

## SUCCESSFUL AND FAILED ATTEMPTS TO CREATE HUMAN RIGHTS STANDARDS

The former Commission on Human Rights (the Commission) had been involved in the development of human rights standards from the time of its creation. The Commission normally set up an open ended working group that would be given the mandate to draft a particular instrument. States that were not members of the Commission and NGOs could also participate in these working groups, which typically met between the Commission's sessions. At its last session, the Commission had before it two draft international instruments, the draft International Convention for the Protection of All Persons from Enforced Disappearance and the draft Declaration on the Rights of Indigenous Peoples. Both these instruments were forwarded, as is the normal practice, to the General Assembly for adoption. The General Assembly itself had also set up an ad hoc committee to draft another international instrument, the draft Convention on the Rights of Persons with Disabilities, which also came before it for adoption in 2006.

### OVERVIEW

After many years of negotiations, two new international human rights treaties were adopted by the General Assembly in 2006.<sup>1</sup> The first new human rights treaty, the *Convention on the Rights of Persons with Disabilities* (the Disabilities Convention), was welcomed by civil society as the long-awaited tool needed to empower persons with disabilities. The Disabilities Convention does not create new human rights but clarifies how existing human rights standards apply to the needs and situations of persons with disabilities. It prohibits discrimination against persons with disabilities in relation to the enjoyment of these rights. It also creates a new treaty-monitoring body, the **Com-**

**mittee on the Rights of Persons with Disabilities**, which will supervise the implementation of the Disabilities Convention. In cases where a State has ratified the optional protocol to the Convention, the Committee will also be able to receive complaints from individuals about violations of their rights under the Convention. In the words of Mr. Kofi Annan, who was at the time the United Nations (UN) Secretary-General, the adoption of the Disabilities Convention promises the beginning of a new era when 'all those living with disabilities around the world become fully fledged citizens of their societies'.<sup>2</sup>

The second major achievement in terms of codifying and developing international human rights

<sup>1</sup> Both Conventions were adopted by consensus, please see the section on the General Assembly.

<sup>2</sup> UN Secretary-General Kofi Annan, in his message delivered to the General Assembly on 13 December 2006. Available at <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm>.

was the adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance* (the Disappearances Convention). The International Committee of the Red Cross (ICRC) welcomed the adoption of the Convention, noting that 'for the first time, an international treaty requires states to incorporate the crime of enforced disappearance into their domestic legislation and to prosecute and punish the perpetrators of such crimes'.<sup>3</sup> The value added of the Disappearances Convention in relation to other human rights treaties is its identification of 'enforced disappearance' as a self-standing human rights violation. The Convention also prohibits secret detention<sup>4</sup> and establishes the rights of families to get information about what has happened to and the location of their relatives who have been detained.<sup>5</sup> It establishes a new treaty-monitoring body, the **Committee on Enforced Disappearances** (the Committee), to monitor the implementation of the Convention.<sup>6</sup> The Committee can also follow up on individual cases of disappearances at the request of the relatives or other persons, and make recommendations to the State on measures to locate and protect the disappeared person.<sup>7</sup> It can receive complaints from individuals about violations of their rights under the Convention, when the State in question has recognised the ability of the Committee to do so.<sup>8</sup> It can also carry out visits, with the agreement of the concerned State, when it receives reliable information indicating grave violations by the State.<sup>9</sup>

Both Conventions have not yet entered into force,<sup>10</sup> and are therefore not yet operational. The Disabilities Convention will be opened for signature by States and regional integration organisations on 30 March 2007 and will become operational when at least 20 States have ratified or acceded to it.<sup>11</sup> The Disappearances Convention is currently open for signature, and also requires 20 ratifications or accessions to enter into force.

In relation to emerging human rights procedures and standards, the Human Rights Council extended the mandate of the Working Group to consider options for the elaboration of an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* for two years.<sup>12</sup> The Working Group has after three years of discussion on possible options, been given the **mandate to draft an optional protocol to**

the *International Covenant on Economic, Social and Cultural Rights*. There was a disagreement between States during the Working Group's last session with a minority arguing that any draft prepared by the Chairperson should reflect the different options presented by all parties.<sup>13</sup> To accommodate the views of this minority and facilitate the adoption of the Resolution extending the mandate of the Working Group by consensus, the Resolution requests the Chairperson of the Working Group to prepare a draft text, which 'takes into account all views expressed during the sessions of the Working Group, and which includes draft provisions corresponding to the main approaches outlined in her analytical paper'.<sup>14</sup>

In contrast with these positive developments, the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) was unaccountably delayed by the General Assembly.<sup>15</sup> A major gap in international human rights law therefore continues to persist and more effort will be required from all stakeholders to ensure that the General Assembly adopts the Declaration.

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### ***Convention on the Rights of Persons with Disabilities***

There have been calls for a convention protecting and promoting the rights of people with disabilities since the mid-1980s. These proposals were rejected however based on the argument that existing human rights conventions adequately covered persons with disabilities.<sup>16</sup> After years of campaigning on this issue, the General Assembly established an Ad Hoc Committee to consider the need for a convention in December 2001. In a series of eight meetings over the course of five years, the text of the Disabilities Convention was drafted. The process was notable for the substantial contribution of NGOs in the drafting of the Disabilities Convention, especially organisations of persons with disabilities.<sup>17</sup>

The Disabilities Convention was welcomed by disabled persons' organisations and others as a significant advancement of the rights of and inclusion of persons with disabilities as equal members of society.<sup>18</sup> The objective of the Disabilities Convention is to 'promote, protect

3 ICRC, 'ICRC applauds adoption of UN Convention Against Forced Disappearances', Press Release, (20 December 2006), available at [www.icrc.org/Web/Eng/siteeng0.nsf/html/enforced-disappearance-news-201206](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/enforced-disappearance-news-201206).

4 Article 17.

5 Article 24.

6 Article 26.

7 Article 30.

8 Article 31.

9 Article 33. These provisions are discussed in greater detail below.

10 Each treaty sets out the conditions under or the date on which it 'enters into force'. The treaty only becomes operational after these conditions are met. States that are parties to the treaty are required to implement the treaty from the date it becomes operational.

11 By signing a treaty, a State indicates that it has preliminarily endorsed the instrument and is examining it domestically to consider ratifying it. Signing a treaty obliges the State to refrain from acts that would defeat or undermine the treaty's objective and purpose. Both ratification and accession signify the agreement by a State to be legally bound by the terms of the treaty, but involve different procedures. States that ratify a treaty will sign it first. Those that accede to a treaty do so directly without the preliminary signature. The formal procedure of ratification and accession varies according to the national legal system of each State, but mostly involves formal approval by the parliament.

12 Human Rights Council *Resolution 1/3*.

13 See the International Service for Human Rights' (ISHR) report on the discussions at the Working Group, available at [www.ishr.ch/hrm/WGOPICESCR/3rdSession.pdf](http://www.ishr.ch/hrm/WGOPICESCR/3rdSession.pdf) and ISHR's report on the discussions at the first session of the Council available at [www.ishr.ch/hrm/HRC/Session1/Item4WGOPICESCR.pdf](http://www.ishr.ch/hrm/HRC/Session1/Item4WGOPICESCR.pdf). See also the section on the Human Rights Council.

14 Paragraph 2. See ISHR's report on the discussions at the first session of the Human Rights Council available at [www.ishr.ch/hrm/HRC/Session1/Item4WGOPICESCR.pdf](http://www.ishr.ch/hrm/HRC/Session1/Item4WGOPICESCR.pdf).

and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.<sup>19</sup> The Disabilities Convention defines 'persons with disabilities' as including 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and active participation in society'.<sup>20</sup> The principle of non-discrimination is already a well-established principle of international human rights law. Prior to the adoption of the Disabilities Convention, 'disability' was not specifically listed as a prohibited ground of discrimination, except under the *Convention on the Rights of the Child*, but was considered by treaty-monitoring bodies to fall within the prohibition of discrimination based on 'other status'.<sup>21</sup> The Disabilities Convention strengthens the **principle of non-discrimination** by specifically prohibiting discrimination against persons with disabilities in all areas of life.

The Disabilities Convention extensively defines key terms used in the Convention. 'Discrimination on the basis of disability' is defined as any distinction, exclusion or restriction based on disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of any of the human rights of persons with disabilities.<sup>22</sup> This means that the right not to be discriminated against is violated if a certain measure or decision by the government has the effect of hindering persons with disabilities in the exercise of their rights, even if the intention behind the measure was not discriminatory. The denial of 'reasonable accommodation'<sup>23</sup> is also covered within the scope of prohibition of discrimination.

While the Disabilities Convention is a comprehensive human rights treaty, it does not create new rights for persons with disabilities.<sup>24</sup> It focuses on particular aspects of well-established rights found in the body of international human rights law, and reaffirms them in the context of disability. This includes both traditional civil and political and economic, social and cultural rights as well as specific rights and issues that are closely linked to disability such as the right to live independently and to personal mobility.<sup>25</sup> While the content of the rights under the Disabilities Convention is similar to other human

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The proposed amendment to 'defer consideration and action on' was adopted by the Third Committee by 82 votes in favour, 67 against, and 25 abstentions.

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Landmine Survivors Network, *Disability, Rights, Advocacy*, (Landmine Survivors Network), 2006.

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For further details on drafting of the Convention, please see the section on the General Assembly.

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Rehabilitation International, 'Global Disability Network Celebrates Adoption of the UN Convention on the Rights of Persons with Disabilities', Press Release, (13 December 2006), available at [www.rehab-international.org/publications/RI\\_PressRelease\\_UNAdoption\\_13Dec06\\_final.doc](http://www.rehab-international.org/publications/RI_PressRelease_UNAdoption_13Dec06_final.doc).

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Article 1.

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Article 1 (2).

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Article 2 (1), *International Covenant on Civil and Political Rights (ICCPR)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

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Article 2.

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Article 5 (3) provides that 'in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.' The term 'reasonable accommodation' is defined in Article 2 of the Disabilities Convention as the '[...] necessary and appropriate modification and adjustments not imposing an undue burden, where needed in a particular case [...] that have to be made in order to 'accommodate' the needs of persons with disabilities. This insistence on the obligation to provide reasonable accommodation is a distinguishing feature of the Disabilities Convention. What is remarkable about the Disabilities Convention is that the test to determine if this accommodation is reasonable has to be made in each particular case, thus placing the individual at the centre of attention. Again, this has the potential to become a strong tool for persons with disabilities to effectively claim their rights.

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Landmine Survivors Network, 'U.N. Adopts Landmark Convention, Protecting Rights of Persons with Disabilities', Press Release, (13 December 2006), available at [www.landminesurvivors.org/news\\_feature.php?id=112](http://www.landminesurvivors.org/news_feature.php?id=112).

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The Disabilities Convention also has specific provisions for women and children with disabilities. It also addresses the right to life; the right to equal recognition before the law; the right to (equal) access to justice; the right to liberty and security of the person; the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment; the right to be free from exploitation, violence and abuse; the right to have the integrity of the person protected; the right to liberty of movement; the right to live independently and to be included in the community; the right to personal mobility; the right to freedom of expression and opinion; the right to have one's privacy respected; the right for respect of home and family including the right to have appropriate information for family planning; the right to education; the right to health including reproductive health; the right to work and employment; the right to an adequate standard of living; the right to participate in political, public and cultural life, as well as leisure and sport.

rights instruments, the focus is on how these rights may be effectively enjoyed by persons with disabilities. The Disabilities Convention therefore serves to clarify the obligations that States have towards persons with disabilities and the measures they need to take to ensure the effective enjoyment of their rights. For instance, the Disabilities Convention reaffirms the right of persons with disabilities to education without discrimination and on the basis of equal opportunity.<sup>26</sup> It specifies that States are obliged to not only welcome children with disabilities in the public education system but to ensure that they receive the (additional) support they require to effectively benefit from their formal access to the education system.<sup>27</sup> Once again, the Disabilities Convention places attention on the individualised support. It is obvious that persons with disabilities have a greater need for individual solutions, and the Disabilities Convention takes this into account. The case of education is an example of how the Disabilities Convention focuses on the concrete application of certain rights to the situation of persons with disabilities, and how abstract rights can change in scope depending on the individual who claims them.

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#### The Committee on the Rights of Persons with Disabilities (the Committee)

Article 34 establishes a committee, composed of 12 to 18 experts, who will oversee the implementation of the Disabilities Convention. When nominating these experts, State parties are required to consult closely with, and actively involve persons with disabilities, as well as ensure the participation of experts with disabilities.

The Committee is modelled on existing treaty-monitoring bodies and has been mandated to consider reports submitted by State parties. The Disabilities Convention incorporates a specific provision inviting States to prepare their reports in an open and transparent process, including through close consultations with persons with disabilities.<sup>28</sup> While some treaty-monitoring bodies have encouraged States to consult with civil society in the preparation of their report, the inclusion of a provision to this effect in the treaty is a new and welcome development. In view of the reform of the treaty-monitoring sys-

tem, the Disabilities Convention includes a provision requiring the Committee to **consult with the existing bodies** to avoid overlap.<sup>29</sup>

The Committee will also be able to receive complaints from individuals or groups of individuals about violations of their rights if the State in question has ratified or acceded to the optional protocol to the Disabilities Convention.<sup>30</sup> The optional protocol also enables the Committee to dispatch country visits in cases of grave or systematic violations of the Disabilities Convention.<sup>31</sup> The optional protocol will enter into force on the 30<sup>th</sup> day after the deposit of the tenth instrument of ratification.<sup>32</sup>

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#### Innovative provisions of the Disabilities Convention

The Disabilities Convention includes a number of interesting and innovative provisions in addition to those identified above. Firstly, and this is certainly because of the particular spirit in which the Disabilities Convention was drafted, it provides for the text of the Convention to be made available ‘in accessible formats’.<sup>33</sup> This shows a remarkable attention to the ‘raison-d’être’ of human rights in general: if the addressees of rights cannot access them, their purpose is defeated. The second novelty is the possibility for regional integration organisations to become a party to the Disabilities Convention.<sup>34</sup> This will for instance allow for the accession by the European Union (EU) to the Disabilities Convention. In combination with the possibilities offered by the optional protocol, this could offer new opportunities to address EU-wide violations. It also reflects new trends in international law and could set a precedent for future treaties.

To conclude, it has to be pointed out that all of the above advantages and new features of the Disabilities Convention for the time are merely words on paper. As stated by former UN Secretary General Kofi Annan, much work remains to be done to produce the results that are aspired from the Convention. The first step will be for States to sign and ratify the Convention. They will then need to undertake the required adaptations of their domestic legal systems, and administrative and social practices. The most crucial and difficult phase after the adoption of any

<sup>26</sup>  
Article 24.

<sup>27</sup>  
Article 24 (2).

<sup>28</sup>  
Article 35 (4).

<sup>29</sup>  
See section on treaty-monitoring  
bodies.

<sup>30</sup>  
Article 1, optional protocol to the  
Disabilities Convention.

<sup>31</sup>  
Article 6, optional protocol to the  
Disabilities Convention.

<sup>32</sup>  
This is subject to the prior entry into  
force of the Disabilities Convention.

<sup>33</sup>  
Article 49.

<sup>34</sup>  
Article 42.

international instrument is its **implementation** and that is where civil society continues to play its instrumental role. Only a quick and effective implementation of the Disabilities Convention will lead to the promised improvements for persons with disabilities.

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***International Convention for  
the Protection of All Persons from  
Enforced Disappearance***<sup>35</sup>

The *International Convention for the Protection of All Persons from Enforced Disappearance* (the Disappearances Convention) was adopted both by the Human Rights Council and the General Assembly by consensus. The Disappearances Convention is the result of over 25 years of lobbying by States, NGOs, and the families of the disappeared.

Enforced disappearances are one of the worst human rights violations that affect both the victims, who are taken away in silence, and their families, who may suffer uncertainty about their fate. While in the past enforced disappearances were dealt with under broader provisions in other human rights treaties,<sup>36</sup> the Convention now clearly identifies ‘enforced disappearance’ as a self-standing human rights violation.<sup>37</sup> Enforced disappearance is defined as the ‘arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’.<sup>38</sup> The Convention also defines widespread or systematic disappearances as a crime against humanity, which can attract consequences under applicable international law.<sup>39</sup>

States that become party to the Convention must incorporate a **specific crime of ‘enforced disappearance’** in their national laws,<sup>40</sup> they must investigate complaints and reports of enforced disappearance and bring those responsible to justice,<sup>41</sup> including suspected perpetrators from other countries who are present in their territory.<sup>42</sup> The Disappearances Convention

also prohibits ‘refoulement’<sup>43</sup> or extradition in cases where there is a risk that an individual might be subject to enforced disappearance.<sup>44</sup> To safeguard the protections against enforced disappearances, the Convention provides that enforced disappearances cannot be justified even in exceptional circumstances, including war, threat of war, political instability or public emergency.<sup>45</sup>

In the past, the greatest frustration of victims has been the impunity of individuals when it comes to investigations into allegations of enforced disappearance. In order to resolve this problem, the Convention identifies those who should be held criminally responsible, including anyone who was either directly involved or a superior official who knew about the situation but failed to take the necessary actions that could have prevented the violation from taking place.<sup>46</sup>

The Convention is also particularly thorough in terms of jurisdiction.<sup>47</sup> Each State party is responsible for offences (1) committed in its territory; (2) allegedly committed by one of its nationals; and (3) where the victim is one of its nationals. The Convention also calls on all State parties to actively pursue perpetrators of enforced disappearances and to cooperate through extraditions and mutual legal and investigatory assistance. This facilitates the capacity of a victim to make his/her complaint, even if the enforced disappearance took place in another country. In this respect, the Convention is also innovative in its definition of ‘victims’ as it takes into account the family and relatives of the person who has undergone an enforced disappearance.<sup>48</sup> The Convention recognises the right of victims to know the truth<sup>49</sup> regarding the circumstances of the enforced disappearance, the fate of the disappeared person, the progress and results of the investigation regarding the events that took place, and to obtain reparation<sup>50</sup> for damages caused. The Convention also pays special attention to the children of parents who have been disappeared or children who have themselves been disappeared, requiring States to prevent and punish any falsification of their identities.<sup>51</sup> States are also obligated to search for and identify such children and to return them to their families of origin and to review and annul any adoption or placement procedure that took place in the context of an enforced disappearance.<sup>52</sup>

35 Human Rights Council *Resolution 1/1* and General Assembly *Resolution 61/177*. For further details, please see the Human Rights Council and General Assembly sections.

36 For instance Articles 7 and 9 of the ICCPR.

37 Article 1 (a).

38 Article 2.

39 This could include other States claiming universal jurisdiction over perpetrators of crimes.

40 Article 4.

41 Article 3.

42 Article 9.

43 The expulsion of persons who have the right to be recognised as refugees.

44 Article 16.

45 Article 1.

46 Article 6.

47 Article 9.

48 Article 12.

49 Article 18.

50 Article 24.

51 Article 25.

52 Ibid.

The Convention also makes secret detention illegal and obliges States to guarantee due process rights and judicial review.<sup>53</sup>

done. The success of the Convention will depend purely on whether States ratify it and practically implement it. This will demand a great amount of political will on the part of States and further lobbying by civil society.

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#### The Committee for the Protection of All Persons from Enforced Disappearance

The Convention establishes the Committee for the Protection of All Persons from Enforced Disappearance (the Committee), composed of ten experts, which will oversee the implementation of the Convention. The Committee is also called on to cooperate with all relevant organs in order to protect persons against enforced disappearances.<sup>54</sup> It is allowed to receive complaints, either from individuals or other State parties, concerning enforced disappearances if the State in question has recognised the competence of the Committee to do so.<sup>55</sup> It is worthy noting that the Committee can also follow up on individual cases of disappearances at the request of relatives or other persons, and make recommendations to the State on measures to locate and protect the disappeared person.<sup>56</sup> The Committee can under this provision also recommend that the State take interim measures to locate and protect the person.<sup>57</sup> If the Committee receives information that a State party is seriously violating the provisions of the Convention, it may, with the agreement of the State concerned, carry out a visit to the country.<sup>58</sup> If the Committee receives information which appears to contain well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis, it may also bring the matter to the attention of the General Assembly.<sup>59</sup>

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#### Future Implications

- <sup>53</sup> Articles 17 and 18. This Convention fills an important gap in the protection of human rights. Civil society has now been given a powerful tool to address cases of enforced disappearance. The Convention creates a number of protections for persons from enforced disappearances and new avenues for individuals and families to complain about disappearances. The Committee itself is endowed with strong monitoring powers and its ability to carry out visits and requests for finding disappeared persons are welcome innovations. Still, in conclusion, further work remains to be
- <sup>54</sup> Article 28.
- <sup>55</sup> Articles 31 and 32.
- <sup>56</sup> Article 30.
- <sup>57</sup> Ibid.
- <sup>58</sup> Article 33.
- <sup>59</sup> Article 34.

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