

International Human Rights Law and Disability: Time for an International Convention on the Human Rights of People with Disabilities?

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Introduction

International concern for the protection of the human rights of people with disabilities² has been all but absent until relatively recent times. As a particularly vulnerable minority of 500 million people worldwide,³ out of whom approximately 80% live in developing countries,⁴ the case to be made for more widespread recognition and effective protection of the human rights of people with disabilities is compelling. Mere numerical quantification, however, is not an adequate basis for assessing the gravity of the situation. As the United Nations' former Special Rapporteur on Disability, Mr Leandro Despouy, has observed:

[Persons with disabilities] frequently live in deplorable conditions, owing to the presence of physical and social barriers which prevent their integration and full participation in the community. As a result, millions of children and adults throughout the world are segregated and deprived of virtually all their rights, and lead a wretched, marginal life.⁵

Historically disempowered and marginalised, people with disabilities still face insidious and trenchant discriminatory barriers, fed by unfavourable attitudes and stereotypes from within so-called "mainstream" society. Flowing from centuries-old traditions of discrimination, "society's expectations of people with disabilities are that they be dependent, unassuming and the grateful recipients of charitable

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² According to the International Classification of Impairments, Disabilities and Handicaps (WHO - ICDH, 1980) a disability is "restriction or lack (resulting from an impairment) of ability to perform an activity in the manner within the range considered normal for a human being."

³ Degener T "Disabled Persons and Human Rights: the Legal Framework" in Degener T and Koster-Dreese Y (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (M Nijhoff, Dordrecht; Boston, 1995) at 9 (hereafter cited as "Degener and Koster-Dreese").

⁴ World Program of Action Concerning Disabled Persons, GA Res 37/52, 3 December 1982 ("the WPA") at para 43.

⁵ Despouy L, Special Rapporteur, Final report, UN Doc E/CN4/Sub2/1991/31 of 12 July 1991, para 3.

assistance.”⁶ As a consequence, the majority of society’s institutions and activities have traditionally operated with a view to accommodating only the needs of those without disabilities. The resultant exclusion of those unable to hurdle these barriers to participation has of course only served to fuel the prejudicial stereotypes and discriminatory attitudes that built the barriers in the first place. Against this background it is hardly surprising that many in mainstream society would tend to view people with disabilities as being incapable of meaningful or productive participation in society, since they have never been seen to participate in the past.⁷

Similarly the collective voice of people with disabilities has traditionally been unable to force disability rights onto the international human rights agenda. Consequently, their situation has until very recent times only been considered in medical, charitable or social welfare contexts. The civil rights traditions generated in the United States in the mid-20th century certainly laid some important and groundbreaking ideological foundations⁸ upon which disability rights could be developed internationally, and indeed the UN General Assembly heralded a shift from paternalistic “welfare” concerns to a disability “rights” approach with two important Declarations in the 1970s.⁹ However notwithstanding these and other more recent advances, it must be acknowledged that the overall experience to date as far as the international observance and protection of the rights of people with disabilities is concerned is discouraging, at best.

To begin with, there is scant reference to persons with disabilities and no specific mention of discrimination on the grounds of disability in the constituent documents of the International Bill of Rights.¹⁰ The important questions of whether people with

6 Astor H “Anti-Discrimination Legislation and Physical Disability: the Lessons of Experience” (1990) 64(3) *ALJ* 113 at 114. See also Hendriks *op cit* at 153-155; Tomasevski K “The Right to Health for People With Disabilities” in Degener and Koster-Dreese, *op cit* pp 131-146.

7 See Lepofsky D “Equality Rights of Persons with Disabilities - Canadian and International Perspective’s” in Mahoney KE and Mahoney P (eds) *Human Rights in the Twenty-first Century* (M Nijhoff, Dordrecht; Boston, 1993) 169-190, at 171-172

8 See the *Americans with Disabilities Act* 1990 and the *Disability Discrimination Act* 1992 (Cth); Tucker P “The Disability Discrimination Act: Ensuring Rights of Australians With Disabilities, Particularly Hearing Impairments” (1995) 21 *MULR* 15 at 16-17; and Tyler MC “The Disability Discrimination Act 1992: Genesis, Drafting and Prospects” (1993) 19 *MULR* 211.

9 The 1971 *Declaration on the Rights of Mentally Retarded Persons* (“the 1971 Declaration”) and the 1975 *Declaration on the Rights of Disabled Persons* (“the 1975 Declaration”).

10 The “International Bill of Rights” consists of the 1948 *Universal Declaration on Human Rights* and two Covenants of 1966 - the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) and the *International Covenant on Civil and Political Rights* (“ICCPR”). The Universal Declaration makes only one reference to disability; Art 25(1) provides that: “(E)veryone has the right to a standard of living adequate for the health and well-being of himself and his family, . . . and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Specific provision for disability has been made in a few other human rights instruments, such as the 1990 *UN Convention on the Rights of the Child* (Articles 2(1) and 23), the 1980 *African Charter of Human and People’s Rights* (Article 18(4)), and the 1988 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (Article 18).

disabilities are entitled to the non-discriminatory application of the fundamental human rights contained in the International Bill of Rights, and what the non-discrimination norm means for those of us with a disability, have been left open as matters for interpretation, leaving considerable room for debate and potential disagreement amongst States.¹¹ In the absence of any relevant international jurisprudence, the lack of which itself speaks to the marginalisation of disability issues from mainstream international human rights law, interpretative comments of the Committee on Economic, Social and Cultural Rights have provided useful guidance on the application of Conventional norms for the benefit of people with disabilities, at least in so far as the ICESCR is concerned.¹² However clearly this is no substitute for having the matter put beyond doubt within the terms of the Covenants themselves.

Of further concern is that disability has been ignored as a "minority" status for the purpose of the various international instruments and Conventional regimes protecting minority rights.¹³ Also, in notable contrast to the manner in which the international community has responded to the situation of other groups of people similarly vulnerable to widespread and systemic human rights abuse, the General Assembly has twice rejected proposals for the articulation of an international Convention on the rights of people with disabilities, largely on the basis of a perception that "existing human rights documents seemed to guarantee persons with disabilities the same rights as other persons."¹⁴ Clearly, the articulation of norms

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- 11 Under international human rights law one person may be treated less favourably than another "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate" - Committee on Human Rights, General Comment No 18, Non-Discrimination, UN Official Records, Suppl No 40 (A/45/40), para 12. See also the *Belgian Linguistics* case, 23 July 1968, Public. ECHR, Series A, No 5-6, in the context of Article 14 of the *European Convention on Human Rights* ("ECHR").
- 12 See General Comment No 5 of the UN Committee on Economic, Social and Cultural Rights on "Persons with Disabilities" ("General Comment 5"), adopted at the Committee's 11th session, 38th meeting, on 25 November 1994; ECOSOC, Official Records, Supple. No 3, 1995. Although people with disabilities aren't specifically mentioned in either the ICESCR or ICCPR, there has been growing recognition that certain guarantees in those documents [concerning equality before the law (ICCPR only) and non-discrimination in the application of the rights contained in the Covenants] do respond to the specific situation of people with disabilities. The Commission on Human Rights has repeatedly invited the ICCPR and ICESCR treaty bodies to monitor compliance of States with their treaty obligations to ensure the full enjoyment of those rights by persons with disabilities, but has been virtually ignored - "Human Rights and Disability - Report prepared by the Secretary-General pursuant to Sub-Commission resolution 1993/22" E/CN4/Sub2/1994/35, 17 June 1994 at paras 15-17.
- 13 See Brolmann C, Lefeber R and M Zieck (eds) *Peoples and Minorities in International Law* (M Nijhoff, Dordrecht; Boston, 1993); Lerner N *Group Rights and Discrimination in International Law* (M Nijhoff, Dordrecht; Boston, 1991).
- 14 The 1987 Global Meeting of Experts to Review the Implementation of the World Program of Action concerning disabled persons at the mid-point of the UN Decade of Disabled Persons recommended that the General Assembly convene a special conference to draft an international Convention on the elimination of all forms of discrimination against persons with disabilities, to be ratified by member States by 1992. However draft outlines of a Convention prepared by Italy and Sweden were rejected

and obligations in a Convention could have brought (and might still bring) a number of obvious benefits to those of us with a disability, not least of all in importing an immediate sense of international legal obligation in relation to the Convention's subject matter. For these reasons, international calls for a binding Convention have been renewed in recent years.¹⁵

As evidence of the urgency of the present situation, in as recently as 1991 the UN Special Rapporteur on human rights and disability was forced to acknowledge that the legal recognition of people with disabilities as victims of discrimination was *still* lacking.¹⁶ This lack of recognition and protection is particularly evident in many developing countries.

Against this background, the objective of this paper will be to examine the extent to which the human rights of people with disabilities are protected under existing principles and instruments in international law, and on that basis to suggest an appropriate framework within which disability rights can most effectively be protected leading into the next century. I begin by exploring the value of, and philosophical basis for, treating disability within the international human rights framework. Focussing in particular on the right to equality and norms against discrimination, I then look at the extent to which the rights of people with disabilities are presently recognised and protected under international law. Following this, I examine competing arguments for and against the articulation of an international Convention on the rights of persons with disabilities, looking in particular at whether the existing level of protection of disability rights would be likely to be enhanced or prejudiced thereby; the application of relevant criteria for

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by the General Assembly at its forty-second and forty-fourth sessions, respectively, with many delegates expressing the view that existing human rights documents seemed to guarantee persons with disabilities the same rights as other persons - see generally paras 6-9 of the Introduction to the Standard Rules and Lindqvist B "Standard Rules in the Disability Field" in Degener and Koster-Dreese *op cit* at 64-65. The views of delegates rejecting the draft outline Convention are short sighted in suggesting that the rights of people with disabilities are protected in equal measure with those of all other people under existing human rights documents. A further suggested reason for the failure of draft Conventions, namely that disability issues "are much broader than that (sic) of human rights of persons with disabilities" and consequently that "excessive emphasis on their human rights tends to marginalise" them, completely ignores the value of rights discourse in this context and the benefits that a Convention regime may bring - cf: Sokalski HJ "Statement - Second session of the Ad Hoc Open-Ended Working Group to Elaborate Standard Rules on the Equalisation of Opportunities for Disabled Persons" (1992) at 3.

15 See eg San Jose Declaration (1993) A/CONF.157/LACRM/15; A/CONF.157/PC 58 at para 17; Oral Intervention by Disabled Peoples' International at the UN Commission on Human Rights, Geneva, 52nd Session, delivered on 2 April 1996; Despuoy L *Human Rights and Disabled Persons* (1993) UN Sales No E.92.XIV.4, at para 281. It is open to debate whether the General Assembly's rejections of proposals for a Convention in the disability area necessarily have had a prejudicial impact as far as the international protection of disability rights is concerned.

16 United Nations, Human rights and disability, Progress-report prepared by Mr Leandro Despuoy, Special Rapporteur, UN Doc E/CN4/Sub2/1988/11 of 13 June 1988, para 22, and Final report, *op cit* at para 257.

international human rights standard-setting instruments under UN guidelines; and in political terms, whether a Convention in this area (however formulated) would be likely to find sufficient acceptance among States to make it effective. I conclude with a recommended framework pursuant to which international protection of disability rights ought to proceed.

Disability Rights as Human Rights

Importance of rights discourse

The symbolic value of “rights” claims to oppressed groups within society should not be underestimated. The language of rights, in contrast to a mere legal or political “entitlement” or “claim”, can provide a valuable framework for the expression of political and social grievances in terms to which mainstream international society is increasingly given to respond. By way of analogy, in the context of the African-Americans’ civil rights struggle in the United States, Patricia Williams has remarked:

‘Rights’ feels new in the mouths of most black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our relation to others.¹⁷

The value of human rights claims for people the subject of widespread discrimination has been well summarised by Hilary Charlesworth:

Rights discourse also offers a focus for political consciousness which can translate into action if legal remedies are inadequate . . . Moreover, the open-textured language of rights can allow debate on legal and political choices without assuming a settled social agenda. In this sense, the language of rights can be interpreted as a communal rather than individualistic discourse, “a brave and fragile assertion that the weak have rights against the strong.” It affirms “a community dedicated to invigorating words with a power to restrain, so that even the powerless can appeal to those words.” . . . It offers an alternative language to that of the mainstream culture and challenges the mythology of the neutrality of the law, making clear the political choices in any constitutional catalogue of rights. In this sense, rights discourse can disturb and reshape existing patterns of . . . legal thought.¹⁸

¹⁷ Williams PJ *The Alchemy of Race and Rights* (Virago, London, 1993) p 164.

¹⁸ Charlesworth H “The Australian Reluctance About Rights” in Alston P (ed) *Towards an Australian Bill of Rights* (Centre for International and Public Law, ANU, Canberra); (HREOC, Sydney, 1994) 21-53 at 50. See also Sedley S “Freedom of Speech for Rupert Murdoch?” (1991) 13 *London Review of Books* (No 24) 3 at 5; Minow M “Interpreting Rights: An Essay for Robert Cover” (1987) 96 *Yale Law Journal* 1860 at 1910; and Morgan J “Equality Rights in the Australian Context: A Feminist Assessment” in Alston P (ed) *ibid* pp 129-131.

Recalling the systematic neglect and discrimination suffered by people with disabilities worldwide, the value of rights discourse at the international level, subject to certain limitations, is obvious. The language of rights remains an important source of potential power for the rectification of centuries-old traditions of disempowerment, providing people with disabilities with an "accepted means to challenge the traditional [international] legal order and to develop alternative principles."¹⁹

Acknowledging the central role that can be played by human rights in this context, the challenge for present purposes is to "rethink that notion so that rights correspond to [people with disabilities'] experiences and needs,"²⁰ in particular, needs arising from State-based forms of persecution.

However, before proceeding to look at that question and examine the extent to which the human rights of people with disabilities are presently protected under international law, a fundamental question arises: On what possible philosophical basis do these rights rest?

Philosophical foundations of disability rights discourse

Perhaps an even more fundamental question than the one posed in the preceding paragraph is: Why does the philosophical basis of disability rights, or indeed *any* human rights, matter? In the cut and thrust arena of international relations it is tempting to dismiss such questions as irrelevant. To a casual observer normative developments in the human rights field are more obviously shaped by the forces of *realpolitik* and the diplomatic dynamics of multilateral treaty negotiation than by shifting and contradictory philosophical theories, themselves informed by vague and conflicting societal values. Indeed the authoritative normative role that the General Assembly has assumed in the international human rights arena since the late 1960s has led one commentator to remark that "in practice, a claim is an international human right if the United Nations General Assembly says it is."²¹

Clearly there are important advantages in a body such as the General Assembly being vested with the role of arbiter in this respect. As Philip Alston has observed, the breakthrough represented by international agreement on the *Universal Declaration of Human Rights*, a comprehensive package of human rights said to represent a "common standard of achievement for all nations and all peoples,"²² was only made possible by the fact that:

¹⁹ Charlesworth H, Chinkin C and Wright S "Feminist Approaches to International Law" (1991) 85 *AJIL* 613 at 638.

²⁰ *Ibid.*

²¹ Bilder R "Rethinking International Human Rights: Some Basic Questions" (1969) *Wis L Rev* 171 at 173, cited in Alston P "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 *AJIL* 607 at 607.

²² See the preamble to the *Universal Declaration of Human Rights*.

[M]ost member states of the United Nations implicitly recognised the authority of the General Assembly to determine which claims should be deemed rights and which should not. For the first time in history, at the international level, a final arbiter had emerged in an area where conflicting ideologies, cultures and interests had previously made the prospect of general agreement seem far beyond reach and even utopian.²³

However it must be acknowledged that it is one thing for the General Assembly to agree to the articulation of a human rights norm of purported universal application, but quite another for that norm (whatever it may be) to be universally observed and implemented. The ability of human rights rhetoric to be translated into State practice depends to a significant degree on the extent to which a given norm exerts moral force, attracting adherence from within a range of cultures and traditions. In general terms it can be said that only when human rights norms are accepted as being grounded in universally (or at least widely) applicable theories and values²⁴ can those “rights”, in contrast to mere “records of decisions”,²⁵ aspire to attract anything close to universal observance in State practice. It is in this context that our “quest for shared foundations”²⁶ assumes critical importance.

On this basis, it is relevant to go on to consider the question raised in the preceding section of this paper, that is, what *are* the philosophical foundations of the human rights of people with disabilities under international law.

Inherent dignity of the human person - natural law traditions

The preambles to the *Universal Declaration of Human Rights* and the ICESCR and ICCPR recognise expressly that the human rights referred to in those documents “derive from the inherent dignity of the human person”, and that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Further Article 1 of the *Universal Declaration* provides that as human beings be are all “born free and equal in dignity and rights.” The “inherent dignity” of people with disabilities, specifically, is recognised in the *Convention on the Rights of the Child* (CROC) Art 23, the preamble of the 1971 Declaration, Article 3 of the 1975

²³ Alston P (1984) *op cit* at 608.

²⁴ Acknowledging the diverse and changing nature of so-called basic human values over time, in a field that is “constantly undergoing evolutionary flux”, *ibid* at 616.

²⁵ Blackstone WT “Human Rights and Human Dignity” in Gotesky R and Laszlo E (eds) *Human Dignity - This Century and the Next: An Interdisciplinary Inquiry into Human Rights, Technology, War and the Ideal Society* (Gordon and Breach, New York, 1970) 3-36 at 3. The author (at 3) observes that “[A] number of contemporary philosophers are sceptical about the existence of human rights. As much as they would like to see universal human rights both respected and implemented, they deny on philosophical grounds that we can know that there are any universal human rights. Some speak of those rights as mere records of decision.”

²⁶ Waldron J in Waldron J (ed), *Nonsense Upon Stilts - Bentham, Burke and Marx on the Rights of Man* (Methuen, London; New York, 1987) p 165.

Declaration, Principles 9-13 of the 1991 *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*,²⁷ the preamble to the Standard Rules²⁸, para 75(k) of the Copenhagen Declaration,²⁹ and para 7 of the *Proclamation of the Economic and Social Commission for Asia and the Pacific (ESCAP) on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region*.³⁰ But what are the philosophical origins of "human dignity", and how has this notion permeated present day conceptions of human rights, in particular disability rights?

Ronald Dworkin sees respect for human rights as based on a Kantian recognition of the value of human dignity and a belief in the value of the political equality of all citizens.³¹ According to Kant, moral nature is part of the "essence of human beings."³² For Kant, "human beings are aware of the option of acting in every case upon a set of general principles which are intuitively perceived as being morally binding, and which (sic) existence is independent from the particular circumstances and needs of the individual."³³ The metaphysical (rather than the theistic) account of moral nature has prevailed, and is reflected today in the Universal Declaration and the various disability-specific instruments referred to in the preceding paragraph. Since this moral nature is a universal feature of humankind, natural rights are also universal.³⁴ It can be seen, therefore, that the basis of universal conceptions of human rights, including disability rights, has been influenced markedly by natural legal theory and a distinctly Western "individualistic" view of society.³⁵

27 GA Res 46/119 of 17 December 1991; UN Doc A/46/49 ("the Mental Health Principles").

28 Standard Rules on the Equalisation of Opportunities for Persons With Disabilities, GA Res 48/96 (20 December 1993).

29 1995 Copenhagen Declaration and Program of Action adopted by the World Summit for Social Development, 6-12 March 1995, UN Doc A/Conf.166/9. See Nowak M and Suntinger W "The Right of Disabled Persons Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment" in Degener and Koster-Dreese, *op cit* pp 119-120.

30 ESCAP Res 49/6 of April 1993, cited in United Nations, *Asian and Pacific Decade of Disabled Persons, 1993-2002: Mandates for Action*, ST/ESCAP/1433 (1994), p 6.

31 Dworkin R *Taking Rights Seriously* (Duckworth, London, 1977) pp 198-9. For discussion of a range of human rights theories see generally UNESCO, *Philosophical Foundations of Human Rights* (UNESCO, Paris, 1986)

32 Rosales-Castaneda J "Are the Commonwealth Countries Bound by International Human Rights Instruments?" (1995) 22(10) *Brief* 16-21 at 18.

33 *Ibid.*

34 *Ibid.*

35 See Robertson AH and Merrills JG *Human Rights in the World* (3rd ed, Manchester University Press, Manchester and New York, 1989) pp 5-9; Hersch J in UNESCO, *The Philosophical Foundations of Human Rights*, *op cit* p 132; Castberg F "Natural law and human rights: An ideological survey" in Eide A and Schou A (eds), *International Protection of Human Rights - Proceedings of the Seventh Nobel Symposium*, Oslo, September 25-27, 1967 (Almqvist and Wiksell, Stockholm, 1968) pp 13-34; Bystricky R "The universality of human rights in a world of conflicting ideologies" in Eide A and Schou A (eds), *ibid* pp 83-93; and Department of Foreign Affairs and Trade, *Human Rights Manual* (AGPS, Canberra, 1993), pp 16-20.

Contemporary challenges to natural legal theory

These natural law traditions have not gone unchallenged, however. The Critical Legal Studies movement attacks liberal rights theory on a number of grounds, including failure to take account of cultural relativity, the indeterminate and ephemeral nature of rights discourse, and the assertion that rights discourse serves only to mask (and perpetuate) the underlying political and social inequities that really are at the heart of the problem.³⁶ In a “parallel, but quite distinct” critique of rights, feminist scholars also question the inherently political nature of rights discourse.³⁷ As Hilary Charlesworth explains, “the search for ‘neutral principles’ as the basis of a scheme of rights protection is quixotic. Legal phenomena cannot rest on an unquestionably ‘objective’ basis, for they are optional and deeply controversial. The quest for objectivity, it has been said, rests on a fear of the vulnerability of responses that come from deep within us. This search . . . persuades us to accept unchallenged the traditional distribution of political and economic power.”³⁸ In this sense, feminist critiques of the alleged objectivity, neutrality and universal applicability of liberal rights traditions are relevant to the situation of people with disabilities, assisting to expose and challenge the inequitable power relationships upon which international human rights norms may be constructed.

Taking quite a different approach, Socialist critiques reject the view that human rights are “natural” to the human personality and “inalienable”, but assert that they are the “emanation of the State, which itself is the incarnation of the interests of the workers in a State-run national economy. The sovereignty of the State is pre-eminent and no limitation thereon may be accepted, either nationally or internationally.”³⁹ The difficulties with Socialist critiques from a human rights perspective are reasonably obvious.⁴⁰ Further, the articulation of communal or “peoples’” rights in instruments such as the *African Charter on Human and Peoples’ Rights*⁴¹

³⁶ See Charlesworth H (1994) *op cit* p 46.

³⁷ *Ibid* at 46-47.

³⁸ *Ibid* at 47.

³⁹ Robertson AH and Merrills JG, *op cit* p 11. For discussion of socialist theories of human rights see Kudryavtsev VN “Human rights and the Soviet Constitution” in UNESCO, *The Philosophical Foundations of Human Rights*, *op cit* pp 83-94, and for an illustration of their manifestation in practice see Tumanov VA “International Protection of Human Rights: Soviet Report” in Bernhardt R and Jolowicz JA (eds), *International Enforcement of Human Rights: Reports Submitted to the Colloquium of the International Association of Legal Science, Heidelberg, 28-30 August 1985* (Springer-Verlag, Berlin; New York, c1987) pp 21-24.

⁴⁰ *Ibid*.

⁴¹ *African Charter on Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc CAB/LEG/67/3/Rev5. See generally Adegbite LO “African attitudes to the international protection of human rights” in Eide A and Schou A (eds), *op cit* pp 68-81. For a comparison and suggested reconciliation of Western liberal and African philosophies, see Devereux A “Should ‘Duties’ Play a Larger Role in Human Rights? A Critique of Western Liberal and African Human Rights Jurisprudence” (1995) 18/2 *UNSWLJ* 464.

may frequently fail to take into account the often severe limitations on the rights of disadvantaged groups within these communities or “peoples.”⁴²

It is beyond the scope of this paper to dwell in greater depth on these or other critiques of the natural rights traditions upon which modern international human rights theory, in the disability field and more generally, is based. For present purposes, the principal value of these critiques is in assisting us to understand “how much we are divided from [different peoples or societies] on matters of belief and how much on matters of commitment,”⁴³ as a basis for seeking to promote universality and the articulation of human rights norms in ways that correspond to more than just Western liberal traditions. Our brief survey of relevant international and regional human rights instruments shows a high degree of shared belief in natural rights theory across different societies and cultures, albeit allowing for differences in emphasis and commitment. Further, as we have seen, feminist critiques in particular serve a valuable function in alerting disability rights theorist to the “ideological straitjacket”⁴⁴ that a liberal rights framework can become, if it is not flexible enough to allow the questioning and challenging of the complex power relations on which it is structured. It is vital to bear these issues in mind when proceeding to consider the next aspect of this paper, that is, the extent to which the human rights of people with disabilities are protected under existing principles of international law.

The international disability rights framework

Non-discrimination and equality

As indicated earlier, the move from social welfare and paternalism to “human rights” of people with disabilities commenced only relatively recently, with the UN Declarations of 1971 and 1975. Further momentum gathered through the 1981 International Year of Disabled Persons, the World Program of Action (1982) (“WPA”) and the International Decade of Disabled Persons (1983-1992). The WPA was of particular importance in a number of respects, including in encouraging the involvement of organisations of persons with disabilities in matters concerning disability, and in its focus on the many obstacles to participation encountered by persons with disabilities.⁴⁵

Critically, beyond assertions of mere non-discriminatory application of existing human rights norms (often referred to as “formal equality”), the WPA focussed for the first time on “equality of opportunity”, importing notions of “material” or “substantive” equality.⁴⁶ The differences between these two measures of equality

⁴² The discussion in Charlesworth H, Chinkin C and Wright S, *op cit* at 636-638 illustrates ways in which this may occur, in the context of women’s rights.

⁴³ Waldron J, *op cit* at 165.

⁴⁴ *Ibid* at 160.

⁴⁵ UN Doc A/50/374, *op cit* at 4. See eg, para 22 WPA.

⁴⁶ See eg, paras 21, 22, 25 and 108-115 of the WPA. See Nowak M and Suntinger W, *op cit* at 117 on

are vital: Formal equality, based to a large extent on Aristotelian and (more recently) classical liberalist philosophy, is concerned only with equality in the form of the law, requiring nothing more than that the law treat persons similarly who are situated alike.⁴⁷ The shortcomings in this view, relying as it does on notions of comparability and taking no account of human diversity nor the reasonable accommodation of structural inequalities, are obvious. By contrast, the doctrine of substantial or "material" equality rejects unrealistic notions of "sameness of treatment." In stark contrast it "acknowledges the importance of both personal and environmental barriers that inhibit the equal participation of certain members of groups in society" and obliges society to take positive steps to "modify those differences that deny or impair the right of each individual to be an equal member of society."⁴⁸ It follows that a right of "reasonable accommodation"⁴⁹ and the institution of appropriate affirmative action programs⁵⁰ may well be required in order to ensure the "equal" enjoyment of rights by people with disabilities. As the Committee on Economic, Social and Cultural Rights has put it:

[Art 2(2), ICESCR's non-discrimination norm] requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The *obligation* in the case of such a vulnerable and disadvantaged group is *to take positive action to reduce structural disadvantages and to give appropriate preferential treatment* to people with disabilities in order to achieve the objectives of full participation and *equality* within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required (emphasis added).⁵¹

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the primary importance of the "right to equality" in the present context.

- 47 Hendriks A "Disabled Persons and Their Right to Equal Treatment: Allowing Differentiation While Ending Discrimination" (1995) 1(2) *Health and Human Rights* 153 at 158; Quinn G "The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework" in Degener and Koster-Dreese, *op cit* at 72-73.
- 48 Hendriks, *ibid* at 158-9; see also Quinn G, *ibid* at 73-5; and Vierdag EW *The Concept of Discrimination in International Law* (M Nijhoff, The Hague, 1973) at 9-18. Substantive equality (in addition to bare non-discrimination norms) is reflected in paras 15, 25 and 27 and Rules 4, 5, 7 and 15 of the Standard Rules.
- 49 The right to reasonable accommodation is not articulated in any binding international instrument, but is receiving an increasing measure of acceptance through "softer" sources of international law such as the Standard Rules and General Comment No 5 of the UN Committee on Economic, Social and Cultural Rights, *op cit*. Equality of opportunity, independent living and "reasonable accommodation" of needs are also strong themes in the 1993 Vienna Declaration and Program of Action and the 1995 Copenhagen Declaration (Part 11B paras 63 and 64 Vienna Declaration, and Commitment 5(m) and Chap 111 para 62(c) of the Copenhagen Declaration).
- 50 Committee on Human Rights, General Comment No 18, "Non-Discrimination", *op cit* at 173-175, paras 8 and 10.
- 51 Committee on Economic, Social and Cultural Rights - General Comment No 5, *op cit* at para 9. While General Comments of Committees are not legally binding, they represent the considered

“Material” or “substantive” equality is the appropriate measure of equality to be borne in mind, therefore, when we turn to consider the existing sources of rights protection for people with disabilities at international law.

Principal sources of international human rights law

It is beyond the scope of this paper to provide more than a brief summary of relevant international instruments and norms, sufficient to convey an overview of the extent of disability rights protection afforded thereby, and to identify the most significant strengths and weaknesses therein. The discussion will consider relevant treaties, international instruments and Declarations, and their relationship with customary and “softer” sources of law.

Conventions

As indicated above, the rights contained in the ICESCR and ICCPR are to be “exercised” (in the case of the former) and “ensured” (in the case of the latter)⁵² without discrimination or distinction of any kind on various bases including, as a matter of interpretation, disability. The rights referred to in each Covenant are expressed to be indivisible and interdependent.⁵³ All the rights in these Covenants are central to the situation of people with disabilities, including the rights to life, liberty and security of person,⁵⁴ the right to work, the right to just and favourable conditions of work,⁵⁵ the right to social security,⁵⁶ the right to an adequate standard of living (including food, clothing and housing),⁵⁷ the right to “the enjoyment of the highest attainable standard of physical and mental health,”⁵⁸ the right to education,⁵⁹ freedom from torture or cruel, inhuman or degrading treatment or punishment,⁶⁰ equality before the law,⁶¹ and the right to marry and found a family.⁶²

51—*Continued*

expert views on the proper interpretation of relevant provisions of Covenants.

52 See Alston P and Quinn G “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* at 159; see also Alston P “Disability and the International Covenant on Economic, Social and Cultural Rights” in Degener and Koster-Dreese, *op cit* at 94-98, and Quinn G, *op cit* at 93.

53 Preambles to Universal Declaration on Human Rights, ICESCR and ICCPR.

54 ICCPR Arts 6 and 9.

55 ICESCR Arts 6 and 7.

56 ICESCR Art 9.

57 ICESCR Art 11. See also General Comment No 5 of the Committee on Economic, Social and Cultural Rights, *op cit* at para 33.

58 ICESCR Art 12. For a discussion of the content of this right in the disability context see Tomasevski K *op cit* at 131-146.

59 ICESCR Art 13.

60 ICCPR Art 7. For a discussion of the content of this right in the disability context see Nowak M and Suntinger W, *op cit* at 117.

61 Article 26 of the ICCPR. See Ramcharan BG “Equality and non-discrimination” in Henkin L (ed), *The International Bill of Rights - the Covenant on Civil and Political Rights* at 254; and Vierdag EW,

Phenomena such as compulsory institutionalisation of the mentally ill,⁶³ non-consensual sterilisations⁶⁴ and sheltered workshops,⁶⁵ to pick only a few of the more glaring examples, illustrate how frequently the above rights continue to be honoured in the breach, rather than in their observance.⁶⁶ Further, it is important to identify subtle but powerful assumptions on which certain of these rights are constructed, as a basis for challenging existing inequitable power relations. The right to work is a good example: Articles 7(a)(i) and 7(d) of the ICESCR provide that "just and favourable conditions of work" include "fair wages and equal remuneration for work of equal value without distinction of any kind" and "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence." The reference to "equal remuneration for work of equal value" arguably masks the reality that in contemporary society the work of a significant proportion of people with disabilities remains inherently undervalued, compared with the work of others (especially that of able-bodied men).⁶⁷ Further, the limitation of relevant considerations in promotion in employment to "seniority and competence" would appear to unduly restrict the opportunities for promotion of people with disabilities, who may often require reasonable adjustments to their workplace in order to be able to perform at a level considered "equal."⁶⁸ Considerations such as these reinforce the need to continue to question the basis on which human rights are formulated, and to assert a "material" or "substantive" measure of equality in enjoyment of these rights.

61—Continued

op cit at 16-17.

62 Art 23 ICCPR. See also General Comment No 5 of the Committee on Economic, Social and Cultural Rights, *op cit* at paras 30-32, and Rule 9 of the Standard Rules.

63 Campbell T "Mental Health Law: Institutionalised Discrimination" (1994) 28(4) *Aust and NZ Journal of Psychiatry* 554; Dawson J "The Changing Legal Status of Mentally Disabled People" (1994) 2 *Journal of Law and Medicine* 38.

64 McSherry B "The High Court and Non-therapeutic Sterilisation of Intellectually Disabled Children" (1994) 2 *Journal of Law and Medicine* 6; Graycar R "Sterilisation of Young Women with Disabilities: Towards a New Regulatory Framework" (1994) 1(1) *Aust Journal of Human Rights* 380 at 387-389; and Little H "Non-Consensual Sterilisation of the Intellectually Disabled in the Australian Context: Potential for Human Rights Abuse and the Need for Reform" (1993) *AYIL* 203 at 214, 225-226. See also General Comment No 5 of the Committee on Economic, Social and Cultural Rights, *op cit* at paras 30-32, and Rule 9 of the Standard Rules.

65 See General Comment No 5 of the Committee on Economic, Social and Cultural Rights, *op cit* paras 20-27.

66 In the mental health area, for example, Conventional human rights have not been much help in protecting the interests of those with mental illnesses, largely due to the "unsound mind" reservation which has been used to deny persons with mental illness the full protection of liberty rights - Campbell T, *op cit* at 556.

67 Where work of people with disabilities is not considered to be of "equal value", there is no requirement to provide equal remuneration, even if the right is to be recognised "without distinction of any kind".

68 See also the discussion of the right to work in the disability context in General Comment 5 of the Committee on Economic, Social and Cultural Rights, *op cit* at paras 20-27.

Subject to these factors, the Covenants — coupled with State party reporting obligations⁶⁹ and (at least in the case of the ICCPR) individual complaint procedures⁷⁰ — reflect an important body of human rights law for the potential benefit of people with disabilities.⁷¹

Of further relevance in the present context are CROC, CEDAW⁷² and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”).⁷³ CROC is of particular importance given that, in contrast to most other major multilateral human rights Conventions, it makes special provision for disability.⁷⁴ Firstly, all rights set out in the Convention are required to be “respected and ensured” to children without discrimination on grounds which specifically include disability.⁷⁵ Secondly, Article 23(1) of the CROC expressly provides that a disabled child shall enjoy “a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.” Finally, in support of the “material equality” doctrine, Article 23(2) deals with the need for “special care” for children with disabilities and the extension of “assistance” to ensure they have “effective access to and receive education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development . . .”⁷⁶

The provisions of CEDAW are also of critical importance. Within the UN system, women with disabilities were not substantially recognised as a vulnerable group with respect to human rights violations until the 1985 Nairobi World Conference on Women.⁷⁷ Women with disabilities have, however, been included in subsequent human rights instruments such as the *Declaration on the Elimination of Violence Against Women*,⁷⁸ and more recently the Beijing Declaration and Platform for

69 See Articles 16 and 17 ICESCR and Art 40 ICCPR.

70 See the First Optional Protocol to the ICCPR, which entered into force on 23 March 1976.

71 See Alston P “Disability and the International Covenant on Economic, Social and Cultural Rights” in Degener and Koster-Dreese, *op cit* at 104–105 on suggestions on ways to make effective use of the ICESCR and the Committee on Economic, Social and Cultural Rights. The fact that Committee meetings are public is also of great importance, potentially allowing NGO’s to witness proceedings and lobby more effectively.

72 *Convention on the Elimination of All Forms of Discrimination Against Women* (GA Res 34/180 of 18 December 1979).

73 GA Res 39/46, 10 December 1984. CAT entered into force on 26 June 1987.

74 CROC entered into force on 2 September 1990. See generally Hammarberg T “The Rights of Disabled Children: The UN Convention on the Rights of the Child” in Degener and Koster-Dreese, *op cit* at 147–155.

75 See Art 2(1) CROC; cf: Arts 2(2) and 2(1) ICESCR and ICCPR, respectively, where as a matter of interpretation disability comes within the catch-all phrase, “other status.”

76 Arts 23(2) and 23(3), although Article 23(2) expresses this to be “subject to available resources.”

77 See the “Nairobi Forward-Looking Strategies for the Advancement of Women” (in which women with disabilities are mentioned as an “area of special concern”), cited in Degener T, “Disabled Persons and Human Rights: The Legal Framework” in Degener and Koster-Dreese, *op cit* at 19.

78 Degener T, *op cit*.

Action.⁷⁹ Although CEDAW itself makes no express mention of disability, its treaty body (the Committee on the Elimination of all Forms of Discrimination Against Women) recently passed a general recommendation emphasising that CEDAW *does* protect the human rights of women with disabilities.⁸⁰ That recommendation specifically requests that States Parties' periodic reports under CEDAW include information on women with disabilities and on measures taken to deal with their particular situation, including "special measures"⁸¹ to ensure that they have equal access to education and employment, health services and social security, and to ensure that they can participate in all areas of social life and culture.⁸² Significantly, States have already begun to acknowledge and comply with this recommendation.⁸³

Finally, the provisions of CAT are of great potential value to people with disabilities. Torture and other forms of cruel, inhuman or degrading punishment are often the cause of physical or mental disability, and it is strongly arguable that the special position of vulnerability of people with disabilities requires that States take positive measures (including affirmative action) to protect such people against the sort of abuse with which CAT is concerned.⁸⁴ "Torture" is defined widely in Article 1 CAT,⁸⁵ and clearly may include (for example) many situations relating to enforced or arbitrary institutionalisation of the mentally ill. It is of interest therefore that the Committee on the Prevention of Torture is empowered (in certain circumstances) under Art 20 CAT to inquire into "systematic" evidence of torture within a State. By way of comparison, the power of inquiry of the European Committee for the Prevention of Torture ("ECPT") (established under the 1989 European Convention for the Prevention of Torture, described by some commentators as "the most outstanding example of an international instrument aimed at preventing human rights violations"⁸⁶) extends even to *compulsory* in-country inspections.⁸⁷ The

⁷⁹ UN Doc A/CONF.177/20, 17 October 1995. See in particular para 32 of the Declaration, and paras 80(a), 82(k), 106(o), 108(b), (c) and (d), 124(m), 126(d), 175(d), 178(f) and (j), 232(a) and (p), 233(a) and (b), 278(d) and 280(c) of the Platform for Action.

⁸⁰ Recommendation 18(x), UN Doc (CEDAW) C/L.8/Add.18, cited in Degener T *op cit*.

⁸¹ The use of the phrase "special measures" in ensuring "equal" enjoyment of rights is further evidence of the increasingly widespread acceptance of the doctrine of "material equality" in international human rights law.

⁸² Degener T "Disabled Persons and Human Rights: The Legal Framework" in Degener and Koster-Dreese, *op cit* at 19.

⁸³ *Ibid*. For comments on the value of treaty body reporting processes from a State party's perspective, see Thomson P "Human Rights Reporting from a State Party's Perspective" in Alston P (ed) *Towards An Australian Bill of Rights*, *op cit*.

⁸⁴ See generally Nowak M and Suntinger W, *op cit*, at 117-119.

⁸⁵ Article 1 - "For the purposes of this Convention, the term 'torture' means any act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person for as . . . (list of purposes) . . . or for any reason based on discrimination of any pain is inflicted by or at the instigation of or with the consent or acquiescence of another person acting in an official capacity" (emphasis added).

⁸⁶ Nowak M and Suntinger W, *op cit* at 124.

⁸⁷ The Committee on the Prevention of Torture may also visit a State Party's territory in its inquiry, but only with the agreement of the State Party concerned (Art 20(3) CA

ECPT has taken particular interest in its reports on the treatment of the mentally ill in this context, leading to a number of recommendations against France, Germany and others concerning *inter alia* termination of long-term isolation and physical restraint measures in a number of psychiatric institutions.⁸⁸

A final noteworthy feature of CAT is the availability of an optional individual complaints procedure,⁸⁹ a feature it shares with the ICCPR. There is as yet no individual complaint mechanism under CEDAW although (as with ICESCR) this is a matter that is presently on the CEDAW Committee's agenda, following a draft protocol prepared in 1994 by international experts.

For the various reasons stated, these are the multilateral Conventions of greatest importance to the human rights of people with disabilities.

Non-treaty sources

Acknowledging the obvious benefit of Conventions in importing an immediate sense of international legal obligation in respect of the matters to which they relate, no discussion of human rights protection in this field (or any other) would be complete without an examination of the ostensibly non-binding sources of international law, including Declarations, ordinary resolutions of the General Assembly and their relationship with the development of customary law.⁹⁰

The important ideological role played by the 1971 and 1975 Declarations and the WPA in signalling a shift in focus from "social welfare" to "human rights" in the disability area has already been mentioned.⁹¹ Other notable doctrinal developments in the WPA included its emphasis on equality of opportunities (with reference to full participation, equal rights *and duties* of people with disabilities, and to positive obligations of States, public agencies and others going beyond the traditional

⁸⁸ Nowak M and Suntinger W "The Right of Disabled Persons Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment" in Degener and Koster-Dreese, *op cit*, at 126-129.

⁸⁹ See Art 22 CAT.

⁹⁰ Frank Newman has identified 4 main ways in which non-treaty instruments play a valuable role in the international protection of human rights: (1) Government officials, UN officials and others can often be persuaded to recognise more rights for people with disabilities than the treaties identify; (2) Constant use, particularly of the Universal Declaration of Human Rights ("a common standard of achievement for all people and all nations" - see the paragraph preceding its Article 1) has confirmed indisputably that non-treaty UN standards can be very influential; (3) As noted in paragraph 14 of the Standard Rules, the Standard Rules "can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law" (see the discussion on customary law requirements below); (4) UN practice shows that human rights declarations quite often precede treaties . . . See for example the preambular paragraphs in the ICCPR and ICESCR and also in the *Convention on the Elimination of all forms of Racial Discrimination* (CERD), CEDAW, CROC and CAT. Newman speculates that "experience in monitoring the (Standard Rules) may well lead to a consensus that additional treaty-law is needed" - Newman F in Degener and Koster-Dreese, *op cit* at 5.

⁹¹ See also Herr SS "Rights of Disabled Persons: International Principles and American Experiences" (1980) 12/1 *Columbia Human Rights Law Review* 1 at 4-13.

rehabilitative measures),⁹² and its recognition that “handicap”⁹³ is a function of the relationship between a person with a disability and his or her social environment, in contrast to the purely individualistic treatment that conceptions of disability and handicap had received historically.⁹⁴

Undoubtedly the *Universal Declaration of Human Rights* is also of fundamental importance in the present context, providing the ideological foundations for the development of the “hard” norms contained in the ICESCR and ICCPR which, as discussed earlier, are required to be respected or ensured without discrimination or distinction on grounds including disability. Further the norms reflected in the *Universal Declaration* and other non-treaty instruments may be useful as a guide to the interpretation of the relevant norms of *inter alia* ICESCR and ICCPR in the specific context of disability, especially where such Declarations or legal instruments represent the conscience of the overwhelming mass of mankind.⁹⁵

Clearly, therefore, these early Declarations have provided an important “rights-based” ideological platform for the Standard Rules.⁹⁶ The Standard Rules are unquestionably the most significant disability-specific international human rights instrument in existence today.⁹⁷ The Rules “summarise the message of the (World Program of Action) and add the ideological development during the decade.”⁹⁸ It is unnecessary here to go into their provisions in any detail. By way of summary the Rules reflect a reaffirmation by the international community of “material” and participatory conceptions of equal rights⁹⁹ and obligations¹⁰⁰ of people with

92 WPA paras 12, and 21 to 30.

93 Cf ICIDH definition of disability above n 1.

94 WPA para 7.

95 Quinn G, *op cit* at 82-83.

96 The preamble to the Standard Rules specifically recalls international standards on human rights laid down in *inter alia* the *Universal Declaration*, ICCPR and ICESCR, CROC, CEDAW, the 1971 and 1975 Declarations, and the *Mental Health Principles*.

97 The Standard Rules were developed by the UN Commission for Social Development under authority of ECOSOC Res 1990/26 of 24 May 1990, following the repeated failure of the UN General Assembly to reach consensus on the need for a Convention in this area - see Paras 8-12 Standard Rules. Their purpose (as stated in Para 15 Standard 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.” Although the Rules are not compulsory, “they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law” (Para 14). That paragraph goes on to note that “(The Standard Rules) imply a strong moral and political commitment on behalf of States to take action for the equalisation of opportunities for persons with disabilities. . . . (They) offer an instrument for policy-making and action to persons with disabilities and their organisations” and “provide a basis for technical and economic co-operation among States, the United Nations and other international organisations.”

98 Lindqvist B, *op cit* at 66. See in particular pp 63-68.

99 Material equality and participation are reinforced in the description of the “fundamental concept” of “equal rights” in the disability context, at Para 25 of the Standard Rules: “The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.” The term “equalisation of opportunities” is defined as “the process through which the various systems of

disabilities, and emphasise States' obligations to remove obstacles to equalisation of opportunities. A number of rights of traditional importance to people with disabilities are emphasised,¹⁰¹ and bases for the progressive realisation of other rights are advanced.¹⁰² The Rules "reach far beyond previously recognised human rights"¹⁰³ with the text using "rights" and "needs" interchangeably, providing that "the principle of equal *rights* implies that the *needs* of each and every individual are of equal importance, that those needs must be made the basis for planning . . . (etc)"¹⁰⁴ (emphasis added). Significantly, both the Copenhagen and Beijing Declarations specifically encourage States to respond to the social needs of people with disabilities by means of implementation of the Standard Rules.¹⁰⁵ The Beijing Declaration also imposes obligations on Governments¹⁰⁶ to ensure equality of access for women with disabilities to education,¹⁰⁷ supportive services,¹⁰⁸ information and

99—Continued

society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities" (Para 24).

100 Para 27 of the Rules provides: "As persons with disabilities achieve equal rights, they should also have equal obligations. As those rights are being achieved, societies should raise their expectations of persons with disabilities. As part of the process of equal opportunities, provision should be made to assist persons with disabilities to assume their full responsibility as members of society." Importantly, however, this formulation of "equal obligations" falls well short of actually *predicating* equal entitlement to human rights on fulfilment of those obligations to society.

101 Such as equal accessibility to the physical environment and activities and services, and rights to education, employment and income maintenance and social security (Rules 5-8 inclusive).

102 Rule 9 (on family life and personal integrity) is new, and has no equivalent in the World Program of Action - Lindqvist B, *op cit* at 66. Other Rules lend support to rights to "reasonable accommodation" (see also General Comment No 5, *op cit* at para 15, in the ICESCR context), independent living, integration, and the related "right to be different" and a right to "personal assistant services" (Rule 4, Paras 6 and 7), although these rights do not yet have firm grounding in international law (a fact implicitly recognised in Rule 15, requesting governments to "create legal bases" for the measures set out in the Rules). However see the discussion in relation to "new rights" below.

103 Tomasevski K, *op cit* at 133.

104 *Ibid.* See Para 25 Standard Rules, cited in full *supra* n 95. The message of the Rules is directly addressed to States, promoting the creation of national equal opportunity programs (through legislation and otherwise), recognition and involvement of organisations of persons with disabilities, national monitoring, and establishment and strengthening of national coordinating committees or similar bodies - See generally Part III "Implementation Measures", Rules 13-22 inclusive.

105 Copenhagen Declaration, *op cit* at para 75(k), and Beijing Declaration, *op cit* at paras 178(j), 232(p) and 270 of the Platform for Action.

106 Governments have committed themselves to implement the Platform for Action - see para 38 of the Beijing Declaration.

107 Paras 80(a), 82(k) and 280(c) of the Platform for Action; this includes vocational training, science and technology and continuing education.

108 Paras 106(o) and 278(d) of the Platform for Action.

services concerning violence against women,¹⁰⁹ programs to enhance their self-reliance,¹¹⁰ employment,¹¹¹ and to protection of the law.¹¹²

Finally, in a unique innovation for an ordinary resolution of the General Assembly, Part IV of the Standard Rules sets up a monitoring mechanism by means of a Special Rapporteur within the framework of the sessions of the Commission on Social Development "to further the effective implementation of the Rules."¹¹³ In November 1994 the Special Rapporteur circulated a preliminary questionnaire to UN Member States seeking to elicit information on the manner in which governments and other interested entities received, promoted and began implementation of the Standard Rules. The results from that exercise, however, have been less than promising.¹¹⁴ A second questionnaire to UN Member States, focussing specifically on the nature and scope of the implementation of the Rules, was circulated at the end of 1995, responses to which were due by the end of March 1996. A key feature of this monitoring mechanism is the active involvement of a Panel of Experts drawn from 10 major international organisations of persons with disabilities; as discussed earlier, participation and an active voice are essential prerequisites to effecting change to mainstream attitudes and breaking the vicious circle of disempowerment and marginalisation. In close consultation with the Panel of Experts and with the subsequent endorsement of the Commission for Social Development, the Special Rapporteur has selected six areas for an in-depth evaluation: Legislation (Rule 15), Coordination of Work (Rule 17), Organisations of Persons with Disabilities (Rule 18), Accessibility (Rule 5), Education (Rule 6) and Employment (Rule 7). The success or otherwise of this mechanism will ultimately depend on the candour of Member States' responses, particularly in developing countries where discussion of

¹⁰⁹ Para 124(m) of the Platform for Action. Further, Governments have committed themselves to the implementation of "special measures" to eliminate violence against vulnerable groups, including women with disabilities (para 126(d)).

¹¹⁰ Para 175(d) of the Platform for Action.

¹¹¹ Paras 178(f) and (j) of the Platform for Action.

¹¹² Paras 232(a) and (p) of the Platform for Action.

¹¹³ Para 1, Part IV Standard Rules - The monitoring process is designed to "assist each State to assess its level of implementation of the Rules and in measuring its progress." The Special Rapporteur (initially Bengt Lindqvist, appointed on June 1994 for a 3 year term) will consult with a panel of experts drawn from international organisations of persons with disabilities who have consultative status with ECOSOC, and submit sets of questions to States addressing their implementation measures, providing advisory services and establishing dialogues with governments and NGOs on information to be included in States' reports. The Special Rapporteur's report on States' responses will be studied by an open-ended working group under the Commission for Social Development, who will thereafter make recommendations (in consultation with relevant NGOs) to ECOSOC on how to improve the application of the Rules and whether the Special Rapporteur's term should be renewed (or another monitoring mechanism established) - Paras 1-12, Part IV.

¹¹⁴ As at July 1995 only 42 replies had been received, few of which appear to be particularly illuminating - see Report of the Special Rapporteur of the Commission for Social Development on monitoring the implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, UN Doc A/50/374, 24 August 1995, at 7 and Appendix (summary of country replies).

the identification and removal of obstacles to the participation of people with disabilities was until very recently "an almost untouched area."¹¹⁵

But even if the Standard Rules are not universally implemented (as is to be expected), a consistent measure of observance (of all or only some of their provisions, whether on a global or more limited basis) may nonetheless contribute to the development of the corpus of customary law. Scope for such a normative role appears expansive today, given what some commentators have called the "identity crisis" of customary law,¹¹⁶ referring to the contemporary tendency to minimise the role of State practice in its formation.¹¹⁷ These parameters may seem appealing, at a glance, from a disability rights perspective; however too permissive an approach to the creation of custom may well give rise to its own set of problems, for example, how to deal with (consequent) inconsistency between practice and *opinio juris*.¹¹⁸ In a relatively expansive judgment on this issue, the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, *Merits*¹¹⁹ said (at 98) that, in the case of such an inconsistency, in order for customary law to survive, "it is sufficient that the conduct of States should be consistent with such rules in general . . . Instances of State conduct inconsistent with a rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."¹²⁰ Bruno Simma and Philip Alston have commented that the ICJ's view is valid "in those cases in which State practice and *opinio juris* have had a chance to establish themselves solidly in an initial, formative stage," but that the argument appears less persuasive "in instances where the inconsistency between words and factual behaviour has been glaring from the beginning,"¹²¹ into which category recognition of the human rights of persons with disabilities, on the basis of continued widespread human rights abuse, regrettably seems to fall.

But irrespective of their relationship with customary law, instruments such as the Standard Rules seem certain to continue playing a key role as "soft" sources of international law, filling the "space between negotiated treaties and customary law."¹²² As Oscar Schachter has remarked:

Implementation and accountability are now regarded as essential elements of normative declarations, whether soft or hard law. Reporting, monitoring,

¹¹⁵ Report of the Special Rapporteur of the Commission for Social Development on monitoring the implementation of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, *op cit* at 9. However progress since the date of that report is encouraging, if words can be translated into action - see *supra* n 30.

¹¹⁶ Simma B and Alston P "The Sources of Human Rights Law: Custom, Jus Cogens, General Principles" (1992) 12 *AYL* 82, at 88.

¹¹⁷ *Ibid* at 102.

¹¹⁸ *Ibid* at 97.

¹¹⁹ ICJ Rep 1986.

¹²⁰ Quoted from Simma B and Alston P, *op cit* at 97.

¹²¹ *Ibid*.

¹²² For a discussion of the nature and role of so-called "soft" law in contemporary international law see Schachter O, "Recent Trends in International Law Making" (1992) 12 *AYL* 1 at 12-15.

transparency are emphasised by governments and international organisations. This indicates that institutional implementation rather than eventual customary law is the significant practical outcome of the non-binding normative resolutions. Governmental conduct is more likely to be influenced by the implementation procedures than by the claim that the norm has become customary law. The latter claim may assume some importance in a case before the International Court or another tribunal; but, outside of litigation, it would be very marginal to a government's decision on whether it should comply with a resolution of a non-binding character.¹²³

Accordingly, with the benefit of reporting and monitoring mechanisms and the potential to build a sense of State accountability through the active involvement of people with disabilities (via the Panel of Experts and more broadly at the domestic level), the Standard Rules have clear potential to supplement human rights protections afforded by Conventional sources, and in their own right may yet provide a compelling moral and political basis for the wider recognition and protection of the equal rights of people with disabilities in practice.

An International Convention on the Human Rights of persons with Disabilities?

Institutional Context

Against this background, the final question to be addressed is whether a disability rights Convention, now or at any point in the foreseeable future, would be likely to add significantly to the existing level of protection of the human rights of persons with disabilities.

This is obviously a difficult question to answer in the abstract, however one is able to draw a certain measure of guidance from general standards-setting principles in international law, along with the experience from comparable exercises considered or embarked upon in other fields.

Before examining that question, however, there are presently a number of significant and well known institutional difficulties within the UN human rights infrastructure itself that need to be addressed, given their impacts on disability and human rights policy. Of particular significance is the recent transfer of responsibility for disability issues from the Commission for Social Development (Vienna) to the United Nations' Department for Policy Coordination and Sustainable Development (New York). This has reportedly led to a loss of European support for the UN's disability policy efforts, a decrease in contributions to the UN's Voluntary Fund for Disability, and perhaps reduced opportunities and prospects for the effective mainstreaming of disability issues into the work of (mainly European-based)

¹²³ *Ibid* at 14.

specialised agencies of the UN.¹²⁴ The view of those responsible for disability policy within the Centre is that prospects for disability rights protection would best be advanced through integration of disability issues into the activities and programs of the UN's specialised agencies such as the United Nations Development Program (UNDP), UNESCO, the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Conference on Trade and Development (UNCTAD).¹²⁵ However the critical issue is *who* is in a position to take up such a coordinating role. The Centre for Human Rights itself appears to lack the requisite resources and expertise, as does the Special Rapporteur appointed under the Standard Rules.¹²⁶ It would be unrealistic to expect the Specialised Agencies to leap forward and take the initiative themselves; rather, those seeking to secure their cooperation need to be able to demonstrate what is in it for *them*, a formidable undertaking.

Against this background, it is obvious that the question of whether a Convention specific to disability is needed, although an important question, is not the only one that merits sustained attention in this field. It is vital to keep the institutional context in mind, as it will be these structural and political factors which will largely determine how effective any particular Convention will be in its operation, through means including sponsorship, promotion, inducing a high rate of ratifications (with as few reservations as are strictly necessary), and mainstreaming disability perspectives into the work of the United Nations Organisation as a whole. Experience in other human rights fields shows how effectively a Convention, with appropriate support and sponsorship, can be integrated into the work of Specialised Agencies.¹²⁷ Exactly how (and if) this experience can be translated into practice in the disability field raises a great many questions of a political and philosophical nature, which it is beyond the scope of this paper to attempt to answer. It is sufficient for present purposes to simply draw attention to this institutional framework, and ensure that the arguments for and against a Convention on the human rights of persons with disabilities are not considered in isolation from it.

Arguments For and Against

Turning now to the merits of a disability-specific Convention, there are a number of obvious potential attractions in treating a human rights regime within a framework of a multilateral treaty. These include importing an immediate sense of international legal obligation, defining States parties' duties with relative precision, clarifying human rights norms in their application to persons with disabilities, providing a solid basis for domestic lobbying for State compliance, and in many instances providing for more effective compliance and complaint mechanisms than might

¹²⁴ Verbal advice of UN Centre for Human Rights, Geneva, to author in April 1996.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ The vigorous promotional efforts given by UNICEF to CROC in recent years is an excellent example.

otherwise be possible. Also, rights protection under a Convention (with distinct reporting and implementation provisions) could assist to focus attention on disability without the risk of disability rights being "submerged in general human rights issues."¹²⁸ Bearing in mind that few human rights are absolute, a disability Convention could also represent an ideal vehicle for the articulation of a framework for resolving conflicts between norms.¹²⁹

Further, the process of treaty negotiation *itself* may convey enormous educative benefits by raising political and social consciousness,¹³⁰ and could conceivably exert a positive influence on the development of customary law.¹³¹ In the disability area an appropriately worded Convention may bring the particular benefit of articulating and promoting acceptance of certain vital rights that presently lack firm grounding in international law.¹³² The attraction in pursuing normative advancements through the means of a Convention is increased, when one considers the need to rectify deficiencies implicit in the ideological construct on which Conventional protection of the human rights of people with disabilities is presently based, and to clarify what "material equality" in the enjoyment of rights means in that context.¹³³

Finally, a Convention in the disability area could provide an extremely useful framework for international cooperation and the provision of technical assistance to developing countries,¹³⁴ particularly in so far as the implementation of economic, social and cultural rights is concerned. There seems little doubt that similar provisions have facilitated an unusually high proportion of developing countries ratifying CROC.¹³⁵

¹²⁸ See Charlesworth H, Chinkin C and Wright S, *op cit* at 632, in the context of CEDAW. See also Byrnes A "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? - Some Current Issues", (1992) 12 *AYIL* 205 esp at 212-223.

¹²⁹ See Sullivan DJ "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination" (1988) 82 *AJIL* 487 at 510-511, discussing normative conflicts in the context of the Religious Declaration. Articulation of the concepts of "reasonable accommodation" and "unjustifiable hardship" (see eg, s 11 of the *Disability Discrimination Act* 1992 (Cth)) are examples of tools which could be of use in resolving conflicts in the recognition of disability rights.

¹³⁰ See eg Falk R "The Rights of Peoples (In Particular Indigenous Peoples)" in Crawford J (ed) *The Rights of Peoples* (Oxford University Press, Oxford; Clarendon Press, New York, 1988) at 33. As with indigenous rights, the dynamics of law-making in the disability field "needs to be a joint creation, something that is the product of participation at all stages" (Falk R, *ibid*).

¹³¹ See Schachter O, *op cit* at 4-11 for a discussion on this issue, and also Reuter P *Introduction to the Law of Treaties* (Kegan Paul International, London; New York, 1995) pp 108-109 and 139-141.

¹³² The rights to integration and independent living and the "needs-based" approach reflected in the Standard Rules are a good example of this. See further Tomasevski K, *op cit*, at 132-133.

¹³³ The Standard Rules go some way towards this end, see eg paras 24-27.

¹³⁴ Bearing in mind that this is where 80% of people with disabilities live. However the limited success to date of technical assistance in international human rights promotion efforts must be acknowledged.

¹³⁵ As at April 1996, 187 States had ratified CROC.

However against all this one needs to be mindful of the potential danger to the international human rights system as a whole that could arise from the proliferation of overlapping and contradictory international standards (through treaty processes or otherwise) over time.¹³⁶ The challenge in articulating disability rights (and more generally) is to “achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being.”¹³⁷ With this balance in mind, the General Assembly has set down guidelines for the development of international instruments in the field of human rights, providing that such instruments should:

- be consistent with the existing body of international human rights law;
- be of fundamental character and derive from the inherent dignity and worth of the human person;
- be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
- attract broad international support.¹³⁸

Accordingly in any future endeavours to negotiate a Convention great care would need to be taken to ensure that “new rights” in the disability area are articulated in terms of established universal human rights,¹³⁹ at least until such time as State practice (with the benefit of sustained educative processes and lobbying efforts) permits a more innovative approach.

On an even more cautionary note, far from the promise of normative advancement through “progressive codification”,¹⁴⁰ there is a real risk that the process of negotiating and bargaining in adopting a Convention on the Rights of People with

¹³⁶ See generally Alston P (1984) *op cit*.

¹³⁷ *Ibid* at 609.

¹³⁸ GA Res 41/120, 4 December 1986, “Setting International Standards in the Field of Human Rights” at para 4. See also Department of Foreign Affairs and Trade, *Human Rights Manual*, *op cit* at 16.

¹³⁹ See in particular criteria (a), (b) and (e) in GA Res 41/120, *ibid*. The rights as expounded in the Standard Rules appear to comply with these guidelines, but it is less clear that certain other rights increasingly proclaimed in this area, such as the “right to be different”, “the right to independent living” and the “right to personal assistant services” presently do so (cf: Degener T, *op cit* at 14-15; Alston P (1984) at 610). For example, the “rights” referred to above might for the time being be better argued in terms of the right to an adequate standard of living (including food, clothing and housing) (ICESCR Art 11), the right to the enjoyment of the highest attainable standard of physical and mental health (ICESCR Art 12), and the freedom from degrading treatment or punishment (ICCPR Art 7).

¹⁴⁰ See Schachter O, *op cit* at 2-7.

Disabilities could lead to “the ‘lowest common denominator’ of law.”¹⁴¹ A Convention in the disability area, in particular, may be doomed to be anachronistic, given the significant advances (both actual and potential) embodied in the Standard Rules and associated potential for normative development through customary and soft law processes.

Indeed one should not be too hasty to inflate the value of Convention, for its own sake, bearing in mind the potential domestic effects of customary law¹⁴² and instruments such as the Standard Rules and Mental Health Principles.¹⁴³ Apart from potentially undermining existing protections,¹⁴⁴ a specialised Convention may allow “‘mainstream’ human rights bodies to justify ignoring or minimising [disability] perspectives”, taking the view that “since these problems are scrutinised elsewhere, [mainstream] organisations are relieved from the task.”¹⁴⁵

¹⁴¹ Schachter O, *ibid* at 4. The experience in the drafting of the Religious Declaration (as opposed to a Convention) is instructive for present purposes; see Sullivan DJ, *op cit* at 518-519.

¹⁴² One must bear in mind too the positive (if not slightly insidious) potential for “back door” law making - “[R]esolutions may be voted for in the UN blithely, one might say, irresponsibly, because key decision-makers, normally not lawyers, having it fixed in their skulls that the General Assembly has no decision-making, no law-making authority, will vote for almost anything of transient political advantage, unaware that such votes may have a law-forming character” - Alston P, (1984) at 613.

¹⁴³ The extent of domestic implementation of the Standard Rules varies. Sweden is an example of a country whose disability policy is governed closely by the Standard Rules - see Handikapp Ombudsmannen, “Report to the Government 94/95” (Sweden, 1995; presented to Swedish government in September 1995). The Commonwealth Disability Strategy is intended to be Australia’s partial implementation of the Standard Rules - see “Commonwealth Disability Strategy - First Progress Report 1995” (AGPS, Canberra, 1995). Further, Australia’s National Mental Health Strategy, in particular the development of consistent State and Territory mental health legislation, is driven at least in part by the UN Mental Health Principles - see “Working Together: Mental Health Federal Budget Initiatives 1994-5” (AGPS, Canberra, 1994) pp 1 and 14; “National Mental Health Report 1994” (AGPS, Canberra, 1995) pp 87-89. See generally Herr SS, *op cit* at 9-13.

¹⁴⁴ One example of how this might occur is through selective implementation of civil and political rights, on the one hand, and economic and social rights on the other, due to perceived costs of the latter (an issue raised earlier in relation to the Standard Rules - see Tomasevski K, *op cit* at 133). Art 4 CROC is an example of a provision making explicit provision for differential treatment of the two categories of rights (immediate implementation of civil and political rights, and only progressive implementation of economic, social and cultural rights), without specifying in the body of the Convention which rights belong to which category. In the event that similar provisions were to be reproduced in a disability rights Convention, with the possibility that certain civil and political rights were only to be required to be implemented progressively, this would represent a significant step backwards. An analogous debate is presently underway in the working group under the Commission for Human Rights on the draft optional protocol to CROC concerning the issues of child prostitution and pornography, where a number of States (including Denmark, Belgium and the Netherlands) and the CROC Committee are of the view that a separate optional protocol would undermine the coverage afforded by CROC - see eg Zoller A-C, “Commission 1995: Towards a New World Order in Human Rights” (1995) 28 *Human Rights Monitor* 4 at 24.

¹⁴⁵ See Charlesworth H, Chinkin C and Wright A, *op cit* at 632, in the context of CEDAW; Meron T, “Enhancing the Effectiveness of the Prohibition of Discrimination Against Women” (1990) 84 *AJIL* 213 at 215.

Further, in terms of treaty body supervision, there are real questions to be asked as to whether existing reporting procedures are properly serving their purpose.¹⁴⁶ It could strongly be argued that the introduction of yet another treaty body supervisory mechanism would only add to the already confused maze of overlapping human rights reporting obligations, to the further detriment of the overall system of international human rights protection.¹⁴⁷ Finally, and perhaps most significantly, one must bear in mind that a Convention however progressive in scope will mean nothing if States are not willing to ratify it, or will do so only subject to extensive reservations. This is a situation to be avoided at all costs, having regard the disappointing situation to date concerning reservations to human rights treaties in general.¹⁴⁸

The Way Forward

It can be seen, therefore, that the arguments for and against a Convention in this area are finely balanced. But perhaps the critical factor to be gleaned from similar standards-setting exercises is that nothing will doom a proposed Convention to failure (whether in its formulation or implementation) more readily than if the international community is not ready for it. This factor assumes particular importance in the disability area where the Standard Rules — the culmination of ideological development over the last decade, complete with their own implementation mechanism — have not yet had the opportunity to achieve their full potential. The same applies for relevant Conventional and customary sources of law, discussed earlier.

Realistically, the prospects for States agreeing to be bound by a treaty reflecting anything near the protections advanced in the Standard Rules or the ECPT in the foreseeable future are minimal; recent reports of the Special Rapporteur on disability and the extent of “unsound mind” reservations to existing rights Conventions are testimony to that.

Further evidence (if it is required) might perhaps be gleaned from attitudes shown by States at the annual sessions of the Commission on Human Rights, Geneva. Although the Commission at its 52nd session reaffirmed its commitment to ensuring that the human rights of persons with disabilities continue to be addressed in all of its work,¹⁴⁹ it has to be said that the Commission’s annual resolutions in relation to

¹⁴⁶ See generally Thomson P “Human Rights Reporting from a State Party’s Perspective” in Alston P (ed), *Towards An Australian Bill of Rights*, *op cit*, at 333 and 343-355.

¹⁴⁷ UN Doc A/CONF.157/PC/62/Add.11/Rev.1, 22 April 1993, “Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights” (Interim Report on Updated Study by Mr Philip Alston), esp at paras 91-96 and 156-166.

¹⁴⁸ Reservations are a problem in the ICCPR context; as at 1 November 1994, 46 of the 127 States Parties had, between them, entered 150 reservations of varying significance, including exclusion of the duty to provide and guarantee particular rights in the Covenant. Proliferation of reservations are also a problem under other human rights treaties, including CEDAW and CERD.

¹⁴⁹ UN Doc E/CN4/1996/L47, 15 April 1996 at para 14.

disability have been disappointing in a number of respects from a human rights perspective. The text of the annual resolution has not varied to any great degree in the last few sessions of the Commission, arguably reflecting a lack of interest or commitment on the part of sponsoring States. The resolutions (in almost identical terms) deriving from the 51st and 52nd sessions¹⁵⁰ of the Commission fail to articulate an appropriate or clear philosophical basis for considering disability as a human rights issue, fail to confirm in unequivocal terms that disability is an "other status" for the purpose of clauses 2(1) and 2(2) of the ICCPR and ICESCR (respectively), fail to call upon States to take positive specific (including legal) measures to protect human rights of persons with disabilities, and fail to meaningfully address underlying systemic issues, particularly those in developing countries¹⁵¹ where 80% of persons with disabilities live. If these shortcomings are any sort of guide as to the priority given by States to disability as a human rights issue, then the challenges that lie ahead should not be underestimated.

However one may take heart from the fact that a common pattern of normative development in international human rights law over the years has been the promulgation of proposed norms at the first instance in Declarations, resolutions and other softer sources of law, which in turn form the ideological basis for a multilateral Convention once the relevant norms take hold.¹⁵² After all, in contrast to many other areas of human rights law, the recognition of disability as a serious human rights issue is only a recent phenomenon.¹⁵³

With these factors in mind, and within the political and institutional context outlined at the beginning of this Part, the most prudent strategy for the protection of the human rights of persons with disabilities should focus in the short term on wider implementation and further development of existing norms and international instruments.¹⁵⁴ Taking their lead from the ICESCR and CEDAW Committees, existing human rights treaty bodies should be encouraged to take a more active role in monitoring the human rights of persons with disabilities.¹⁵⁵ Of course, the viability of such a role will depend on a number of factors, including the outcomes of ongoing

¹⁵⁰ CHR Res 1995/58, 3 March 1995 (51st session); UN Doc E/CN.4/1996/L47, 15 April 1996 (52nd session).

¹⁵¹ Except in relation to landmines, a widespread cause of severe physical disability, particularly in developing countries - UN Doc E/CN.4/1996/L47, 15 April 1996 at paras 9-11 - Economic and health imperatives, along with other systemic factors (apart from armed conflict), are not addressed.

¹⁵² CERD, CEDAW and CROC are good examples of this phenomenon, as is the Religious Declaration (see GA Res 3027 (XXVII), 18 December 1972, "Elimination of all forms of religious intolerance", at para 1), although the latter instrument has not to date been followed up by a Convention.

¹⁵³ See *supra* pp 1-5.

¹⁵⁴ As Theodor Meron has observed (*op cit* at 217), the task of human rights law making should be treated "not merely as an operation designed to produce a particular instrument, but as a continuing process that includes extension, elaboration, consolidation and revision."

¹⁵⁵ In its 52nd session the Commission on Human Rights reiterated its (annual) call for human rights treaty monitoring bodies to take a more active interest in disability perspectives - UN Doc E/CN.4/1996/L47, 15 April 1996 at paras 2-4.

treaty-body reform efforts,¹⁵⁶ the adequacy of guidelines to assist and coordinate the Committees' work on disability-related issues, and the existence of effective avenues for NGO and grassroots participation and input into these processes.

The success or otherwise of the Special Rapporteur's mandate under the Standard Rules should not begin to be definitively assessed until after the expiry of his first 3-year term in 1997, preferably allowing for at least one further term, to allow the Rules to achieve maximum potential. This approach would also allow further time for other reforms of the UN human rights system as a whole, as they impact upon disability, to take effect.¹⁵⁷ More time is clearly also required to actively promote disability as a human rights issue, through the Special Rapporteur's work under the Standard Rules, the work of the major human rights treaty bodies, NGO's, and any other means available. Having regard to the clear potential benefits of Conventional human rights protection, the question of an international Convention on the rights of persons with disabilities should be considered only as a final step in this strategy, building on outcomes achieved through the strengthening of existing mechanisms, thereby enhancing its prospects for success.

¹⁵⁶ See generally UN Doc A/CONF157/PC/62/Add11/Rev1, 22 April 1993, "Effective Implementation of International Instruments on Human Rights" (Interim Report on Updated Study by Mr Philip Alston).

¹⁵⁷ For example, strengthening international cooperation, coordination of UN human rights institutions and activities, and development of national laws and institutions - see "Human Rights and Disability: Report prepared by the Secretary-General pursuant to Sub-Commission resolution 1993/22," UN Doc E/CN4/Sub2/1994/35, 17 June 1994 at paras 28-48; "Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels: Human Rights and Disability" UN Doc E/CN4/Sub2/1995/L23, 15 August 1995; "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session", UN Doc E/CN4/1995/L46, 27 February 1995; "Implementation of the World Programme of Action Concerning Disabled Persons and the United Nations Decade of Disabled Persons - Report of the Secretary General", UN Doc A/43/643, 28 September 1988; and Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995), UN Sales No E.95.XIV.2.