

Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability

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Convened by the United Nations in cooperation with
Boalt Hall School of Law, University of California at Berkeley
and the World Institute on Disability (Oakland, California USA)
at Boalt Hall School of Law, University of California at Berkeley
8-12 December 1998.

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Introduction

A consultative Expert Group Meeting on International Norms and Standards relating to Disability was convened by the United Nations in cooperation with Boalt Hall School of Law, University of California at Berkeley and the World Institute on Disability (Oakland, California USA) at Boalt Hall School of Law, University of California at Berkeley from 8-12 December 1998. This report presents the findings of the Meeting.

Fifteen experts in international law and disability policy issues attended the Meeting, in their individual capacity. The list of participants is attached as an annex. The United Nations Voluntary Fund on Disability co-financed the Meeting. Meeting participants elected the following officers: Professor Andrew Byrnes of University of Hong Kong and Dr. Marcia Rioux of the Roehar Institute, Canada, as Chairperson and Rapporteur respectively; Professor Alison Dundes Renteln of University of Southern California and Dr. Ana Maria de Frappola of the Inter-American Unit on Childhood, Families and Disabilities of the Organisation of American States, as Secretaries of the Meeting.

The Meeting set out to review and discuss issues and trends relating to the practical application of international norms and standards to promote the human rights of persons with disabilities, and to offer findings and recommendations on the following:

- ways of increasing understanding of international norms and standards relating to disability in relation to domestic law and policies;
- promoting their application in the domestic contexts; and
- appropriate legislative frameworks to promote relevant application of international norms and standards, including formulation of model national legislation.

Findings of the Meeting were discussed in the public forum held on 11 December 1998, co-organized by the World Institute on Disability, a non-governmental organization based in Oakland, California and Boalt Hall School of Law, University of California at Berkeley. The forum was attended by disability rights advocates from major non-governmental organizations based in the San Francisco Bay Area, legal practitioners, the academic community as well as members of United Nations Association of the United States. This public Forum discussed application of international norms and standards in country and project-specific situations, as well as broader issues of disability law and policy. The recommendations that emerged in the course of those discussions have been incorporated into the recommendations adopted by the Meeting. The Meeting particularly welcomed the occasion of the forum, as well as the presence of representatives of disability groups during the course of the Meeting, as participants were concerned with the inadequate representation of persons with disabilities at the Meeting, and recommended that future meetings of this sort should have such representation.

Historical Overview

Outline:

- A. Evolution of Thinking about Disability Issues - a Human Rights Approach
 1. From a Medical Model of Disability to a Social Model of Disability
 2. The Evolution in Thinking of Disability at the International Level and International Norms focussing on Disability
- B. Definition of Disability
- C. Prevention of Disability
- D. Fundamental Approach to Broad-Human Rights of Persons with Disabilities
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A. Evolution of thinking about disability issues - a human rights approach

1. From a medical model of disability to a social model of disability

Traditional approaches to disability have depicted it as a health and welfare issue, to be addressed through care provided to persons with disabilities in the form of charitable handouts and similar measures. Persons with disabilities have been viewed as abnormal, deserving of pity and care, and not as individuals who are entitled to enjoy the same opportunities to live a full and satisfying life as other members of society. As a consequence, persons with disabilities have been marginalized and excluded both from the mainstream of society, and have been denied, or significantly limited in the enjoyment of, their fundamental human rights and freedoms.

This approach has also been accompanied by a way of thinking about disability (known as the 'medical model' of disability, among other names) which has been described in the following terms:

"Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their

non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs. This has resulted in severe isolation for people with disabilities and their families."¹

In recent years, however, this approach has been superseded by a broader understanding of disability, sometimes referred to as the 'social model'. This analysis recognises that the circumstances of people with disabilities and the discrimination they face are socially created phenomena and have little to do with the impairments of people with disabilities.²

This is a critical reorientation of perspective, which has important implications for the way in which law and policy in relation to disability are developed, as well as for its substantive content. It focuses on the many ways in which the existing social environment places barriers in the way of persons with disabilities who seek to carry out the usual activities of everyday life and to participate in the full range of activities in society. Thus, this model sees the problem not as residing in the person with a disability, but as resulting from the structures, practices and attitudes that prevent the individual from exercising his or her capabilities: the cure to the problem of disability lies in restructuring society.³ A number of examples given in the South African White Paper on an Integrated National Disability Strategy illustrate the significance of the shift in perspective the social model entails:

"It is the stairs leading into a building that disable the wheelchair user rather than the wheelchair.

It is defects in the design of everyday equipment that cause difficulties, not the abilities of people using it.

It is society's lack of skill in using and accepting alternative ways to communicate that excludes people with communication disabilities.

It is the inability of the ordinary schools to deal with diversity in the classroom that forces children with disabilities into special schools."

2. The evolution in thinking about disability at the international level and international norms focusing on disability

The move from the patronising and paternalistic approach to persons with disabilities represented by the medical model to viewing them as members of the community with equal rights has also been reflected in the evolution of international standards relating specifically to disability, as well as in moves to place the rights of persons with disabilities within the category of universal human rights.

In the 1970s, the evolution of thinking on disability issues at the United Nations manifested itself in a number of United Nations initiatives that embraced the growing international concept of human rights of persons with disabilities and equalization of opportunities for them. In furthering the advancement of the rights of persons with disabilities, the efforts were intensified within the framework of the United Nations Decade of Disabled Persons 1982-1993. A major outcome of the International Year of Disabled Persons which preceded the Decade was the World Programme of Action concerning Disabled Persons (1982), the most comprehensive global strategy, which took "equalization of opportunities " as its guiding principle for the achievement of full participation of persons with disabilities in all aspects of social and economic life. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) was a major outcome of the Decade of Disabled Persons, which is an instrument for

policy-making and a basis for technical and economic cooperation.

There are a number of 'general' conventions and recommendations that are applicable to the rights of persons with disabilities which have adopted under the auspices of various intergovernmental bodies and international agencies. The inclusion and the reaffirmation of the human rights of persons with disabilities in documents such as the Vienna Declaration and Programme of Action (1993), the Copenhagen Declaration and Programme of Action (1995), and the Beijing Declaration and Platform for Action (1995) also reflect the increasing recognition given to the human rights of persons with disabilities.

The Meeting noted that these and earlier instruments addressing disability and the right of persons with disabilities reflect the evolution of approaches to the subject. As a consequence, some provisions of the earlier instruments (and also some of the more recent ones) are based on assumptions and analyses which do not reflect current thinking and which persons with disabilities would today consider inappropriate or offensive. One example was the reference in article 7 of the Declaration on the Rights of Disabled Persons (1975) to the right of disabled persons "according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation" (emphasis added) The group therefore noted the need for caution in relying on international instruments in this field, particularly in the context of efforts to incorporate them as part of national law and practice.

The Meeting considered that it was desirable to approach the subject of the rights of persons with disabilities from a human rights perspective, which recognised that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms and to do so without discrimination on the ground of disability. When one adopted this approach against the background of a social model of disability an insistence that the State take positive measures to ensure that in reality persons with disabilities are in a position to exercise those rights - sometimes described as equalisation of opportunities - could be seen as a particular instance of the general obligation of the State to take such steps as are needed to enable the exercise in practice of guaranteed rights by any group in society, rather as an making exceptional provision for persons with disabilities. (Such measures might also be viewed as temporary special measures to redress disadvantage; these are permissible under international law, and arguably mandated in certain circumstances.) At the same time, the adoption of international standards dealing specifically with the human rights of persons with disabilities could be seen as part of the process of giving more detailed content to the general human rights standards in order to ensure their enjoyment in practice by all groups in society.

The Meeting thus considered that many of the injustices inflicted on persons with disabilities and the claims made by them fell within existing human rights concepts and norms, though in many cases they had not been conceptualised as such and little attention had been given to them within that framework. However, it was noted that some of the references in universal human rights instruments to persons with disabilities appeared to reflect an assumption that persons with disabilities were in need of social support and assistance, rather than being the holders of the full range of human rights on the basis of equality and full and productive participants in the life of the community. It was also recognised that the dominant conceptions and norms might fail to reflect the violations of human dignity experienced by persons with disabilities and that radical reinterpretation of existing norms or supplementation of them by new norms might be necessary. The example was given of the rights of members of minorities under existing international human rights law: although the concept of minority included ethnic, linguistic or religious groups, claims that hearing-impaired persons who used sign language could qualify as a linguistic minority had not been accepted by the dominant human rights discourse.

B. Definition of disability

The Meeting noted the difficulties in defining disability in a manner which reflected the social dimensions of disability, avoided the construction of persons with disabilities as abnormal or inferior, and reflected the fact that disability was frequently dependent on context. At the same time it recognised the need to define or describe disability for certain purposes.

A number of definitions were identified as providing a starting-point for formulation of a definition: that contained in the 1993 report of Mr Leandro Despouy, the Special Rapporteur on Human Rights and Disability of the Sub-commission on Prevention of Discrimination and Protection of Minorities, those contained in the Americans with Disabilities Act and the Hong Kong Disability Discrimination Ordinance, and that of the Draft Inter-American Convention on the Human Rights of Persons with Disabilities.

The Meeting also took note of the on-going revision of ICIDH (International Classification of Impairments, Disabilities and Handicaps)⁴ and its current adoption of social and political dimensions of the classification.

C. Prevention of disability

The Meeting recognised that the question of prevention of disability and its relationship to efforts to promote the human rights of persons with disabilities was complex and contentious. On the one hand, among the major causes of disabilities in the modern world were poverty, environmental pollution and degradation, and violence in various forms (including wars and their aftermath). There were powerful reasons for attempting to prevent the occurrence of these phenomena and to limit their impact on people so far as possible, while existing international law norms and United Nations programmes sought to address those problems squarely, it was important - especially in many developing countries - to recognise this as a priority concern.

On the other hand, the view was expressed that it was necessary to accept that there will always be persons with disabilities and that there were dangers in attempting to address all these phenomena within the framework of the human rights of persons with disabilities (one such danger being as the encouragement of the view that certain characteristics and the persons who have them are undesirable). The goal of eliminating disabilities and the potential use of reproductive technology, genetic testing and the increasing ability to manipulate genes gave rise to serious concerns. At the same time, it was noted that prevention of disability rarely included the goal of ensuring that persons with existing disabilities did not experience further disablement (for example, in the work place).

D. Fundamental approach to broad-human rights of persons with disabilities

The Meeting took as its starting point for analysis the social model of disability, and recognised that disability is a result both of the biological condition or functional capacity of the individual and of the social status that attaches to that biological condition⁵, and that there was a broad set of social factors that contribute to exclusion and inability to exercise human rights⁶. The Meeting recognised that the many forms of discrimination and exclusion experienced by persons with disabilities involved violations of fundamental human rights guaranteed to all members of society as well as being inconsistent with international standards dealing explicitly with the human rights of persons with disabilities.

The Meeting noted that there had been some efforts to address questions relating to the human rights of persons with disabilities within the United Nations human rights framework. It noted in particular the 1993 report by Mr Leandro Despouy, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities⁷, the jurisprudence of the Committee on Economic, Social and Cultural Rights⁸ and of the Committee on the Elimination of Discrimination against Women⁹, the conclusions of the Committee on the Rights of the Child following its general day of discussion on children with disabilities¹⁰, and resolution 1998/31 of the United Nations Commission on Human Rights¹¹. Nevertheless, they noted that there was still much that needed to be done to ensure that violations of the human rights of persons with disabilities were both recognised and responded to by human rights organs.

The Meeting considered that there were benefits in a two-pronged strategy: insisting on the full measure of general human rights guarantees in the case of persons with disabilities, as well as developing specific instruments that refine and give detailed contextual content to those general guarantees.

The Meeting agreed that it was critical to start from a framework of general human rights guarantees when developing law and policy in relation to the denial of rights suffered by persons with disabilities. Not only did this give the claim of universality of human rights real meaning, but it underlined the fact that persons with disabilities were full members of the community equal in dignity and entitled to enjoy the same human rights and freedoms as others. It was well-accepted that the steps a State may have to take to ensure the full enjoyment of rights by particular groups within the community might vary according to the situation of those social groups; this might apply in relation to persons with a disability. The mode of ensuring effective realisation of a right may vary, but the right, which was being guaranteed, was the same right.

Footnotes:

^{1,2,3} See "South African Integrated National Disability Strategy", White Paper Office of the Deputy President of South Africa, 1997

⁴ WHO, International Classification of Impairments, Disabilities and Handicaps(1980; reprinted 1993)

^{5,6} See "Enabling the Well-being of Persons with Disabilities", *entourage*, v.11, nos. 2-3, 1998, 11, at 18

⁷ See "Human Rights and Disabled Persons", Centre for Human Rights, New York / Geneva 1993

⁸ See "General Comment No. 5", in: General Comments, adopted by the Committee on Economic, Social and Cultural Rights, 9 December 1994

⁹ See "General Recommendation No. 18", in: General Recommendations, adopted by the Committee on the Elimination of Discrimination against Women, 1991

¹⁰ A/53/281

¹¹ E/1998/23, E/CN.4/1998/177

LEGAL FRAMEWORK

- A. Overview of Existing International Legal Framework
- B. Fundamental Human Rights Principles

A. Overview of existing international legal framework

The Meeting noted that there was already extensive protection of the human rights of persons with disabilities under international law, in the form of treaties, customary international obligations and non-treaty instruments. Some of these were general, while others addressed disability specifically.¹²

All international human rights instruments protect the rights of persons with disabilities through the principles of equality and non-discrimination. Universal and regional human rights instruments that deal with general human rights include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. International human rights instruments which have provisions explicitly concerning persons with disabilities include: Universal Declaration of Human Rights (article 25, right to an adequate standard of living), Convention on the Rights of the Child (article 23), African Charter of Human and Peoples' Rights (article 18(4)), and the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights¹³ and Additional Protocol to the American Convention on Human Rights in relation to Economic, Social and Cultural Rights¹⁴. Moreover, provisions protecting members of vulnerable population groups, which are included in basic human rights instruments, are also applicable to disabled persons. In addition, General Comments on the human rights of persons with disabilities have been adopted by the Committee on Economic, Social and Cultural Rights¹⁵ and the Committee on the Elimination of Discrimination against Women.¹⁶

In addition to these treaties, which are binding on States parties to them, some universal instruments, such as the Universal Declaration on Human Rights, and some specific provisions, such as the principle of non-discrimination, have become part of customary international law and bind all States, whether or not the State has ratified the treaty in which a particular guarantee also appears.

There has been growing recognition in contemporary international law that all States have a duty under article 56 of the Charter of the United Nations to ensure respect for and to observe human rights, including the incorporation of human rights standards in their national legislation. While the means chosen to promote full realisation of the human rights of persons with disabilities will differ from one country to another, there is no country in which a major policy or programme effort is not required. The obligation of States Parties to the international human rights instruments to give effect to their obligations clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities.

In addition to protection provided by binding rules of international law, whether embodied in treaties or rules of customary international law, further protection of the rights of persons with disabilities is contained in non-treaty instruments adopted by various international bodies. These instruments represent a moral and political commitment by

States to enhance the status of persons with disabilities, and in some case may contribute to or codify customary international law rules. They also can be used as guidelines for States in enacting legislation and formulating policies concerning persons with disabilities.

Disability-specific international instruments concerning the rights of disabled persons have also been adopted at the international level. Unlike the international legal instruments mentioned above, these consist of declarations, resolutions and guidelines adopted by the General Assembly of the United Nations. While these instruments may not themselves be legally binding, their provisions may nevertheless in part reflect customary international law norms or be important sources for the interpretation of more general norms contained in treaties. These instruments include the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, the World Programme of Action concerning Disabled Persons, the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, and The Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

B. Fundamental human rights principles

The Meeting identified a number of fundamental principles of human rights that it considered should form the basis for the development of law, policy and practices in the field of disability and that should inform the interpretation of existing human rights standards and the elaboration of future instruments.

The overarching principle was that all persons are entitled to the full enjoyment of fundamental human rights and freedoms on the basis of equality and without discrimination on the basis of disability. An important theoretical and practical consequence of this was the duty of the State to ensure that persons with disabilities have the facilities and services that they need to exercise the rights to which every member of the community is entitled. Specific elaborations of the overarching principle were put forward:

- Every person is born equal in dignity and rights, and has the right to equal individual human dignity, worth, and autonomy (which includes the right freely to make and pursue choices concerning his or her life)
- Every person has the right to the full and equal enjoyment of all fundamental human rights and freedoms, including economic, social, cultural, civil and political rights, which are interrelated and indivisible
- All persons are equal before and under the law and are entitled to the equal protection of the law
- No person shall be discriminated against on the basis of disability
- Every person has the right of full and equal participation and inclusion in all fields of the life of the community, including the political, economic, social, cultural, civil or any other field
- Every person has the right to an adequate standard of living and well-being (including, inter alia, adequate food, clothing, housing, and access to health care)
- Every person has the right to obtain an effective remedy for violations of her or his rights, including access to tribunals
- The human rights of persons with disabilities, in particular their economic and social rights, are not to be viewed as optional obligations that can be dispensed with or limited as a matter of expediency or convenience in times of economic hardship or recession, or as part of a process of marketisation or privatisation of governmental functions

- States have the obligation to take all necessary measures to ensure that all persons, irrespective of disability, enjoy fundamental human rights; this obligation includes the duties (a) to take any special measures needed to ensure that persons with disabilities are in a position to exercise and enjoy those rights (such measures should not be considered to amount to discrimination) and (b) to ensure that the State, public institutions, and private persons and organisations refrain from discrimination on the basis of disability.

Footnotes:

¹² See "Human Rights and Disabled Persons", Centre for Human Rights, New York / Geneva 1993

¹³ Committee on Economic, Social and Cultural Rights, report of the 14th/15th session, Official Records, 1997, Supplement No.2, E/1997/22, Annex IV at 91

¹⁴ <http://www.oas.org:80/EN/PROG/ichr/embas5.htm>

¹⁵ See "General Comment No. 5", in: General Comments, adopted by the Committee on Economic, Social and Cultural Rights, 9 December 1994

¹⁶ CEDAW, General Recommendation 18, UN Doc A/46/38

STRATEGIES FOR IMPLEMENTATION AT THE NATIONAL LEVEL

Outline:

- A. Legal strategies - Constitution-making as an Occasion for Intervention
- B. Legislative Strategies
- C. Strategies in other Areas
- D. Strategies for Using International Standards at the National Level
 - 1. Invoking International Standards in Domestic Law
 - 2. Role of Domestic Courts
- E. Legislature
 - 1. Legislative and Policy Strategies
 - 2. Process: Inclusion, Representation and Full Participation
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- G. Strategies for Implementation: Challenges of Globalisation and Privatisation

Footnotes

The Meeting sought to identify strategies for enhancing the full enjoyment of human

rights by persons with disabilities, in particular how international standards could be used at the national level. The Meeting also considered what measures could be taken at the international level to strengthen efforts to ensure that full realisation of the rights of persons with disabilities.

The Meeting identified various strategies by which effective protection of the human rights of persons with disabilities could be enhanced at the national level.

Two general strategies were identified: the elaboration of laws, policies and programmes that address specifically the position and entitlements of persons with disabilities, and the formulation of general laws, policies and programmes that are inclusive of disability issues and perspectives (similar to what has become known as 'mainstreaming' in the context of gender issues).

In relation to each of these substantive approaches the Meeting also noted the critical importance of inclusion of persons with disabilities and disability perspectives in the formulation and implementation of both specific and general laws, policies and programmes. This entailed the participation of representatives of disability groups and persons with disabilities in the elaboration of laws, policies and programmes specifically addressing disability issues. It also meant the full participation of persons with disabilities as policymakers within government, and the adoption of measures that ensured that disability groups were able to provide substantive input into the formulation of laws and policies, including those not specifically addressing disability.

Participants noted that, while international standards could provide useful guidance for action, not all action is taken in response to international law provisions but may arise out of local or national conditions and understandings of certain disability issues. Measures to advance the rights of persons with disabilities could be taken at many levels, and in many cases actions resulting from a "bottom up" approach might be more effective than those that embody a "top down" approach. Legislation or regulations developed at the grassroots or local level may significantly contribute to empowering or protecting persons with disabilities in their most immediate setting. While local initiatives may sometimes be undertaken independently, often such initiatives will be adopted in response to a requirement to comply with national laws, which are generally more directly linked to international law and norms and standards relating to disability. A village or municipal ordinance will frequently be of much greater direct benefit to local persons with disabilities than an international convention or other instrument, but may well have been required or stimulated directly or indirectly by such an international instrument or the development of international norms and standards.

A. Legal Strategies - constitution-making as an occasion for intervention

The Meeting noted the opportunities that the revision of a nation's constitution or the adoption of a new constitution offered for enhancing the protection of the human rights of persons with disabilities at the highest level of the national legal system. Rights guarantees can be most visibly entrenched by inclusion of rights guarantees in the constitution of a nation or jurisdiction.

The form of constitutional protection could vary: it could invoke the inclusion of a specific reference to discrimination on the ground of disability (including discrimination by private actors); guarantees of a right to all measures to enable the full exercise of rights by

persons with disabilities; guarantees of full representation in the political process; statements of the principle of non-discrimination etc. as a programmatic goal or directive principle that should guide all organs of government for example, the Constitution of Canada.¹⁷

Opportunities for constitutional interventions were most likely to arise when a period of radical constitutional change occurred. However, the chance to include such guarantee also arose in other situations. For example, recent constitutional changes in the United Kingdom including the adoption of a Bill of Rights and the process of devolution of some powers to regional governments could provide an opportunity to entrench human rights provisions or indeed to make specific provision for persons with disabilities.

More typically, radical constitutional change occurs after revolution or in a time of major political transformation. In such times of significant political change, the pace and agenda for constitutional change will be determined by the political situation in the jurisdiction. Whether the changes are the result of a successful national liberation struggle or a response to external forces, they may provide the opportunity for the incorporation of international norms and standards within the local context.

Constitutional protection may take the form of general human rights guarantees in the constitution, or constitutional provisions explicitly guaranteeing the rights of persons with disabilities. Recent examples of the inclusion of general provisions were the constitutions of most of the members of the Commonwealth of Independent States. While these did not contain provisions explicitly protecting the rights of persons with disabilities, they did include chapters based on the Universal Declaration of Human Rights, thereby indirectly improving the position of persons with disabilities. Similar guarantees are also found in the constitutions of many other States, as the inclusion of general rights guarantees based on or similar in content to international or regional human rights catalogues had been a feature of nearly all States which have attained independence since 1945. An example of a constitutional provision that explicitly addresses the rights of persons with disabilities is the Constitution of Malawi¹⁸. Another example was section 9 of the 1996 Constitution of the Republic of South Africa, which guarantees the right of all citizens to freedom from discrimination on a number of social criteria, including disability.

However, the Meeting noted that constitutional guarantees alone may not be enough and that more detailed implementing legislation may be needed to bolster constitutional guarantees. Furthermore, it was important to pay full regard to the local context and to ensure that any constitutional provision was solidly based in community expectations and supported by appropriate implementing legislation or mechanisms. For example, in the Constitution of Malawi provisions specifically guaranteeing the rights of persons with disabilities were included¹⁹. However, these had yet to be underpinned by any legislation and in a recent constitutional review the only proposal in this area was to replace the existing phrase with the phrase 'persons with disabilities', a suggestion which, if adopted, was unlikely to have any immediate effect on the situation of persons with disabilities in Malawi.

The importance of supplementing constitutional guarantees by detailed legislation or national policy on disability was also underlined by the South African experience²⁰, where the government, in an effort to further practical implementation of the constitutional provisions, issued a major consultation report as part of developing a national disability strategy (a similar exercise was also subsequently undertaken in neighbouring Botswana).

There were many other cases in which constitutional change was proceeding or being discussed (for example, Nigeria and Kenya) and which may give rise to opportunities for

significant input. Where the initiation or likelihood of radical constitutional or significant political change is identified, assistance should be given to local disability groups to support their efforts to have the rights of persons with disabilities fully recognised a new or revised constitution. Apart from facilitating access to relevant expertise, this could include providing compendia of constitutional provisions, national laws relating to disability, and international standards in order to assist lobbying for the inclusion of constitutional provisions relating to disability. Intergovernmental bodies, such as the Commonwealth Secretariat, have considerable experience in assisting with constitution-making and can provide national decisions makers access to a wide range of comparative material.

Inclusion of representatives of disability groups in the process of constitution-making itself was of central importance. Constitutional commissions and constituent assemblies usually involve representation of vocational or interest groups (as well as democratically elected members), a factor, which provides an opportunity to include representation of disability groups. For example, in Uganda in 1994 this approach ensured the inclusion of a delegate with a disability to represent citizens with disabilities as a special interest group. The new constitution contained provisions guaranteeing protection against discrimination on the ground of disability and a stipulation that in the 1996 elections five seats in Parliament should be reserved for representatives of persons with disabilities. The 1996 legislature in turn enacted legislation to provide for representation of persons with disabilities at every level of local government and the appointment of a Minister with responsibility for the elderly and persons with disabilities. The former is estimated to have resulted in the election of 47,000 representatives with disabilities or some 0.5% of the registered electorate in Uganda.

B. Legislative strategies

One important pillar of ensuring the rights of persons with disabilities was the enactment of laws at the national level. In some cases national laws may be enacted to implement or give effect to international law standards. In other cases, national laws may be initiated independently of any international obligation yet may be closely modelled on or give effect to international norms or standards relating to disability. Finally, national law may involve a local initiative or the modification or development of an existing norm or standard and, if validated, may in turn become accepted as a new norm or standard for emulation or adaptation by other jurisdictions.

Apart from the constitutional strategies referred to above, the Meeting identified a number of additional strategies that might be utilised:

- (a) Laws guaranteeing full participation in the political process and fair representation in representative political institutions, the public service, judicial and administrative institutions, and private sector bodies;
- (b) Anti-discrimination laws (similar to the "Americans with Disabilities Act" of the United States or the British, Australian, Canadian and Hong Kong legislation);
- (c) Other specific disability-related legislation, such as social protection legislation in many countries in Latin America²¹;
- (d) Laws providing adequate protection against arbitrary institutionalisation of

persons with disabilities, access by them to independent legal advisers and readily available remedies for unlawful deprivation of liberty;

(e) Laws to regulate the activities of locally-based actors abroad, similar to those that had been used by some countries to prevent companies incorporated in their territory from offering bribes to foreign government officials abroad.

C. Strategies in other areas

While legal strategies were important, there were many other strategies that needed to be adopted in order to advance the human rights of persons with disabilities. Among those identified by the Meeting were:

- (a) Collection of reliable statistics in order to analyse needs and formulate responsive policies;
- (b) Administrative monitoring measures such as the preparation of budget impact statements, which broke down spending according to contribution;
- (c) Encouraging a concern with disability issues as part of the concept of good corporate citizenship (for instance the Equality Exchange of the United Kingdom in the field of sex discrimination was referred to);
- (d) Developing, in consultation with business groups and disability groups, codes of conduct governing domestic and international activities;
- (e) Incentive-based schemes, such as providing tax relief or subsidies;
- (f) Grant levy schemes, such as in Germany, under which employers were required to employ a certain number of persons with disabilities or to pay a levy, the proceeds being used to fund disability policy initiatives in a wide range of fields;
- (g) Providing financial and other support to national and local disability rights groups to ensure that they are in a position to participate fully and to make their views and needs known;
- (h) Bringing disability rights groups and other human rights groups, including the ones focussing on human rights of women, together to focus on the issue of rights of persons with disabilities;
- (i) Developing policies to ensure full access to education at all levels by persons with disabilities, including special scholarship schemes;
- (j) Support, perhaps by acting as patron, of disability interests by the Head of State or first spouse or senior members of the Executive which can be of great significance particularly in the developing world, for example to stimulate or galvanize action at local level (the development of the Paralympics and the Special Olympics were advanced significantly by the support of interested Heads of State); and
- (k) Nations may additionally honour and recognize persons with disabilities as achievers and role models.

D. Strategies for using international standards at the national level

While there were many strategies, legal and others, for enhancing the human rights of persons with disabilities, these measures don't necessarily involve the use or invocation of international standards. However, the Meeting was particularly interested in identifying ways in which international standards might be invoked or utilised at the national level. The Meeting noted that the efficacy and practicability of invoking international standards will vary from country to country.

1. Invoking international standards in domestic law

Translation of international norms and standards into national law and then to ensure its implementation can be a slow and complex process, but it can also be of critical importance. States are the major, though not the only, actors in transforming international standards into domestic law through legislation, executive and administrative action and the courts, which are necessary to empower persons with disabilities to vindicate their rights. States Parties to international treaties on human rights are legally bound to implement the provisions contained in the conventions in their domestic jurisdiction. International law generally leaves it to States to decide on the type of legislative and other measures, consistent with their constitutional processes, necessary to give effect to the obligations they accept. However, international human rights law requires that States ensure that any person whose rights or freedoms are violated have an effective remedy before independent and impartial tribunals or under other national procedures. Even if adoption of national legislation does not always ensure that individuals have recourse against violations of rights contained in international human rights instruments, the general character of treaty provisions makes it advisable for these instruments to be implemented by specific detailed provisions in domestic law.

Four main methods are available to implement international legal instruments in domestic law (and there are many variants of these in different jurisdictions):

- (a) The direct effect of international legal instruments and customary international law in the national legal order;
- (b) Direct incorporation of rights recognised in the international instrument into a national bill of rights or in a national law;
- (c) Enactment of detailed legislative measures to give effect to the rights recognised in international legal instruments;
- (d) Indirect incorporation or use of norms as aids to interpret other norms or to develop new norms in the domestic legal order.

The course of the legislative process will differ according to the particular domestic legal systems. For instance, incorporation of international human rights principles and norms in national constitutions - or similar documents - remains the most important way of bringing national laws into conformity with international standards.

The application of international law by domestic courts also can play an important role in implementing international human rights norms applicable to persons with disabilities by means of compliance with relevant international standards and citing precedents in other jurisdiction.

2. Role of domestic courts

Domestic courts can play a major role in identifying, interpreting and developing international standards and norms in the field of disability as in other areas. The greater the extent to which international norms on disability are known in the community, the greater the likelihood that domestic courts will apply these norms. In addition to serving as fora for the promotion and protection of international human rights of persons with disabilities, national courts can also stimulate law reform and public discussion through their decisions.

The position of international law differs from one nation to another. In some jurisdictions, international law is not directly applicable in domestic courts. While it may be persuasive or educative, tribunals differ in their willingness to consider and rely on international standards. Nevertheless, experience has shown that there was frequently much to be gained by invoking international standards - including unincorporated treaties or non-binding instruments - before domestic courts.

The extensive discussion of these issues within Commonwealth jurisdictions which had been started by the Bangalore Judicial Colloquium in 1988 and followed up in other judicial colloquia since then showed the potential for drawing on international standards in domestic litigation even when the instruments in question had not been directed incorporated as part of domestic law.²²

Participants in the Meeting noted that there were many examples of the successful invocation of international standards in domestic courts in recent years, though the record of courts was variable in applying those standards. Examples included:

(a) *Filartiga v Pena-Irala* [2nd Circuit 1980], in which the United States' Court of Appeals for the 2nd Circuit relied on the Universal Declaration of Human Rights as customary international law and as an authoritative guide for identification and clarification of the human rights guaranteed to all persons under the Charter of the United Nations. This was developed in *Lareau v Manson* , 507 F. Supp. 1177, 1193 n.18 (D. Conn.1980), where a federal district court in Connecticut used the United Nations Standard Minimum Rules for the Treatment of Prisoners as "an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind" and also utilized both the Universal Declaration and the Covenant on Civil and Political Rights as aids for interpretation of the Eight Amendment to the United States' Constitution. About the same time, a decision of the Supreme Court of Oregon addressed human rights norms as part of the treatment of prisoners (See: *Sterling v. Cupp*, 290 Or.611 (1981)).

(b) In *Unity Dow* [1991],LRC (Const) 574 (HCA), [1991] LRC (Const) 623 (CA) the Botswana Court of Appeal held that, as Botswana was signatory to the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights conventions prohibiting discrimination against women, it was proper to interpret the constitutional guarantee of equality (which did not explicitly cover sex discrimination) as prohibiting laws which discriminated on the basis of sex. It concluded that provisions of the citizenship law that a mother could not transmit her Botswanan nationality to her child violated the equality guarantee and were therefore void.²³

(c) In *Gradidge v. Grace Bros Pty Ltd.* (1988) 93 FLR 414, Justice Kirby, then President of the New South Wales Court of Appeal, relied on the right to an

interpreter in article 14 (3) (f) of the ICCPR to uphold the right of a person who was deaf and mute to a sign language interpreter in court proceedings.

(d) However, in Japan in the *Shiomi* case, a woman with a disability unsuccessfully invoked the Declaration on Rights of Disabled Persons in relation to her application for a disability welfare pension. Her application was refused as she was an alien and thus did not qualify for the pension at the time the disability was determined as a matter of law. This was upheld by the Supreme Court 2 Mar 1989 35 Shomu Geppo 1754.²⁴

It was noted that many civil jurisdictions are more receptive to international law. For example, Argentinian NGOs have successfully brought cases based on international law in various human rights fields, including economic and social rights.²⁵

Strategies for implementation in the judicial arena would include:

- (a) Litigation either affirmative in pursuit of damages and / or injunctions or defensive in protecting the rights of the persons with disabilities²⁶;
- (b) Obtaining advisory opinions and declaratory judgments;
- (c) Gap-filling: the refinement of the content of domestic law with decisions on relevant issues;
- (d) Litigation to stimulate action, educates, expose, politicize or sensitize the public to disability issues; and
- (e) Encouragement of individual access to training and recruitment to the Bar and Bench for persons with disabilities.

Advocates General, Peoples' Defenders or similar have a significant role to play. In litigation involving those with low incomes there was a need to ensure that legal aid or other support was available.

Education of the judiciary in the form of judicial dialogue and education tailored to the individual civil or common law system is critically important. Some jurisdictions may resent or ignore educational initiatives by outside actors and the exchange of information, rather than the didactic function, should be stressed. International and regional law conferences have an important function here. The Meeting noted the work that had been done by the Commonwealth Secretariat in organising a series of judicial colloquia for Commonwealth judges on the application of international human rights law in domestic litigation.

It was also important to educate lawyers on the relevance of international standards and to encourage them to rely on these standards before the courts. Advocates may often need substantial assistance in framing arguments based on international standards. There was a need to incorporate such material in continuing legal education programmes (including judicial studies programmes) and to encourage cooperation between lawyers and experienced national and international NGOs.

E. Legislatures

1. Legislative and Policy Strategies

Legislatures also have a role in implementing international law at the national level. Legislators can be mobilized to support disability issues and are well placed to in turn lobby their colleagues and the executive in support. It was important to ensure that persons with disabilities are represented as legislators. The involvement of legislators with disability groups serves as an effective link and should be greatly encouraged.

When legislation is initiated by the Executive, there is scope for the Legislature to amend such legislation before enactment. In doing so, provision can be made for persons with disabilities by ensuring that the legislation addresses their demands and needs. For example, building regulations should have specific requirements for the disabled inserted, provisions which would unlikely be included in a 'Disabled Persons Bill'. Lobbying by and through legislators is essential, and the existence of legislators with disabilities is a most obvious and powerful reminder to others without disability. Legislators may be more receptive to general legislation rather than laws specifically addressing disability issues. In Latin America the perception is that general laws are enforced but provisions specifically addressing disability and other human rights issues may well be ignored and remain unenforced.

2. Process: inclusion, representation and full participation

The Meeting sought to identify a range of strategies that could contribute to the effective national implementation of general human rights standards and disability-specific standards and to the development of effective national laws, policies and institutions conducive to the realisation of the human rights of persons with disabilities. The Meeting discussed issues of process, institutions, and substantive models for laws and policy.

Fundamental to the achievement of the goal of an inclusive society and the development of strategies that reflect the rights and needs of persons with disabilities is the question of process. Persons with disabilities must be full participants in the bodies and procedures by which both general laws and policies, as well as disability-specific ones, are formulated. This is essential for ensuring the responsiveness, legitimacy and effectiveness of such laws and policies, as well as reflecting the rights of persons with disabilities to full participation in the life of the community, including all forms of public decision-making.²⁷

This means not only that persons with disabilities should be full participants in special committees, advisory bodies or other bodies concerned with drawing up laws and policies on disability issues, but that persons with disabilities should be fully represented in all institutions of public decision-making: the executive government at the political level, the bureaucracy, the legislature, independent statutory bodies, and the judiciary. The recent experience in Uganda, under which the representation of persons with disabilities had been achieved at all levels of the political process and representative institutions through inclusive electoral laws was seen as an instructive model.

3. Public institutions

The Meeting identified two basic strategies in relation to public institutional development. The first was the need to develop institutions within and outside the organs of government that had distinct disability-related mandates. Just as had been the case for the integration of womens' rights and needs into government decision-making, the establishment of national machinery within government with the status and resources to ensure that disability issues were taken seriously was seen as central. The establishment of a disability rights ombudsperson, or the incorporation of a specific mandate into the work

of an existing human rights commission was another option. A second critical aspect was the need to ensure that disability issues are incorporated into all existing institutions and processes as a matter of course.

F. Other bodies and institutions

1. Governmental

It was noted that there are many other institutions that have developed which do not fit easily in any of the classic divisions of government reviewed above. These have varying degrees of autonomy according to the system in which they exist and the basis of their incorporation. Being somewhat distanced from core government they may well be more accessible as alternate fora for the receipt and investigation of complaints and for bringing to bear social or moral suasion and thus stimulating action by Government.

These institutions include:

- (a) Ombudspersons and similar offices, including officials concerned with protection and promotion of the rights of persons with disabilities;
- (b) Human rights or equal opportunity commissions or other advisory or regulatory commissions, which may have a general competence or specific competence in relation to discrimination against persons with disabilities; and
- (c) Public inquiries, which can investigate issues or incidents and develop policy/ law reform proposals.

2. Non-governmental and civil society institutions

- (a) Religious structures: leaders can exert powerful influence to change social attitudes to persons with disabilities and can mobilize sectors of the population in efforts to ensure the full enjoyment of human rights by persons with disabilities;
- (b) Cultural and Tribal processes: Tribal leaders may be mobilize members swiftly and effectively in enhancing the enjoyment of rights by persons with disabilities: the involvement of the Kabaka of Uganda and other traditional leaders in Uganda promoting polio vaccination in 1997;
- (c) Educational institutions: Universities and secondary schools are arenas where dissemination of information about disability issues should be undertaken;
- (d) Political processes: for example, political parties are encouraged to develop a policy on disability issues;
- (e) Employers: employers can adopt and encourage relevant and effective measures to accommodate and utilize talents of persons with disabilities by using international norms and standards relating to employment of persons with disabilities, in consultation with experts, organisations and research institutes;
- (f) Other professional organisations: in particular architects and the medical profession are in key positions to make valuable input in developing practices and regulations and should be targeted for sensitization and promotion of the rights of persons with disabilities in their own professional areas.

(g) Media and cultural institutions: The media can make especially important contributions through appropriate presentation of progress and obstacles in implementing disability-sensitive policies, programmes and projects. Public awareness of the contributions of persons with disabilities to the arts and culture and to the social and economic well-being of society as a whole can be effectively promoted through the media. Cultural institutions also, through celebration in public fora of the artistic and cultural contributions of persons with disabilities to the societies in which they live, can change perceptions. Cultural institutions may convene exchanges and dialogues focussing on the rich and varied skills, interests and aspirations of person with disabilities in artistic and cultural realms.

G. Strategies for implementation: challenges of globalisation and privatisation

The Meeting considered the role that multilateral development and aid agencies might play in advancing or thwarting the rights of persons with disabilities. It noted that globalisation has a significant impact on the rights of persons with disabilities. The Meeting recognised that poverty makes people more vulnerable to disability, and that disability reinforces and exacerbates poverty. Hitherto, little systematic effort seems to have been made to include promotion of the rights of persons with disabilities in the planning or implementation mainstream development projects.

Globalisation and the privatisation of industry, transportation, and public utilities present additional challenges to disability advocates. Many of the decisions that will determine the extent of inclusion or exclusion of person with disabilities from public and economic life, such as decisions relating to the construction of industrial and educational facilities and places of public accommodation, or the design and operation of transportation and telecommunications systems, fall increasingly under the control of private, corporate actors. Economic globalisation, and with it movement in developing nations towards modernisation of state and private institutions and systems, emphasize requirements of competitiveness at the expense of social services. This emphasis on competitiveness, with its accompanying hostility towards social welfare-related regulation, can be expected to result, if not counteracted in some way, in the exclusion of vulnerable populations from social and economic opportunity and advancement.

Many of the private actors driving these developments are multi-national corporations, which would be subject to regulation, including regulation relating to accessibility, in their countries of incorporation. Finding ways to ensure compliance by these international actors with international norms and standards relating to disability and to have appropriate regard to social welfare concerns is of critical importance.

The Meeting recognized that globalisation may have positive effects on the advancement and interests of persons with disabilities. The United Nations, along with other multilateral organisations, should be encouraged to implement such programs and initiatives as will capitalize on the opportunities that globalisation presents. For example, advances in telecommunications and international travel have facilitated the development of ties and working relationships between disability advocacy groups in various parts of the world. This developing trend should be strengthened by international organisations, multilateral aid agencies and non-governmental organisations, including multilateral human rights organisations.

65. While it was beyond the scope of the Meeting to spell out in detail how the interests of

persons with disabilities could be better served in connection with processes of globalisation, privatisation, and projects funded by multilateral assistance and international financial institutions, such as United Nations Development Programme (UNDP), the World Bank, the Meeting made the following recommendations:

(a) multilateral development agencies should encourage States to adopt special policies and legislation that promote the full inclusion of persons with disabilities in all aspects of social, cultural, and economic life;

(b) multilateral development agencies should develop and promote minimum standards relating to accessibility and related disability rights issues in connection with the projects they sponsor and fund;

(c) the United Nations should commission an in-depth study of the effects of globalisation and privatisation on persons with disabilities in various regions of the world;

(d) the United Nations and other multilateral agencies should encourage and help facilitate the development of working relationships between disability community advocate groups in different countries, utilizing the networks and partnerships they have worldwide, thereby encouraging the development of transnational strategies to respond to the problems we here identify; and

disability advocacy groups in countries/regions affected by the operation of transnational groups should explore such strategies as the filing of litigation against transnational corporations operating in their countries to enforce the extraterritoriality provisions of disability law in those corporations' home countries.

For example, section 102 of the Americans with Disabilities Act provides for extraterritorial application of the employment provisions of the A.D.A. in certain circumstances. That section has not yet been definitively interpreted by United States courts. Such suits, whether or not ultimately effective, could serve important politicizing and educative functions in countries where American transnational corporations operate.

The Meeting expressed its concern about the potential negative effects of free trade agreements, in particular multilateral agreements on investments, which could limit the ability of governments to legislate in relation to the rights of persons with disabilities. Specific examples of the issues involved include:

(a) the effects that privatisation of health systems may have on the enjoyment of the right to health care;

(b) the concern that the drive towards free movement of capital which seeks low taxation and low production costs will drive down wages and increase unemployment; and

(c) the impact on social security and pension system.

Footnotes

¹⁷ Part 1, Article 15 of the Constitution Act 1982

¹⁸ Adopted in 1994 by the National Consultative Council (NCC)

¹⁹ Article 13, (g)

²⁰ e.g.: Section 9 (3) of the Constitution of South Africa, 1997

²¹ See: <http://www.uneclac.cl>

²² For the text of the Bangalore principles, see Commonwealth Secretariat and Interights, *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of international Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992)

²³ See generally Andrew Byrnes, Jane Connors and Lum Bik (eds), *Advancing the human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (Commonwealth Secretariat, 1997)

²⁴ See Yuji Iwasawa, *International Law, Human Rights and Japanese Law* (Oxford: Clarendon Press 1998), 39

²⁵ See generally Martin Abregu and Christian Courtis, *La aplicaci n de los tratados sobre derechos humanos por los tribunales locales* (Buenos Aires, UNDP and Editores del Puerto, 2nd edition 1998)

²⁶ Litigation by people with disabilities could be specially effective in order to gain support by media and the general public

²⁷ See "Strategies to Enhance Social Protection and Reduce Vulnerability", Inter-American Children's Institute, Montevideo 1998

STRATEGIES FOR IMPLEMENTATION AT THE INTERNATIONAL LEVEL

Outline:

- A. General
- B. Using Existing United Nations Human Rights Mechanisms
 - 1. Reporting under the UN Human Rights Treaties
 - 2. Jurisprudence of the Treaty Bodies
 - 3. Increasing Awareness of Treaty Bodies regarding Disability Issues
- C. Enforcement Mechanisms
 - 1. UN Mechanisms - Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities
 - 2. Regional human rights institutions
 - 3. Other international bodies

A. General

Some general principles apply to all international implementation strategies. First, dissemination of documents should be in an alternate format and clear or plain language that is accessible to all persons with disabilities. One example of this is the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which already exist in larger print formats and as a fully accessible document on the Internet. Translation to additional languages other than the six official languages of the United Nations also should be encouraged, utilizing Internet for consultations and dissemination.

Secondly, documents need to be disseminated more widely and greater use made of electronic resources, such as the Internet, so that they reach persons with disabilities and non-governmental organizations concerned with disability rights. Thirdly, an investigation could be conducted by experts regarding the barriers that may exist that prevent persons with disabilities and groups from using international human rights procedures.

B. Using existing United Nations human rights mechanisms

1. Reporting under the UN human rights treaties

The treaty bodies should request States Parties to include in their reports specific information relating to the human rights of persons with disabilities. Efforts towards that end include the Guidelines for Periodic Reports adopted by the Committee on the Rights of the Child, the Committee on Economic, Social, and Cultural Rights, and the Commission on the Elimination of Discrimination Against Women.

The participation of NGOs concerned with disability rights should be encouraged, both for purposes of providing information for the general reports prepared by countries as well as for the alternative reports. Government officials should be encouraged to meet with those NGOs before they finalize their reports.

Since many States, especially developing countries, have expressed concern regarding the overwhelming task they face in preparing reports under the treaties, it is helpful to support their request for technical assistance from the United Nations in how they could better prepare reports. Such technical assistance should include a component for addressing rights of the persons with disabilities.

2. Jurisprudence of the treaty bodies

The formulation of general comments or general recommendations, one of the important avenues for the treaty bodies to provide authoritative interpretations of their instrument, should be further encouraged. They should include specific consideration of the rights of persons with disabilities. A good example of such a development was General Comment No. 5 of the Committee on Economic, Social, and Cultural Rights. In formulating such general comments or recommendations, it is important for the treaty bodies to receive input from NGOs as well as intergovernmental organisations concerned with disability rights.

3. Increasing awareness of treaty bodies regarding disability issues

States parties which have not already done so should ensure that persons with disabilities are among those nominated for and elected to the treaty bodies. Briefings on disability issues should be provided to the members of treaty bodies. They should include materials prepared by disabled persons and groups concerned with disability issues.

C. Enforcement mechanisms

Links between international human rights advocacy groups, including groups focussing on women's rights, and national disability rights advocacy groups need to be developed and fostered. Human rights clinics should be encouraged to take cases involving the human rights of persons with disabilities.

The most expansive use of treaty provisions should be promoted. For example, Article 26 of the International Covenant on Civil and Political Rights, which guarantees equal protection of the law, may be used to protect both civil and political rights as well as economic, social, and cultural rights. Disability is a status covered by the other status language of the anti-discrimination provisions included in most human rights treaties. Thus, discrimination on the basis of disability can be the subject of individual petitions filed under the various treaty provisions guaranteeing equality, as well as substantive rights.

1. UN human rights mechanisms - Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on the Status of Women

United Nations Charter-based human rights bodies, as well as treaty-based human rights mechanisms, should further incorporate the human rights of persons with disabilities as their substantive concerns and part of their agenda. The Special Rapporteur on Disability of the Commission for Social Development should further co-ordinate its efforts with the work of the Commission for Human Rights and its Sub-Commission, as well as with the Commission on the Status of Women.

A working group of the Commission on Human Rights should be established to address specific violations in the area of the rights of persons with disabilities. The working group should include persons with disabilities as its members. The Office of the High Commissioner for Human Rights should consider the possibility of holding the meetings of the working group in places around the world in order to ensure accessibility to persons with disabilities from the most number of countries.

The rights of persons with disabilities should be considered under all the human rights procedures, including the thematic, Resolution 1235 and Resolution 1503.

An example of the successful use of UN mechanisms to change a law on mentally disabled persons involved the treatment of mental patients in Japan, which was severely criticized in the United Nations Commission on Human Rights in the mid-1980s, leading to changes in Japanese law. There were more than 300,000 patients in mental hospitals in Japan in the mid-1980s. Most of them were confined involuntarily with the consent of the person responsible for the patient's protection (usually an immediate relative) under the Mental Hygiene Law of 1950. Some authors asserted that Japan's mental health care system ran counter to article 9 (4) of the International Covenant on Civil and Political Rights, because a person detained in a Japanese mental hospital had no effective means to challenge the lawfulness of his hospitalization. In 1984, some NGOs (especially the International League for Human Rights and the Disabled Peoples' International) criticized

Japan before the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1985, two other NGOs (the International Commission of Jurists and the International Commission of Health Professionals) sent a fact-finding mission to Japan and published a report in which they criticized the Japanese mental health system from the viewpoint of international law²⁸. As a result, Japan declared before the United Nations Sub-Commission in August 1985 that it would revise the Mental Hygiene Law.

2. Regional human rights institutions

Promotion and protection of persons with disabilities, including the right to litigate, should be considered by various regional organisations dealing with human rights, disabilities, childhood, women, and other related issues. There should be a focus on the elimination of discrimination against persons with disabilities. Those regions without human rights protection systems should be encouraged to develop both systems and mechanisms for consideration of individual complaints, including those involving disabled persons.

Regional fora on disability law and policy should be encouraged to develop concrete strategies for promoting the rights of persons with disabilities, such as the Decade for Persons with Disabilities in Asia and Pacific (1993-2002), adopted by Member States of the Economic and Social Commission of the Asian and Pacific Region (ESCAP).

The Meeting took note of this Asian and Pacific Decade of Disabled Persons which was proclaimed by ESCAP to promote the goals of full participation and equality of persons with disabilities in the mainstream of development process. The regional fora such as ESCAP may play a catalytic role in mainstreaming of the human rights of persons with disabilities through implementation of their policies and programmes.

3. Other international bodies

Intergovernmental and multilateral organisations, including specialized and development agencies, are urged to co-ordinate their efforts in promoting the rights of persons with disabilities.

ILO, WHO, UNESCO, UNICEF and UNIFEM are specifically encouraged to develop or expend programmes, policies, and instruments to ensure the full enjoyment of the human rights by persons with disabilities.

The United Nations Centre for Human Settlements (UNCHS / Habitat) is urged to develop technical models for housing to promote independent living of persons with disabilities and use those models for organizing its conferences.

Member States of the United Nations should be encouraged to use the advisory service of the United Nations Secretariat to address issues related to disability.

One example would be the provisions of education on the application of international norms and standards relating to persons with disabilities for government officials, judges, practitioners, and the media through seminars and materials.

DESIRABILITY OF A NEW INTERNATIONAL INSTRUMENT ON HUMAN RIGHTS OF PERSONS

WITH DISABILITIES?

- A. Benefits and Drawbacks of a new International Instrument
- B. Possible Form and Core Content of a new International Instrument

The Meeting considered the desirability of elaborating an international instrument to promote and protect the human rights of persons with disabilities. The Meeting noted that a proposal made in the late 1980s for a new convention on the human rights of persons with disabilities had not been proceeded; the international community had instead devoted its efforts to the development of The Standard Rules on the Equalization of Opportunities for Persons with Disabilities. The Meeting considered the possibility and feasibility of a new instrument and noted that the Organisation of American States was presently engaged in drafting a regional instrument on the subject.

A. Benefits and drawbacks of a new international instrument

It was recognized that there were advantages and disadvantages in formulating a new international instrument specifically addressing the human rights of persons with disabilities. Prior efforts by the international community to address the rights of persons with disabilities have been inadequate or too limiting of rights. Some norms have had the effect of limiting the State's responsibility to integration 'within the limits of the State's capacity'; while others limit the responsibility of the State based on the 'capacity' of individuals to exercise their rights. Concern was expressed that a new instrument might have the unintended consequence of marginalising persons with disabilities, and that discrimination could be perpetuated by attention to the rights of persons with disabilities in a special instrument. The severe resource constraints, which already limited the efficiency and effectiveness of the United Nations human rights mechanisms, also needed to be borne in mind.

On the other hand, many of the existing norms, principles, declarations, standards, and guidelines dealing with disability issues are dispersed through various instruments; some are not sufficiently specific, legally binding; others are not overall, they do not ensure widespread and effective legally operative freedom from discrimination on the basis of disability. A new convention would afford the opportunity to revise or discard existing standards or statements of rights which were inconsistent with current thinking about the human rights of persons with disabilities or which were unsatisfactory in other respects. It was observed that group-specific instruments, for example, those guaranteeing the rights of children, women, minorities, and indigenous peoples, have focused attention on issues that would have remained much less visible under the general human rights instruments.

It was further observed that the diversity and dispersal of existing norms, principles and standards does not serve the needs of uniformity or universalization of rights or of a holistic approach to effective implementation of those norms and other standards. A comprehensive international instrument may also be a convenient format for promoting common standards, guiding domestic policy-makers through use of such common standards, legislators and others to make these standards legally obligatory and practically effective. In turn, the use of common international standards renders reporting and monitoring easier and more rational, providing minimum standards that will be applied in all countries while not precluding the adoption of higher national standards in some States.

It was noted that in some countries there is a need for a treaty because other laws do not

provide such minimum protections while persons with disabilities in such countries are in need of greater legal protection. In such jurisdictions, a treaty would impact positively on the development of domestic legislation for the promotion and protection of the rights of the persons with disabilities.

B. Possible form and core content of a new international instrument

The Meeting suggested that such an instrument should include the fundamental human rights principles set out in this report. The Meeting underlined the importance of ensuring that the formulation of any new convention not dilute existing universal human rights guarantees by creating a separate instrument that qualifies the substance of those rights in the case of persons with disabilities. Moreover, the draft of a new international instrument should include appropriate input of persons with disabilities.

The Meeting also noted that the project of developing a new instrument needs to be approached with realism, in view of the existing strains on the United Nations human rights system, such as heavy resource constraints and the burden imposed on States by existing reporting requirements for treaty mechanisms.

Footnotes:

²⁸ See "Human Rights and Mental Patients in Japan", Report of a Mission on Behalf of The International Commission of Jurists and The International Commission of Health Professionals, 1985

CONCLUDING REMARKS: FUTURE ACTION

The Meeting urged:

- Governments, non-governmental organizations, United Nations and its agencies, other international and intergovernmental organisations, as well as multilateral development agencies, and the academic community, to promote an active and visible policy of adopting international standards and norms applicable to persons with disabilities.
- The international community to support strongly strengthening and expanding effective partnerships between Governments, the United Nations and its agencies and other international organizations, multilateral development agencies, civil society, (including the private sector) to ensure that such collaboration will accelerate the efforts of national and international organisations of persons with disabilities to undertake concerted action to promote the rights of persons with disabilities.
- Regional fora on disability law and policy should be encouraged to develop concrete strategies for promoting the rights of persons with disabilities.
- United Nations human rights bodies as well as treaty based human rights mechanisms to incorporate further the human rights of persons with disabilities as substantive concerns and part of their agenda. The Committee on the Convention on the Rights of the Child and The Committee on the Convention on

Elimination of All Forms of Discrimination against Women are urged to further their work focussing on the rights of children and women with disabilities, respectively.

- The Special Rapporteur on Disability of the Commission for Social Development to further co-ordinate his efforts with the work of the Commission for Human Rights, its Sub-Commissions and other relevant bodies.
- Consideration be given to establishing a working group of the Commission on Human Rights to address specific violations in the area of the rights of persons with disabilities. The working group could include persons with disabilities as its members. The Office of the High Commissioner for Human Rights could consider the possibility of holding meetings of the working group in places around the world in order to ensure accessibility to persons with disabilities from the maximum number of countries.
- The rights of persons with disabilities could be considered under all human rights procedures, including thematic, 1235 (violations), and 1503 (confidential).

The Meeting recommended that, as part of the follow up, the Division for Social Policy and Development of the United Nations Secretariat:

(a) undertake the revision of the draft 'Compilation of International Norms and Standards relating to Disability' in the lights of comments made by participants in the Meeting, and consider the appointment of a consultant to finalize the document in consultation with interested groups;

(b) widely disseminate the document submitted by the Division for Social Policy and Development (i) "Compilation of International Norms and Standards relating to Disability";(ii) the report of this meeting as reference tools for promoting the use of international norms and standards in domestic legislation and advocacy;

(c) collect (i) disability legislation world-wide and (ii) best practices in application of international norms and standards to promote rights of persons with disabilities and develop a disability law library, making appropriate use of the electronic resources available, so this will be accessible to all;

(d) organize, subject to available resources, regional / interregional fora for substantive dialogue on disability law and policy between policy makers and experts (in legal and other fields), non-governmental organisations, academic institutes, and appropriate inter-governmental bodies, international institutions and agencies to develop strategies for practical action to promote the rights of persons with disabilities;

(e) examine the desirability of a new international instrument and the form and content of such an instrument; and solicit input and proposals for that meeting from interested parties;

LIST OF DOCUMENTS AND INTERNATIONAL INSTRUMENTS RELATING TO DISABILITY

List of Participants (below)

I. Reports

Documents

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