

INTERNATIONAL DISABILITY CAUCUS

Updated contribution on the draft text of

A Comprehensive and Integral
International Convention on Protection
and Promotion of the Rights and Dignity
of Persons with Disabilities

Fifth Session of the Ad Hoc Committee

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THIS DRAFT TEXT IS NOT A FINAL PROPOSAL BUT A
WORKING PAPER THAT IS SUBJECT TO CHANGE

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Since the Fourth Ad Hoc Committee meeting, the members of the International Disability Caucus have continued their analysis and improvement of draft articles 8 through 15 and 24 bis.

In this paper, the work on these articles is presented. Article 14 is still under consideration and will be presented early in the first week of this session.

Thank you for your attention.

International Disability Caucus on the Convention members;

Australian Federation of Disability Organizations
Bizchut , The Israel Human Rights Center for People with Disabilities
Canadian Association for Community Living
Center for International Rehabilitation
Council for Canadians with Disabilities
Danish Organization of disabled people
Disability Australia Ltd.
Disabled Peoples International
European Disability Forum
Forum of people with disabilities
Forum for Human Rights of people with disabilities – Costa Rica
Fiji Disabled People's Association
Handicap International
Inclusion International
Inter-American Institute on Disability
International Disability Convention Solidarity in Korea
Japan Disability Forum
Landmine Survivors Network
Lebanese Council of Disabled People LCDP
National Disability Party
National Association of Community Legal Centres
National Disability Council of Netherlands
People with Disability Australia Incorporated
People Who
Rehab Group
Rehabilitation International
Support Coalition International
World Blind Union
World Federation of the Deaf
World Federation of the Deafblind
World Network of Users and Survivors of Psychiatry
World Union for Progressive Judaism

Draft Article 8

RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT

1. States Parties recognize and protect the inherent right to life of all persons with disabilities, and shall take all necessary measures to ensure its effective enjoyment by girls and boys, women and men in all stages of life.
2. The right to life also includes the right to survive and to develop on equal basis with others.
3. Disability is not a justification for the termination of life.
4. States Parties shall undertake effective measures to the prohibition of compulsory abortion at the instance of the State based on the pre-natal diagnosis of disability.
5. States Parties shall also prohibit all medical, biological and other experiments reducing the quality of life of persons with disabilities, or seeking to remedy a disability against an individual's will.
6. In case of natural and humanitarian disasters, including wars and armed conflicts, states parties shall secure safety of girls and boys, women and men with disabilities on equal basis with others, taking into account each individual's needs

Draft Article 9

EQUAL RECOGNITION AS A PERSON BEFORE THE LAW

1. States Parties recognize that persons with disabilities have the right to recognition as persons before the law.¹
2. States Parties shall recognize that persons with disabilities have a legal capacity identical to that of other persons and shall accord them equal rights and opportunities to exercise that capacity in civil, political, economic, social and cultural matters and in any other field.²
3. States Parties shall ensure that children with disabilities have rights and opportunities to express their views on matters concerning them, their views being given due weight in accordance with the child's age and maturity, equal to those of non-disabled children.³
4. States Parties shall ensure that persons with disabilities are entitled to use support to exercise their legal capacity, including assistance to understand information and to express their decisions, choices and wishes; and that such support is adequate to meet the person's requirements and respects the legal capacity, rights and freedoms of the person.⁴
5. States Parties shall provide persons with disabilities with adequate information and resources to establish networks for supported decision-making.⁵

¹ NOTE: Increasing use of cognitive abilities to define personhood puts people with disabilities at risk of being deprived of all rights by being defined as non-persons. The right to recognition as persons before the law is a prerequisite to legal capacity and should be included in this article.

² NOTE: We have combined the CEDAW model and the Working Group text for this paragraph. We have kept the stronger term "identical" (which is in CEDAW) rather than "equal" to compare the legal capacity of people with disabilities with that of other people. We have added "equal rights" to "equal opportunities" for the exercise of legal capacity, since there has been some question about whether surrogate decision-making could be considered an exercise of the person's own legal capacity by another person. In order for "legal capacity identical to that of others" to be meaningful, there has to be an equal right to exercise it for oneself. We have replaced the second sentence from CEDAW, on instances where equal legal capacity is particularly recognized, with a comprehensive inclusion of all matters. People with disabilities have been deprived of legal capacity and the right and opportunity to exercise it in virtually every facet of life and so a comprehensive treatment is desirable.

³ NOTE: Children with disabilities are at risk of being treated differently from other children when it comes to participation in decision-making. This paragraph guarantees equal enjoyment of the rights in CRC article 12.

⁴ NOTE: We have changed the language from the Working Group text to focus on the right of people with disabilities to use supported decision-making and to have such support meet their own requirements. We have also made the language in the last phrase more positive

⁵ NOTE: This paragraph provides for measures to implement the use of supported decision-making.

NOTE: Our text for article 15 incorporates economic rights of people with disabilities that were dealt with in the Working Group text for article 9.

NOTE: Our text does not include provision for substituted decision-making. It is against the interest of people with disabilities to allow for restriction of the right to make decisions, on the basis that a person has difficulty in doing so. This is unfair and represents a punitive and paternalistic approach to people with disabilities rather than accommodation for difference and equal effective enjoyment of rights.

Draft Article 10
LIBERTY AND SECURITY OF THE PERSON

1. States Parties shall ensure that persons with disabilities:
 - (a) enjoy the right to liberty and security of the person, without discrimination based on disability;
 - (b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty shall be in conformity with the law, and in no case shall be based on disability.⁶
2. States Parties shall take effective measures to eliminate all barriers to the exercise and enjoyment by persons with disabilities of rights under national and international law generally applicable to persons deprived of their liberty, and in particular, shall ensure that, if persons with disabilities are deprived of their liberty, they are:
 - (a) treated with humanity and respect for the inherent dignity of the human person, including access to necessary services and assistive devices, and access to their support networks;
 - (b) entitled to receive reasonable accommodation in process, communications, languages and facilities at all stages of arrest and detention;
 - (c) ensured access to all programs and services generally available to persons under arrest or detention;
 - (d) provided with adequate information in accessible formats and languages as to their legal rights and the reasons for the deprivation of liberty at the time this occurs;
 - (i) in the case of a criminal arrest or detention, brought promptly before a court and entitled to trial within a reasonable time or release;
 - (ii) entitled without delay to take proceedings before a court to determine the lawfulness of any deprivation of liberty, to have a prompt decision and to be released if the deprivation of liberty is unlawful;

⁶ NOTE: We agree with the Working Group text as it stands. We oppose language that would weaken subparagraph b by adding the term "solely" or "exclusively" – this would allow disability to be used as one factor among others to justify deprivation of liberty.

(iii) provided with access to legal assistance, and other services necessary to ensure accessibility, in such proceedings.⁷

3. States Parties shall ensure that any person with a disability who has been a victim of unlawful deprivation of liberty, including deprivation of liberty based on disability, shall have an enforceable right to compensation.⁸

⁷ NOTE: Paragraph 2 guarantees the rights of people with disabilities who are deprived of their liberty. The Working Group text combines procedural rights with the right to humane treatment and dignity while in detention. We have added elimination of barriers, accessibility and accommodation which are relevant to both procedural rights and humane treatment. We have also brought the requirement for court control of any detention into conformity with ICCPR article 9.

⁸ NOTE: This text uses the ICCPR language for compensation and includes deprivation of liberty based on disability, which has been prohibited by paragraph 1b.

Proposed New Article
ACCESS TO JUSTICE

1. States Parties shall take appropriate and effective measures to ensure accessibility of the legal system to persons with disabilities, including but not limited to the following:
 - (a) accessibility of judicial proceedings, including modification of evidentiary and other procedures so that persons with disabilities can serve as witnesses, jurors, lawyers, judges and in other roles;
 - (b) elimination of physical, social, informational, communicational, linguistic or other barriers to the effective exercise of rights and participation in all official proceedings concerning the person or in which the person has an interest;
 - (c) accommodation in law enforcement processes, including investigative procedures;
 - (d) provision of accessible services to crime victims who are persons with disabilities;
 - (e) placing a duty on courts to consider hatred of their victims as an aggravating factor when sentencing convicted perpetrators of physical, sexual, psychological or any other form of violence against people with disabilities.⁹

⁹ NOTE: We support a general provision on training to be put in article 4, which would cover training of law enforcement and judicial personnel among others, in issues related to implementation of the convention.

Draft Article 11

FREEDOM FROM TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

1. States Parties shall take all effective legislative, administrative, judicial, educational or other measures to prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment or punishment.
2. In particular, States Parties shall prohibit, and protect persons with disabilities from, medical or scientific experimentation without the free and informed consent of the person concerned, and shall protect persons with disabilities from forced interventions or forced institutionalisation aimed at correcting, improving, or alleviating any actual or perceived impairment.¹⁰

¹⁰ NOTE: We support retention of article 11 as in the Working Group text. Forced interventions have long been recognized by people with disabilities ourselves as a serious violation of our mental and bodily integrity, comparable to rape and other forms of torture. The definition in the Convention Against Torture includes discrimination as a purpose of torture, which is clearly relevant in the disability context. Measures intended to obliterate the personality or to diminish the physical or mental capacities of the victim are also regarded as torture, in the Inter-American Convention to Prevent and Punish Torture and by leading commentators. Many forced interventions used against people with disabilities would fall into this category, since they are intended to diminish capacities of the individual which are seen as undesirable, or compel people with disabilities to give up their identity as disabled people and mimic non-disabled reality.

The ICCPR treats medical and scientific abuse as an instance of torture, in the context of experimentation without consent. For people with disabilities, both experimentation and forced interventions by medical personnel and others violate our rights and assault our dignity as human beings.

We oppose amendments to articles 11 or 12 that would under some circumstances permit forced interventions. Alternative formulations of the obligation to protect against forced interventions would be acceptable, as long as they maintain the norm without exceptions.

The EU has proposed the following language for article 12:

In particular, States Parties shall protect persons with disabilities from all forms of medical or related interventions, carried out without the free and informed consent of the person concerned.

This text is acceptable if it stops here. However, the EU goes on to propose three paragraphs of exceptions that swallow the rule. First the EU proposes surrogate decision-making based on an evaluation of the person's decision-making capacity. Second, the EU asserts a prerogative to perform forced interventions on people with disabilities to "prevent imminent danger" to the person or to others. Third, the EU requires a "best interest" standard and unspecified legal safeguards for all forced interventions.

We have dealt with the harm done by surrogate decision-making in our discussions of article 9. The concept of capacity as a measurable attribute discriminates among different kinds of intelligences, favoring the cognitive over the emotional and intuitive. This must be fundamentally challenged, in order to fulfill the purpose of this Convention to guarantee equal effective enjoyment of human rights to all people with disabilities.

The attempted justification of forced interventions as a preventive measure raises serious alarms. Danger to others does not justify carrying out medical (or related) interventions on a person. Medical interventions are not a legitimate means of law enforcement; used this way they violate medical ethics and become torture. Consider sterilization of prisoners or administration of psychotropic drugs to create confusion and

fear and to diminish the ability to resist authority. Danger to oneself similarly cannot justify medical interventions without consent; individuals may decide to accept or refuse risks of various kinds including the risks associated with medical interventions.

The third paragraph of the EU's exceptions is vague and paternalistic; and demonstrates the low value of the term "best interests". What does it mean to say that a medical intervention carried out on one person for the benefit of others is in that person's best interests? By cheapening individual worth and dignity, the amendment is in sharp contrast with the overall human rights regime.

New Zealand's amendment would place a prohibition of torture and cruel, inhuman or degrading treatment or punishment in article 12 on violence and abuse, and would retain article 11 with the new title "Free and Informed Consent to Interventions." New Zealand has stated that the reason for removing forced interventions from the article on torture was because torture does not permit any exceptions.

We could accept some of New Zealand's language as an alternative to the Working Group text.

FREE AND INFORMED CONSENT TO INTERVENTIONS

- * States Parties shall take the necessary measures to ensure that medical or scientific, experimentation or interventions, including corrective surgery, aimed at correcting, improving or alleviating any actual or perceived impairment, are undertaken with the free and informed consent of the person concerned.
- * Such measures shall include the provision of appropriate and accessible information to persons with disabilities and their families.
- * States Parties shall accept the principle that forced institutionalisation of persons with disabilities on the basis of disability is illegal.

In subsequent paragraphs, New Zealand proposes language that would allow governments to meet lesser standards if they have not abolished "involuntary treatment" (apparently referring to both forced interventions and forced institutionalization). "Involuntary treatment" might be used "only in the most exceptional circumstances" and must be "minimized through the active promotion of alternatives." Furthermore, any instance of "involuntary treatment" would have to meet certain requirements.

This language is not as onerous as that of the EU's amendment, since it does not purport to carve out exceptions for all time but only as a standard to be met if governments have not yet adopted the more far-reaching norm. However, we are concerned that forced interventions will not be meaningfully reduced by such standards since the standards reflect fear and mistrust of people with disabilities combined with a "best interests" approach that negates individual will and self-determination.

The Ad Hoc Committee should refuse to incorporate language in the Convention that restricts or limits the rights of any people with disabilities, or that conflicts with the principles stated in Draft Article 2. The task of social transformation that the Convention is intended to accomplish will not be possible if the Convention contains internal contradictions or elements adopted in opposition to people with disabilities. We can accept a flexible timeline for implementation, but we cannot accept a text that would be a basis for unequal rather than equal enjoyment of rights.

Draft Article 12
FREEDOM FROM VIOLENCE AND ABUSE

6. States Parties recognize that persons with disabilities may be at greater risk, both within and outside the home, of all forms of violence and abuse. Violence and abuse is understood to include hate, bias, harassment, victimization, violence, injury, physical or mental and emotional or sexual abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual and economic exploitation. States Parties shall, therefore:
- (a) Take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms violence and abuse.
 - (b) Secure the equal rights of children to protection from all forms of violence and abuse.
 - (c) Prohibit, and protect persons with disabilities from abduction, and any forced interventions or forced institutionalisation aimed at correcting, improving, or alleviating any actual or perceived impairment.
 - (d) Reaffirm that persons with disabilities have the right to make choices about their own bodies and shall prohibit forced sterilization or abortion.
 - (e) Provide information, support and education to persons with disabilities, their families, and persons working with persons with disabilities about how to avoid, recognize, report, and seek protection from violence and abuse.
 - (f) Ensure that facilities and programmes, both public and private, where persons with disabilities live or receive services, are effectively monitored by independent authorities, which shall include persons with disabilities, to prevent the occurrence of violence and abuse.
 - (g) Where persons with disabilities are the victim of any form of violence and abuse, States Parties shall take all appropriate measures to promote their physical and psychological recovery and social reintegration which shall at all times respect personal autonomy and dignity of the persons concerned.
 - (h) Ensure the identification, reporting, referral, investigation, treatment and follow-up of instances of violence and abuse, and the provision of protection services and, as appropriate, judicial involvement.

Draft Article 13

FREEDOM OF THOUGHT, EXPRESSION AND OPINION

1. States parties shall take appropriate actions to ensure that:
 - (a) all persons with disabilities enjoy the same freedom of expression, thoughts and opinion as that enjoyed by others;
 - (b) persons with disabilities can exercise their right to freedom of expression, thoughts and opinion through languages, scripts, modes, means and formats of communication of their choice, including but not limited to sign languages, tactile communication techniques, captioning, plain and easily understood texts, large print, Braille and augmentative and alternative communication, in order to seek, receive and impart information on the basis of equality with others;
2. States parties shall take actions to:
 - (a) accept and promote the use of a variety of languages and modes and means of communication by persons with disabilities in official interactions in order to seek, receive, impart and access information and enable persons with disabilities to communicate on an equal basis as others;
 - (b) provide training of assistants, intermediaries, interpreters, such as sign language and tactile communication interpreters, note takers, readers and augmentative and alternative communication assistants, to ensure that persons with disabilities have access to information and the facility to communicate;
 - (c) officially recognise national sign languages in legislation to guarantee linguistic rights for all deaf persons, and to ensure communication with their families, immediate community and the general public;
3. States parties shall protect the freedom of thought of persons with disabilities, including:
 - (a) the freedom of choice whether to consider oneself a person with a disability;
 - (b) the freedom to adopt and hold opinions and beliefs about the experience of disability;
 - (c) the freedom to choose practices of support for well-being, based on personal thoughts, opinions and beliefs;

(d) the freedom from coercion that interferes with the capacity to freely produce or sustain thought.

Draft Article 15

LIVING AND BEING INCLUDED IN THE COMMUNITY

1. States Parties shall reaffirm the rights of persons with disabilities to liberty of movement, to live in the community, and the freedom to choose his or her residence. States Parties shall ensure that persons with disabilities have equal opportunity to determine how, where and with whom they live.
2. States Parties shall take effective and appropriate measures to enable persons with disabilities to live and to be fully included as members of the community. States Parties shall take measures to ensure that:
 - (a) persons with disabilities are not obliged to live in an institution or in a particular living arrangement;
 - (b) community services and facilities for the general population, including government housing, are available on an equal basis to persons with disabilities and are responsive to their needs.
3. States Parties shall take appropriate measures to ensure the provision of services, including personal assistance, necessary to support persons with disabilities to live and participate in the community with choices equal to others, and to prevent isolation or segregation from the community. In particular States Parties shall ensure that:
 - (a) Persons with disabilities have access to information about community services, including support services.
 - (b) Supports are provided in a manner that recognizes the autonomy, individuality and dignity of persons with disabilities
 - (c) The support provided is consistent with the right to liberty of movement, to live in the community, and the freedom to choose his or her residence.
 - (d) Persons with disabilities have access to needed aids, devices and adaptations.
4. States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to opportunities for economic development and financial independence including to rent, own or inherit property, to control their own financial affairs, and to have equal access to bank loans, mortgage and other forms of financial credit.

Draft Article 24bis
INTERNATIONAL COOPERATION

States parties recognize that the international cooperation is a fundamental element contributing to the inclusion of People with disabilities and for the effective implementation of this treaty. In a spirit of solidarity, state parties undertake to:

- a) Promote and ensure among themselves the exchange of information and the dissemination of the best practices, experiences, knowledge related to the effective implementation of this treaty.
- b) Encourage the technical cooperation that could contribute to build capacities of the parties to design and implement policies that allow the full enjoyment of their human rights by people with disabilities.
- c) Ensure that resources are dedicated to eradicate the extreme poverty that face people with disabilities, their exclusion and the difficulties they face to access to basic services.
- d) Ensure the inclusion of disability issues as described in this convention in any of their program, tool and policies of cooperation, development and humanitarian aid. In case of bilateral cooperation, this should engage both the donors and recipient of the support.
- e) Contribute to the availability of specific resources dedicated to disability and development, especially regarding the empowerment of disabled people organizations and the enhancement of the disability movement.