "Let the World Know", Seminar on Human Rights and Disability, Almåsa Conference Centre (Stockholm, November 5-9, 2000), <http://www.un.org/esa/socdev/enable/stockholmnov2000n.htm>.

⁷ Gerard Quinn and Theresia Degener (and other coauthors), *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (New York and Geneva: United Nations, 2002)

issues. While accepting that there is greater potential to explore the application of existing standards to violations of the rights of persons with disabilities, the authors conclude that it is unlikely that the existing treaty bodies will be in a position to focus on disability to the extent that the area merits. Quinn and Degener argue:⁸

[I]t must be frankly acknowledged that the treaty monitoring bodies will continue to have many different constituencies to keep in focus and many intractable and general issues to wrestle with. The pressure they are under is bound to increase. In other words, there is probably a limit to the extent to which these bodies can focus on disability – a limit that is explained by other pressing priorities. This is in no sense a criticism of the bodies concerned. It is simply a recognition of the reality that other matters will always compete for their attention.

In short, not only the significant positive benefits that would flow from the adoption of a thematic convention but also the likely continuing inability of the existing human rights treaty bodies to address disability issues in a sufficiently sustained and focused manner would justify the adoption of such a convention in relation to disability.

NATURE OF A NEW CONVENTION

What, then, should be the approach taken in the formulation of a new convention? This of course depends on what one sees the convention as doing and the conceptual frameworks on which it draws. A number of governments and organisations have already made suggestions as to the possible structure of a convention. Central to most of the proposals has been that the treaty should be a human rights-based treaty, which would reflect the move in thinking about disability at the international level from a social welfare model to a rights-based model. Under a rights-based model, persons with disabilities are viewed as *entitled* to access to opportunities, services and possessing an effective right to participate on an equal basis in all political and social activities; governments are obliged to ensure this, not just as a matter of welfare or optional social policy, but as a binding legal obligation.

Accordingly, the view of a number of commentators (and my own view) is that the central approach of a new convention should be to reaffirm the application of existing

⁸ *Id* at 13.2, p 299

human rights norms to persons with disabilities, while expanding on what the full realisation of those rights means for persons with disabilities.

In looking to how a rights-based approach could be developed, it is worth noting that governments and international lawyers often manifest a quite conservative streak in drafting. Perhaps unsurprisingly given the existing body of international human rights instruments, governments will approach the task guided (perhaps limited) by one or other of the existing treaties, though these offer a range of different approaches. As a practical matter, therefore, it seems advisable to draw on those existing models to the extent that they are useful, while of course pushing for innovations and changes where they are needed (as they are).

One important goal that has been already been underlined is that any disability-specific convention should not involve any diminution in the level of protection provided under existing binding instruments, either in relation to permissible limitations on rights or in relation to the nature of the obligations assumed by States to give effect to particular rights.⁹ In recent years some States have used the drafting of new international human rights instruments as an occasion to challenge long-established rights or interpretations, whether on grounds such as the need to respect diverse customs and traditions, local variations, or on other grounds that are redolent of cultural relativist positions or unhappiness with criticism by existing human rights bodies. When moving from non-binding instruments (such as the various UN instruments relating specifically to disability) to a binding treaty, there is also a danger that States will seek to restrict and qualify these standards, in effect arguing for more limited obligations in relation to a specific group than they have already accepted under other treaties in relation to all their citizens. It is a real challenge to produce a convention which will actually strengthen existing rights and instruments without diluting or undermining them.

Given the antecedents and the goals of the proposed convention, the two most recent thematic human rights treaties adopted within the United Nations system provide a

⁹ See *Principles for drafting of a new treaty*, June 2002, www.sre.gob.mx/discapacidad/principlesfordrafting.htm, and earlier discussions at the Berkeley meeting (supra note 5) and interregional seminar in Hong Kong (infra note 18).

typology that seems suitable for achieving the goals of disability rights advocates and which would provide a familiar framework for governments. These are the Convention on the Rights of the Child (1989) (the CRC) and the International Convention on the Rights of All Migrant Workers and Members of their Families (1990) (the MWC). Each of these conventions addresses particular groups and reaffirms the universal human rights which members of those groups enjoy, while at the same time spelling out the implications of those generally stated rights for the particular situation faced by the protected groups. One could see this as explicating those rights, or formulating new rights (though the former characterisation may be more likely to gain support from governments). In addition, the two treaties contain guarantees of non-discrimination in the enjoyment of the rights specified in the convention (CRC, art 2; MWC, art 7), though neither contains the freestanding guarantee of equality before the law and equal protection of the law contained in article 26 of the ICCPR.¹⁰

A substantial proportion of both the CRC and the MWC consists of a restatement of the rights contained in earlier instruments with either children or migrant workers as the rights-holder. For example, article 13 of the CRC provides that the child shall have the right to freedom of expression in terms almost identical to the same guarantee in article 19 of the ICCPR; article 13 of the MWC makes similar provision in relation to migrant workers and members of their families. There are many other examples of similar provisions in each of the two conventions.

At the same time, the conventions address special entitlements, needs or concerns which are viewed as of particular significance to those groups, and the classical statement of a particular right is spelt out, or specific obligations on the State are detailed. For example, in relation to children, the CRC makes explicit provision for ensuring that the views of a child are taken into account in all matters affecting the child (CRC, art 12), it requires

¹⁰ Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons 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 or other status.

States to regulate systems of adoption in the best interests of children, limits the circumstances under which a child may be separated from his or her parents (CRC, art 8), and imposes a specific obligation on States parties to combat the illicit transfer of children abroad (CRC, art 11). In relation to migrant workers, the MWC provides protection against collective expulsion (MWC, art 22), guarantees a right to transfer earnings and savings (MWC, art 32), and deals with a range of other matters relating to immigration status and related matters.

These treaties provide a familiar framework which might be used as a template for a new holistic convention on disability. In filling in this framework, there are significant questions of structure and overarching concepts to be addressed. One question is that of balance: how much can one include in a convention without making it unwieldy, with a level of detail that runs the danger of being too time-specific and which is not sufficiently flexible to apply across societies and to evolve with time. The danger of overloading a treaty is relevant not only to how detailed and expansive statements of rights should be, but also to the willingness of States to ratify. The more detailed and limiting the obligations, the more reluctant States may be to accept binding language (as opposed to the language of progressive implementation), and to ratify a new convention without reservations or at all.¹¹

Combining civil and political and economic, social and cultural rights: the nature of the obligations

One of the issues that will need to be addressed if the convention is to contain both civil and political, and economic, social and cultural rights based on the catalogues of rights in the ICCPR and ICESCR is the nature of the obligation assumed by the State in relation to the different categories of rights. In short, the classic, though now somewhat discredited, distinction between the immediately enforceable civil and political rights as opposed to the claimed aspirational or progressive nature of economic, social and cultural rights. The Convention on the Rights of the Child was the first of the UN human rights treaties to

¹¹ Another issue is whether it is desirable to include in the proposed convention so-called third generation rights, such as the right to peace. In my view one should be rather cautious about inclusion of these rights, as they are likely to be highly controversial, may distract attention from the other important rights about which there is more consensus, and may slow down the progress of a convention.

combine the categories comprehensively outside a non-discrimination model. Article 4 of that Convention essentially reproduces the traditional understanding of the difference between the two categories of rights by reproducing the substance of the relevant clauses from the two International Covenants:¹²

States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

To include a provision drawing such a sharp distinction between the two categories of rights in a convention on disability would fail to reflect the considerable advances in

¹² Article 2 of the ICESCR provides:

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.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 2 of the ICCPR provides

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his 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, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

thinking about the justiciability and enforceability of economic, and social rights that have been made in the past 15 years, both within the framework of the United Nations but also within regional organisations. To simply replicate the received formula might undermine the goal of ensuring real and enforceable protection for the economic, social and cultural rights that are fundamental to all persons being able to live a life of dignity and to enjoy autonomy.

It is well accepted that the non-discrimination aspects of economic social and cultural rights are in large measure immediately enforceable rights, or justiciable -- a view articulated by the Committee on Economic, Social and Cultural Rights (CESCR)¹³ and demonstrated in practice at the international level by case law under the First Optional Protocol to the ICCPR. However, it is clear that the enforceability and justiciability of economic, social and cultural rights extend beyond discrimination to embrace significant components of freestanding rights themselves, a view shared by commentators, special rapporteurs and international and national tribunals.¹⁴ The challenge then is how one can refine the approach taken in the earlier treaties to ensure that the obligations on States to ensure the full enjoyment of economic, social and cultural rights by persons with disabilities are not formulated in a manner which seems them as largely aspirational and open-ended obligations, subject to a largely unreviewable State discretion to decide whether resources are available. The challenge is a significant one, but the notion of a minimum core entitlements and the obligations not to adopt regressive measures deliberately, both developed by the CESCR, are important elements to consider in this context.

¹³ See, e.g., Committee on Economic, Social and Cultural Rights, *General comment No 2*, para 5.

¹⁴ See, e.g., Committee on Economic, Social and Cultural Rights, *General comment No 9*, paras 10-11.

Structure of a convention

There has been a good measure of consensus in the discussions so far about how a convention might be structured and its content.¹⁵ A structure along the following lines might be appropriate:

1. Preamble
2. Introductory part
 - Statement of objectives and general principles
 - Definition of disability
 - Definition of discrimination (including positive measures and the question of intersectionality/multiple grounds of discrimination)¹⁶
3. General obligations
 - Statement of the obligation of a State party to implement the Convention, in particular the obligations to respect, ensure and provide remedies for violations of the rights set out in the Convention
 - Guarantee of equality and non-discrimination (generally and in the enjoyment of the rights guaranteed in the Convention; statement of gender equality)
4. Guarantees of specific rights (drawing on UDHR, ICCPR, ICESCR and other instruments, expanded by reference to disability perspectives)
5. Other State obligations (such as obligations in relation to collection of statistics, establishment of national machinery, publicity for convention)
6. Monitoring mechanism
7. Administrative provisions (including a provision on reservations)

Of particular interest have been the various proposals to have not just a detailed Preamble setting out the background to and justification for a convention, but a substantive section

¹⁵ See *Compilation of the results of the working groups of the Seminar*, Américas regional seminar and workshop on norms and standards related to the rights of persons with disabilities and development, Quito, 9-11 April 2003, www.worldenable.net/quito2003/compilation.htm; Gerard Quinn, Rodrigo Jiménez, Maria Soledad Cisterna and Marcia Rioux, "What Rights Should the Treaty Contain?", www.sre.gob.mx/discapacidad/whatrights.htm [hereinafter *What rights*], and the earlier proposal by the Mexican government: *Text of Elements for a United Nations Comprehensive and Integral International Convention to Promote and protect the Rights and Dignity of Persons with Disabilities*, 16 May 2002, www.sre.gob.mx/discapacidad/elements/htm, as well as other drafts tabled for the meeting in Mexico.

¹⁶ See on intersectionality issues *What rights*, supra note 15, Section D.

of the convention which sets out principles and objectives which would underpin the interpretation of all the provisions of the convention. The principles suggested included an affirmation of dignity, autonomy, equality and solidarity as overarching values underlying any convention.¹⁷

Definition of disability

A definition of disability is of course critical to a convention the scope of which is defined by reference to the rights of persons with disabilities to the full enjoyment of human rights. There is a range of definitions or descriptions of disability adopted at the international and national level,¹⁸ and of course to some extent the definition of disability depends on the purpose for which it is being defined. It needs to be broad enough to include disability resulting from physical, sensory and mental impairments and importantly must reflect the importance of environment in the construction of disability.

The most recent international legal definition appears in article 1 of the Inter-American Convention on the Elimination of Discrimination against Persons with Disabilities,¹⁹ adopted in 1999, which may provide a useful starting-point:

"The term 'disability' means a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of life and which can be caused or aggravated by the economic and social environment."

Definition of discrimination and whom it should cover

There are two major categories of non-discrimination contained in the international human rights instruments. The first one, which appears in article 2 of both International Covenants and all the regional human rights treaties, is a right not to be discriminated against in the enjoyment of the rights guaranteed in the particular treaty; an open-ended list of prohibited bases of jurisdiction accompanies the right to be free from

¹⁷ See Gerard Quinn, *Preliminary reflections on a new Thematic Convention on the Rights of Persons with Disabilities* (June 2002), www.sre.gob.mx/discapacidad/papergquinn.htm

¹⁸ For a review, see *Report of the Interregional Seminar and Symposium on International Norms and Standards relating to Disability*, Hong Kong, SAR, 13-17 December 1999, section VII ("Summary of Proceedings: Cluster Three: definitions of disability"), <http://www.worldenable.net/hongkong99/hkreport9900.htm>.

¹⁹ Text at www.oas.org/juridico/english/ga-res99/eres1608.htm

discrimination. The other type of guarantee is a freestanding guarantee of equality, as seen in article 26 of the ICCPR. While there is some overlap between the two guarantees in the case of the ICCPR, the article 26 formulation is wider and incorporates the protection afforded by the more limited guarantee.

A definition of equality or discrimination does not appear in the text of either of the Covenants (or of the regional conventions), though there are definitions in a number of specialised treaties at the international level, and the treaty monitoring bodies have also formulated their understanding of the term under the convention. If guarantees of equality and non-discrimination are to appear as part of the Convention, it may be useful to draw on existing definitions, though these will need to be modified to address some of the specific issues relating to disability. The opportunity might also be taken to clarify some of the ambiguities in some of the existing definitions used in treaties and other formulations.

Definitions of discrimination appear in the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD Convention), the CEDAW Convention, ILO Convention No 111 (Discrimination in Occupation and Employment), and the UNESCO Convention on Discrimination in Education. In addition the Human Rights Committee has considered the issue in its *General comment 18 (37)*, and the CESCR has addressed the issue in relation to disability in its *General comment 5 (1994)*. Extracts from each of these sources appear in the Annex to this paper.

A number of points might be considered in formulating a definition or modifying these definitions:

- The need to adopt a substantive approach to equality that would ensure that not just facial discrimination and traditionally defined disparate impact (indirect discrimination) is covered, but also arrangements, practices and social structures that lead to the denial of rights and freedoms

- The need to include a failure to accord reasonable accommodation as part of any definition of description (as does the CESC in its *General comment 5*²⁰)
- The need to clarify the different types of "positive measures" that may be required to ensure equality (some continuing, some which may need to be temporary) and the relationship of these "positive measures" to the definition of discrimination (are they a permitted exception to prohibited discrimination, or are they not discriminatory at all?)
- The need to include protection for associates of persons with disabilities against discriminatory treatment because of their association
- The need to provide protection against adverse treatment based on imputed disability or on a past disability (and whether this should be included as part of the definition of disability or within the prohibition on discrimination)
- The need to address intersectionality/multiple discrimination) and to make clear that adverse treatment based on or impacting on particular groups of disabled persons (e.g. disabled women with disabilities, minority members with a disability) is covered by the prohibition on discrimination

Other issues

There are many other specific issues that may need to be addressed in the formulation of a convention. One important issue is the relevance of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The Standard Rules are themselves based on a human rights model, though the format in which they have been adopted is as a non-binding declaration of the General Assembly. Clearly, both the general principles contained in the Standard Rules and their specific provisions are highly relevant background material, and compliance with those Rules will be an important way of implementing obligations under any convention. Indeed, some of the provisions of the Standard Rules might well be included in some form in the text of the treaty as part of the elaboration of what general rights mean for persons with disabilities. However, given the

²⁰ *General comment 5*, para 15

fact that the Rules were negotiated as a non-binding instrument, it is less clear whether States would be prepared to give the Standard Rules any elevated status by being referred to in the text of the treaty as a controlling standard. A similar issue arose in the drafting of the Convention against Torture in relation to the Standard Minimum Rules for the Treatment of Prisoners (a non-binding instrument adopted by the Economic and Social Council²¹), where it was proposed (unsuccessfully) that the definition of torture or cruel inhuman or degrading treatment should include an explicit reference to the Standard Minimum Rules. Nevertheless, it may be worth pushing for this, given the widespread support for the Standard Rules in any event the Standard Rules would be drawn on as a persuasive source in interpreting relevant treaty provisions (as have other similar "soft" law provision by other treaty bodies²²).

Another important issue that will need to be addressed as the convention takes shape is the issue of reservations, and whether there should be any provision in the convention restricting the extent to which States may enter reservations to the convention or for a procedure for determining their compatibility with the object and purpose of the convention. Given the likelihood that the convention will be very wide-ranging in scope and will impose significant obligations on States parties, States will be extremely reluctant to restrict their usual right to enter reservations (subject of course to the general restriction under international law that reservations may not be incompatible with the object and purpose of a treaty).²³

²¹ *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report by the Secretariat*, UN Sales No. 1956.IV.4, Annex I.A, approved by ESC Res. 663 C (XXIV), E/3048 (1957), and amended by ESC Res. 2076 (LXII), E/5988 (1977).

²² For example the Committee against Torture has drawn on not only the Standard Minimum Rules, but also the Code of Conduct for Law-Enforcement Officials (GA Res. 34/169, Annex (1980)), the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA Res. 37/194, Annex (1982)), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA Res. 43/173, Annex (1988)), and other international and regional prohibitions of torture

²³ A similar issue will arise in the case of enforcement procedures if the convention contains an individual complaints procedure, an inquiry procedure or an inter-State complaint procedure, though the practice in this area has been to allow States the choice of accepting the substantive obligations under the treaty without having to accept any procedure other than a reporting procedure (compulsory under all the major UN human rights treaties).

Given the desirability of encouraging widespread participation in the eventual treaty, it would be unwise to prohibit reservations to the treaty. Nevertheless, consideration might be given to alternatives that do not simply leave the matter in effect entirely to the discretion of the ratifying State. For example, the convention could provide that reservations to particular provisions are impermissible; that reservations are valid only for a limited period (during which time States are obliged to review the continued need for them), and could only be renewed if a report justifying a renewal (and detailing the reviews) were provided to the monitoring committee before the expiry of the period. Or a procedure similar to that under article 20(2) of the CERD Convention might be considered under which a reservation is considered invalid if two-thirds of the States parties object to a reservation.²⁴ The challenge is to limit the type of inroads that have been made into the integrity of other treaty regimes -- in particular under the CEDAW Convention -- by broad reservations which some States parties have entered and which clearly incompatible with the object and purpose to of the relevant treaty, while at the same time encouraging States to participate in the treaty.

How should it be monitored?

Within the United Nations human rights treaty system, there is already a well-established palette of implementation mechanisms for treaties of the type we are considering. Common to all the existing principal treaties is the establishment of a committee of independent experts to monitor implementation of the treaty by carrying out specific functions conferred by the treaty or other constituent instrument. There are four principal procedures that have been established under some or all of the treaties:

- a *reporting procedure* under which all States parties are required to report regularly on the steps they have taken to implement the Convention (this appears in *all* the conventions and is compulsory for any State which ratifies or accedes to the conventions)

²⁴ However, it should be said that reliance on meetings of States parties to pronounce on the validity of individual reservations (as opposed to general exhortations to themselves and others to withdraw reservations) have not produced much by way of results under any of the UN human rights treaties.

- an *individual complaint procedure* under which an individual may bring a complaint to the committee that his or her rights have been violated (after exhausting remedies at the national level)
- an *inquiry procedure* under which the committee may on its own initiative institute an inquiry into a situation in a State party where the committee has received reliable information indicating that there are serious violations of the convention in that State party (CAT, art 20; CEDAW Optional Protocol)
- an *inter-State complaint procedure* under which the committee is empowered to consider complaints made by one State party against another State party that the latter is failing to fulfil its obligations under the convention (both States must have accepted the procedure).

Apart from the reporting procedure, all the other procedures are optional, that is they apply to a State party only if that State has expressly declared its willingness to be bound (or in the case of the inquiry procedures under the CAT and CEDAW Convention failed to opt out at the time of ratification or accession to the relevant treaty).

While some have suggested that it may be premature to discuss the monitoring procedure in too great a depth before work on the substantive parts of the convention has progressed, it is nevertheless important to address this issue at an early stage, since States' views of the desirability of a new convention may be influenced by the possible implementation measures, at least in part.

There is much support for the establishment of a new committee to monitor the proposed convention and for conferring on that committee the types of functions outlined above. My own view is that all these functions should be conferred on a new committee, with the possible exception of the inter-State procedures (which has never been utilised under UN human rights treaties, though similar procedures have been used at the regional level). The inclusion of an inquiry procedure may be of particular importance, given the difficulties that persons with disabilities may have in accessing the legal system in their own countries.

The arguments in support of a new committee specialised in disability issues and human rights are many. They include the fact that this approach has been effective in relation to areas such as women and children, so far as developing understanding and visibility of those issues is concerned (and indeed stimulating other treaty bodies and procedures to devote more attention to those matters in their own work) A specialised committee can also provide a focal point for government analysis of issues from a disability perspective, and increase momentum for change at the national level. The likelihood that at least some members of the committee would be persons with disabilities would bring a sharpness to its consideration of reports, and it would be a vivid representation of the incorporation of persons with disabilities and their concerns within the human rights treaty family (though initially perhaps a little marginalised as the new committee on the block).

Yet the concerns about establishing yet another treaty body are very real, and the exploration of other options and their limitations is an important part of the ongoing process. A number of countries have already indicated that quite different (and less effective) forms of implementation might be proposed.²⁵ These include the distribution of evaluation forms to States parties that would then be analysed by the UN, or giving a primary role in monitoring the meeting of States parties; neither of these would be an effective way of effectively monitoring implementation of the convention. Other countries have expressed their concern that establishing a new committee would involve unproductive duplication of work already being done by other committees, as well as increasing already burdensome reporting requirements under existing treaties. One State has even suggested that including material in reports to existing treaty bodies would be sufficient and that no new body would be needed. In short, the case for a new treaty body and the value it would add has to be made, and the concern about unproductive duplication and increasing burdens on States has to be addressed one way or another.

One route which may well appear attractive, legally and substantively, would be conferring on the Committee on Economic, Social and Cultural Rights the task of carrying out monitoring functions under the convention, particularly in light of the work

that that Committee has already done in relation to disability. As the Committee is a creation of the Economic and Social Council, the Council could confer those functions on the Committee relatively easily, something that could not be done so easily in the case of the other committees, since they are all creations of the treaties themselves (and States parties would have to approve amendments to the treaties in question).

However, this route would not appear to be satisfactory either. It is doubtful whether it would serve the substantive goals of bringing great visibility to disability issues given the existing workload of the CESCR, and it would not ensure that the expertise and perspectives of persons with disabilities were brought into the monitoring body. Notwithstanding the concerns about additional expense and overlap, the preferable route would be to establish a separate committee, perhaps of the size of the Committee against Torture (or the Committee on the Rights of the Child when it was first established). Even if this is done, it will be necessary from the outset to streamline its procedures and coordinate closely with other committees.

In establishing such a committee, attention will need to be given to the qualifications and method of selection of the committee. There are opportunities for innovation to the process more transparent and more open to public participation in the nomination of candidates for the committee than existing procedures. It is highly desirable that expertise in disability issues be a *sine qua non* for membership of the committee and that a significant number of committee members be themselves persons with disabilities. Gender balance should also be specified, as should independence of government (given the recent increase in nominations of serving diplomats and government officials to human rights treaty bodies).

If the established procedure of nomination by individual States and election by the States parties is followed, it may be appropriate to require or encourage governments to select their nominees by a transparent process at the national level (presently an infrequent occurrence). Alternatively, a departure from established procedure has been proposed,

²⁵ Views submitted by Governments, Intergovernmental Organizations and United Nations Bodies on a Comprehensive and Integral Convention on Protection and promotion of the Rights and Dignity of Persons with Disabilities, A/AC.265/ , paras 29-30 (2003)

drawing on the Standard Rules, under which an advisory body to the Special Rapporteur is selected by disability organisations themselves.²⁶ Perhaps half the committee could be selected in this way, and half in the usual procedure. In any event, the treaty should provide for a formal role for non-governmental organisations to contribute to the work of the committee.

CONCLUSION

The restarting of the work on adopting a convention on disability rights has begun favourably, but there is still a long way to go. Once more governments (particularly those which are less supportive) become more closely involved in the process and serious drafting begins, the going will become harder, and NGOs will have to be well-organised and assertive in order to keep the process moving in the right direction.

While one should be optimistic about the prospects of the convention and its ultimate impact, it is important also to recognise that the final product will inevitably disappoint in some respects. Not everything we might want to appear in the treaty can or will go into the treaty – politics, substantive decisions about the nature of a binding instrument, unbridgeable disagreements about substantive issues may all influence the final inclusion or exclusion. A treaty of this sort is unlikely to resolve issues which are highly controversial (such as issues of prevention)²⁷ and these may be omitted or dealt with in general or ambiguous terms. But the important thing is to be bold and innovative in our proposals, since this is the only way to advance beyond what we have now.

At the end of the day, the very achievement of a convention on disability rights which does not regress from existing standards -- even though it does not represent our ideal

²⁶ Craig Scott proposes an analogous procedure in relation to the promotion of diversity of knowledge on all the human rights treaty bodies, by giving the High Commissioner for Human Rights, advised by an eminent persons group, the role of suggesting suitable candidates to individual States for nomination. While problematic in terms of realpolitik, it is based on the need to move away from the process of nomination and election that is often driven by political or other concerns to which the qualifications of the nominee are of minor importance. Craig Scott, "Bodies of Knowledge: A diversity promotion role for the UN High Commissioner for Human Rights" in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 403, at 422-435.

²⁷ See John Mathiason, "Considerations for the proposed international convention to promote and protect the rights and dignity of persons with disabilities", www.sre.gob.mx/discapacidad/paperaimsfollowup.htm.

instrument -- will be a significant step forward in the struggle to ensure that all human beings enjoy fundamental human rights and freedoms on a basis of equality.

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ANNEX

Definitions of discrimination in existing international human rights treaties or instruments

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Article I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women 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; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Human Rights Committee, *General comment 18(37)* (extracts)

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Committee on Economic, Social and Cultural Rights, *General comment 5* (1994) (extracts)

15. Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. *For the purposes of the Covenant, "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.* Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

UNESCO Convention on Discrimination in Education (1960)

Article 1

1. For the purpose of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
2. For the purposes of this Convention, the term "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

ILO Convention No 111 (Discrimination in Occupation and Employment)
1958

Article 1

1. For the purpose of this Convention the term discrimination includes--
- a) any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.