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Enforcing the Rights and Freedoms
of Disabled People: the Role of Transnational Law (Part I)

Jeremy Cooper and Richard Whittle

This two-part article examines the role of transnational law in the assertion of rights and freedoms by people with disabilities. By transnational law we refer to law derived from sources that transcend national frontiers. For the purpose of our analysis, we divide transnational law into two categories: *global international law* (GIL), and *European international law* (EIL). GIL is derived essentially from the work of the United Nations and its subsidiary organizations; EIL is derived from the work of the European Union, and the Council of Europe. Part I addresses the impact of GIL; Part II, the impact of EIL. Although the articles are self-contained, Part I begins with some general introductory remarks that inform both Parts, as do the concluding remarks contained in Part II.

1. General Introduction

1.1 Definitions

Throughout these articles we refer to certain key terms that require preliminary explanation; in particular the terms *binding*, *accessible*, and *self-executing*.

Binding: If an international instrument is described as *binding* on a national government (referred to as a 'Contracting State'), it is because the instrument has been signed and, if necessary, ratified by the government of that country with the intention that it should have a *binding effect* (such a document is normally referred to as a *treaty*). A binding instrument will, at the very least, place a moral obligation on the Contracting State to comply with the provisions contained in the document. The extent of those obligations will vary from document to document and the legal effect of each provision will depend upon its construction and the language used. In contrast, a *non-binding instrument* (for example a Resolution adopted by the General Assembly of the United Nations) expresses, at most, a political intention and arguably a moral commitment by a government - assuming they had voted in favour of the measure - but little else.¹

It is worth noting at this juncture that both *binding* and *non-binding* international instruments may constitute *customary international law* if the provisions which they encompass are applied by a large number of States with the intention of respecting them as rules in international law. Once established as *customary international law*, such instruments place an interpretive obligation on national courts. National courts are thereafter under an obligation to interpret domestic statutes so that they are consistent with *customary international law*. In the context of the United Kingdom this obligation will only cease to apply if, and it is here that the uncertainty arises, either the domestic statute is unambiguous

¹ The most recent example of such a document is the Resolution on Human Rights of Persons with Disabilities (proposed by Ireland) which at the time of writing remains in draft form. Depending upon the importance of the matter, a simple majority or two thirds majority vote is normally required to adopt a Resolution in the General Assembly.

or it expressly contradicts the rule of international law.² Non-binding international instruments addressing issues relating to disability may therefore have an indirect application to relevant national provisions protecting the rights and interests of people with disabilities; an application which may, in some cases, extend to the enforcement of a rule against other private parties.

Accessible: A *binding instrument* may not necessarily constitute an *accessible* measure. By using the term *accessible*, we refer to the perspective of the individual or group of individuals whose rights or interests protected by the relevant document have been violated or infringed. If the instrument is *accessible*, it will be possible for the person, or persons aggrieved, to ask for a hearing regarding an alleged breach of that instrument in accordance with whatever procedures have been laid down. We distinguish, therefore, between international instruments such as the European Social Charter 1961 (ESC) which, while *binding*, entail a supervisory element only, and instruments such as the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR) which allow an aggrieved individual personally to initiate a process from which a *binding* decision in respect of their protected rights may be obtained from a court of law or treaty body with recognised jurisdiction in such matters. In this sense, therefore, the ECHR can be described as an *accessible* instrument.

Given that the most effective ‘watchdogs’ in respect of instruments relating to human rights are their intended beneficiaries, be they groups or individuals, it is arguable that the more *accessible* the protected rights are to the individual, the more *enforceable* a given instrument will be. The *enforceability* of the various treaties therefore, will vary from instrument to instrument depending upon the level of *accessibility*.

Self-executing: The term *self-executing* is used to describe international instruments conferring rights upon individuals that are directly enforceable before their national courts. To be *self-executing*, such measures must meet with certain ‘technical requirements’ i.e. they must be unconditional, sufficiently clear and precise, and not require any further implementation by either the international organisation or the Contracting State. In this respect, similarities may be drawn with the term ‘direct effect’ under European Community law.

Traditionally, a distinction is made between two main categories of rights, those which are ‘justiciable’ and those which are ‘programmatic’ in nature. Programmatic, or ‘progressive’ rights, are commonly associated with international instruments pertaining to social and economic considerations such as the ESC 1961 and are unlikely to constitute *self-executing* rights, because the obligations which they impose upon Contracting States are often couched in terms of policy orientation; obligations which invariably fail to satisfy the technical requirements described above. ‘Justiciable’ rights, on the other hand, can be found in international instruments relating to the protection of civil and political (‘freedom’) rights. As a minimum, ‘justiciable’ rights, such as those found within the ECHR, place a negative obligation upon Contracting States to abstain from an unjustified encroachment upon such rights and do not, therefore, require any further government action for their realisation. Due

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R v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696, HL; *Garland v. British Rail Engineering Ltd* [1983] 2 AC 751, HL at 771 A-C, per Diplock J. For an extensive and interesting treatment of this question and an argument in favour of the Garland view see, Hunt, *infra* fn. 5.

to their nature, justiciable rights will invariably satisfy the technical requirements outlined above.

One should note, however, that the traditional distinction between ‘justiciable’ civil and political, and ‘non-justiciable’ social and economic rights, is often blurred³ and this, we suggest, is likely to be particularly relevant in the development of future rights and freedoms for people with disabilities because a comprehensive programme in this respect will require justiciable rights of both a civil and political, and social and economic nature.⁴

A further distinction must also be drawn in respect of countries operating a *monist* and those operating a *dualist* legal system. For dualist legal systems such as the United Kingdom and Ireland, international law must first be incorporated into the domestic legal system by a national statute before it can be treated as being ‘directly applicable’, i.e. capable of providing *self-executing* rights to nationals of that Contracting State. *Binding* international instruments, such as the ESC 1961, which have not been incorporated into the domestic law of a dualist legal system are not directly applicable to that system and, as a consequence, are not capable of conferring rights upon individuals which are directly enforceable before domestic courts.⁵ This should be contrasted with monist legal systems - such as France and Germany - where signature and ratification at the international level will automatically render the treaty part of domestic law. Those provisions, therefore, within *binding* international instruments which are *self-executing*, are enforceable by individuals within a monist jurisdiction at a domestic level and can, as a result, be pleaded directly before national courts.

An example of international law which is directly applicable and therefore capable of providing *self-executing* rights to nationals of Contracting States operating a dualist legal system can be found within the Treaties relating to the European Community. The EC Treaty and secondary (delegated) legislation emanating therefrom became *directly applicable*⁶ to the domestic law of the United Kingdom (for example) by virtue of the statute of incorporation entitled the European Communities Act 1972. Consequently, any provision within either the Treaties or secondary legislation emanating therefrom conferring rights upon individuals and satisfying the necessary ‘technical requirements’⁷ can be described as

³ M Addo, ‘Justiciability Re-examined’ in Beddard and Hills (eds.) *Economic, Social and Cultural Rights: Progress and Achievement*, Macmillan, London, 1990.

⁴ R Whittle, ‘The Question of Resources and the Application of Disability Rights’, 6 *Health Care Analysis*, (1998), 3, pp. 227-233.

⁵ The indirect potential of unincorporated treaties in terms of an interpretive obligation on domestic courts has been recognized in dualist legal systems; see for example, M Hunt, *Using Human Rights Law in English Courts*, Hart Publishing, Oxford, 1997, and Elkind, ‘Ashby v Minister of Immigration: Overruled?’ *New Zealand Law Journal*, (1994), p. 95.

⁶ It is commonly accepted that if a time period for implementation of the measure is attached it must first expire before it becomes directly applicable. However, the application of the ‘indirect effect’ principle in *Case 80/86 Officier van Justitie v. Kolpinghuis Nijmegen* [1987] ECR 3969 before the expiration of the time period must surely bring this point into question.

⁷ One should also note that, under European Community law, even where the technical requirements are not fulfilled, an individual may still seek redress through the principle of ‘indirect effect’; see *Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984]

self-executing or, in the context of European Community law, *directly effective*. The ability to enforce international law before national courts, whether by virtue of a domestic statute of incorporation or the operation of a monist legal system, clearly increases the *accessibility* and, as a consequence, the *enforceability* of a given instrument.

It is commonly accepted, however, that the weakness of international law, and treaties relating to human rights in particular, is that they essentially derive their authority from the continued co-operation and assent of the contracting parties. As Feldman identifies,⁸ treaty institutions in the area of human rights have to maintain a difficult balance between ensuring, on the one hand, the legitimacy of the treaty by not imposing unacceptable burdens upon the Contracting States and, on the other, fulfilling their responsibilities to individuals which, in turn, may cause them to interpret rights which would run counter to the assent of the Contracting States. It is perhaps partly for this reason that at a transnational level there is, at present, no *binding* and *accessible* (let alone *self-executing*) measure which specifically relates to disability. At most, the nature and existence of disability has, to date, accrued only secondary or incidental consideration in such measures.⁹ But it would be misleading to paint an overly bleak picture in terms of the actual and potential impact of transnational law on the development of the rights and freedoms of disabled people, and the following section aims to substantiate this point in the context of GIL.

2. Global International Law (GIL)

The landmark transnational instrument relating to human rights is the Universal Declaration of Human Rights (UNDHR), adopted by the General Assembly of the United Nations in 1948. It is a document containing principles to which the members of the General Assembly have expressed a willingness to aspire and its principles have been written into many of the new national Constitutions drafted since its inception. It is a *non-binding* document, and the provisions which it enshrines are not *accessible* to the individual. The existence of a symbolic document of this nature does nevertheless create a strong moral and political benchmark for governments throughout the world (described by Eleanor Roosevelt in 1948 as 'the common standard of achievement for all peoples of all nations'). In a major recent speech Mary Robinson, the UN High Commissioner for Human Rights, confirmed, *inter alia*, the application of the UNDHR to the rights and freedoms of disabled people thus:¹⁰

'The [human rights] debate must give more priority to current complex human rights

ECR 1891.

⁸ D Feldman, 'Human Rights Treaties, Nation States and Conflicting Moralities', 1 *Contemporary Issues in Law*, 1995, p. 62.

⁹ See, for example, Annex 1.20 of European Community directive 89/654 [1989] O.J. L393/1 *on the minimum safety and health requirements for the workplace*, a generic health and safety at work measure which provides that: 'Workplaces must be organised to take account of handicapped workers, if necessary. This provision applies in particular to the doors, passageways, staircases, showers, washbasins, lavatories and workstations used or occupied directly by handicapped persons'.

¹⁰ Romanes Lecture, Oxford University 11 November 1997.

issues: the right to development, the recognition of the rights of indigenous people, the *rights and empowerment of people with disabilities*, gender main-streaming and issues of benchmarks and accountability in the furtherance of these and other rights [emphasis added].'

The UNDHR would clearly appear to be an instrument which can be used to good effect by Non-Governmental Organizations (NGOs) to exert political pressure to encourage advances in the rights and freedoms of people with disabilities. In this respect, the (Draft) Resolution on the Human Rights of Persons with Disabilities in 1998, is another strong example of the willingness of the United Nations to commit itself to a forceful strategy to promote and protect the rights and freedoms of people with disabilities into the 21st century.

2.1 Non-binding instruments of GIL

The following are the principal *non-binding* instruments of the United Nations with particular relevance to the rights and freedoms of disabled people:¹¹

UN Declaration on Social Progress and Development 1969¹²

UN Declaration of the Rights of Mentally Retarded Persons 1971¹³

UN Declaration on the Rights of Disabled Persons 1975¹⁴

UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993 ('The Standard Rules').

UN Declarations are a device by which the United Nations General Assembly seeks to 'register a consensus of opinion, or a direction in which sentiment is moving'.¹⁵ Their main value is to serve as common statements of principle and persuasion. The three Declarations cited above, cover in very broad terms the necessity of protecting the rights and assuring the welfare of children, the aged and the disabled, and the protection of the physically and mentally disadvantaged. They seek to ensure that members of these groups have, to the maximum degree of feasibility, the same rights as other human beings. The UN Declaration on the Rights of Disabled Persons is a particularly important point of reference for disability rights campaigners as it contains a strong statement of the general principles of decency and

¹¹ For a comprehensive account and overview of the whole range of binding and non-binding instruments see T Degener and Y Koster-Dreese (eds.) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, Martinus Nijhoff, Dordrecht, 1995.

¹² Proclaimed as Resolution 2542 (XXIV) by the General Assembly of the United Nations on 11 December 1969.

¹³ Proclaimed as Resolution 2856 (XXVI) by the General Assembly of the United Nations on 20 December 1971.

¹⁴ Proclaimed as Resolution 3447 (XXX) by the General Assembly of the United Nations on 9 December 1975.

¹⁵ H Nicholas, *The United Nations as a Political Institution*, 5th Edition, Oxford, Oxford Paperbacks, 1975, p. 117.

protection that international law expects of nation states in the policies and attitudes they adopt towards their citizens with mental or physical disabilities.¹⁶ Specifically it calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of the basic rights of disabled people, linking them explicitly with the rights and freedoms contained in the two binding instruments of GIL described below; rights and freedoms reflected in the (Draft) Resolution on Human Rights of Persons with Disabilities, 1998, proposed by the Irish Government.

2.1.1 UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities 1993 ('The Standard Rules').

The *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* were adopted by the UN General Assembly, Resolution 48/96, on 20 December 1993. They contain the most far-reaching expression of the standards that should be adhered to by governments with regard to disabled citizens living in their jurisdiction. The effectiveness of the Rules will depend largely upon both the power of NGOs to raise public awareness of their potential and the willingness of governments to implement them.¹⁷ They are clearly designed as the central plank of UN efforts to equalize opportunities for disabled people across the globe, as is evident in the wording of the Preamble linking the Rules to the UN's wider commitment to human rights and fundamental freedoms, to social justice and to the dignity of the person.

The Preamble to the Rules states specifically that they have been adopted:

'To propose national mechanisms for close collaboration among States, the organs of the United Nations system, other intergovernmental bodies and organisations of persons with disabilities,' and

'To propose an effective machinery for Monitoring the process by which States seek to attain the equalisation of opportunities for persons with disabilities.'

The international monitoring of the implementation of the Rules is co-ordinated through the United Nations Commission for Social Development. The first Special Rapporteur charged with developing a monitoring mechanism is Bengt Lindqvist, a visually impaired Swedish ex-minister for Social Services who has been an active disability rights campaigner for many years. He is advised and guided by a Panel of Experts (ten in total) two each from Disabled Peoples' International (DPI), the International Leagues of Societies for Persons with Mental Handicap (ILSMH), the World Blind Union (WBU) and the World Federation of the Deaf (WFD), and one each from Rehabilitation International and the World Federation of Psychiatric Users. As Special Rapporteur he makes a triennial Report to the United Nations which seeks to provide an overview of the progress of the Rules implementation.

¹⁶ J Cooper and S Vernon, *Disability and the Law*, Jessica Kingsley, London, 1997, p. 37.

¹⁷ B Doyle, 'Disabled Workers Rights, the Disability Discrimination Act and the UN Standard Rules', 25 *Industrial Law Journal*, 1, (1996), p. 1.

Although technically *non-binding*, the international status of the Standard Rules has been acknowledged by various transnational bodies including the European Commission and the Council of Ministers of the European Union.¹⁸ Bengt Lindqvist is in no doubt that the Rules currently constitute the most important guidelines in the field of disability. Speaking in 1998, he said as follows:¹⁹

'The Standard Rules have proved to function well as an implementation tool. We know what should be done and we know a lot about how it could be done. And things are beginning to happen.'

The Rules are grounded on the belief that equal participation of disabled people in society is only possible where the following four pre-conditions are met:

Rule 1: States should take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution.

Rule 2: States should ensure the provision of effective medical care to persons with disabilities.

Rule 3: States should ensure the provision of rehabilitation services to persons with disabilities in order for them to reach and sustain their optimum level of independence and functioning.

Rule 4: States should ensure the development and supply of support services, including assistive devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights.'

The Rules go on to identify eight target areas of life in which principles of equality regarding people with disabilities ought to be concentrated. The eight areas are:

'Accessibility, Education, Employment, Income Maintenance and Social Security, Family Life and Personal Integrity, Culture, Recreation and Sports, and Religion.'

¹⁸ Commission's White Paper, *European Social Policy: A Way Forward For The Union* (1994) Chapter IV, para.27; its commitments contained in the *Medium-Term Social Action Programme 1995-97*, Social Europe, 1/95; and its Communication on *Equality of opportunity for people with disabilities - a new European Community disability strategy* (1996) COM 406 final. In the Council of Ministers Resolution on *equality of opportunity for people with disabilities* (97/C12/01), the heads of State and government made a commitment to the Standard Rules. The latter is significant as the signatories to the Rules have accepted, *inter alia*, the responsibility to '...create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities' (Rule 15 of the Standard Rules). See also UN General Assembly 52nd session, Agenda Item 102, 20.10.97: *Implementation of the World Programme of Action Concerning Disabled Persons* and the recent (Draft) Resolution on the Human Rights of Persons with Disabilities, 1998.

¹⁹ B Lindqvist, *Statement at World Bank Seminar on Disability*, Washington, 5 March, 1998.

They also outline a variety of processes through which such equality can be achieved, including legislation, policy making and planning, the dissemination of more detailed information and research, personnel training and national monitoring systems. Of particular significance in this respect is Rule 18 requiring that:

'States should recognize the right of the organizations of persons with disabilities to represent persons with disabilities at national, regional and local levels.'

Rule 18 provides some detail as to how this policy should be implemented, emphasising that disabled people should be directly involved in disability policy-making and development. Closely allied to the provisions and philosophy of Rule 18, Rule 19 relates to the training of personnel involved in the planning and provision of programmes and services concerning disabled people. This Rule also emphasises that training should involve the full participation of disabled people, their families and carers, and other community members.

The extent to which Rules 18 and 19 are making an impact on the attitudes of state governments, policy planners, and services providers is unclear at present and more information is required. An early study on the implementation of Rule 18 in the European Union concludes:²⁰

'There is some evidence to suggest that governments are still inclined to question the degree to which disability organisations are a democratic voice for disabled people, especially when such organisations are viewed as 'radical.'

The study further observes that:

'The previously identified correlation between national economic performance and the situation of disabled citizens continues to have a fundamental effect'.

The extent to which the Rules will be effective is likely to depend heavily upon the ability of NGOs and disability groups - working together with governments - to insist upon regular reports and other forms of monitoring similar to those associated with the UN treaties examined below. It is also interesting to note that if the Rules, or certain provisions therein, were held to constitute customary international law (see above), then the interpretative obligation arising therefrom may have a positive impact within jurisdictions - such as the United Kingdom - which have enacted specific legislation to combat disability-based discrimination.

2.2 Binding instruments of GIL

There is, at present, no *binding* international instrument which specifically relates to the protection of disability rights. There are, however, two *binding* instruments protecting

²⁰ R Light, *A Promise to be Kept: Implementation of the UN Standard Rules in the European Union*, European Disability Forum, 1997.

human rights generally, both of which have a significant bearing on the rights and freedoms of disabled people: the *International Covenant on Civil and Political Rights 1966* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR). While each Covenant, as their titles suggest, operates in a widely different area of human activity and responsibility, in the words of Gerrard Quinn:

'It is perhaps time that the disability community paid the same attention to civil and political rights as it does to economic and social rights. Rather, one's focus should ideally be on both sets of rights simultaneously.'²¹

There are a number of other international conventions that also constitute examples of *binding instruments* and which have a bearing upon the rights and freedoms of disabled people. These include: *The International Convention on the Elimination of All Forms of Racial Discrimination, 1965*; *The Convention on the Elimination of All Forms of Discrimination Against Women, 1979*; *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*;²² and *The Convention on the Rights of the Child, 1989*.²³ Each could form the subject of a separate study. This article, however, will confine itself to the two principal covenants, the ICCPR and the ICESCR, which we shall examine in turn.

2.2.1 ICCPR

The ICCPR primarily relates to the protection of 'first generation' or 'civil and political' rights. Though *binding*, the ICCPR is only *accessible* to individuals within Contracting States which have signed the First Optional Protocol to the Covenant. By so doing, Contracting States recognise the competence of the UN Human Rights Committee (HRC), once all domestic remedies have been exhausted, to receive and consider communications from any individual within that state alleging violations of the Covenant. The HRC has developed a substantial case-load under the Optional Protocol and has taken a robust approach to states which try to avoid co-operating with its deliberations.²⁴

²¹ G Quinn, 'The International Covenant on Civil and Political Rights and Disability: a Conceptual Framework,' in T Degener, and Y Koster-Dresse (eds.), *supra* fn. 11, p. 93.

²² M Nowak and W Suntinger, 'The Right of Disabled Persons Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment,' in T Degener and Y Koster-Dresse (eds.), *supra* fn. 11.

²³ T Hammarberg, 'The Rights of Disabled Children: the UN Convention on the Rights of the Child', in T Degener and Y Koster-Dresse (eds.) *supra* fn. 11.

²⁴ D Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press, Oxford, 1993; Human Rights Committee, *Selected Decisions Under the Optional Protocol: 2nd-16th Sessions*, United Nations, New York, 1985; Human Rights Committee, *Selected Decisions of the Human Rights Committee Under the Optional Protocol. ii. 17th-32nd Sessions*, United Nations, New York, 1990. One should note, that the United Kingdom has not yet signed the First Optional Protocol.

Regardless of *accessibility*, the symbolic force of a government's formal willingness to bind itself through treaty, coupled with the supervisory mechanisms associated with such an instrument,²⁵ still enable the ICCPR to influence national policy and law via political persuasion. In particular, strong moral pressure may be exerted by the HRC on recalcitrant states, irrespective of signature to the Optional Protocol, through the organs of the United Nations, in the light of serious *prima facie* infringements or violations of human rights.²⁶ With respect to the rights and freedoms of disabled people, the processes of enforcement are also monitored by special reports.²⁷ Once incorporated into domestic law, either by national statute (in a dualist legal system) or by virtue of ratification (in a monist legal system), the ICCPR can provide *self-executing* rights to individuals within the Contracting State, rights that are directly enforceable before domestic courts.

One of the most significant provisions of the ICCPR for disabled people, which satisfies the technical requirements to be *self-executing*, is Article 26:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit *any* discrimination and guarantee to *all* persons *equal* and *effective* protection *against* discrimination on *any ground such as* race, colour, sex, religion, political or other opinion, national or social origin, property, birth or *other status*.' [Emphasis added]

As a free-standing equality norm, Article 26 may be described as an autonomous right, i.e. a right not restricted to prohibiting discrimination in the context of the other rights and freedoms enshrined within the Covenant, and may therefore extend to prohibiting discrimination in the context of social and economic considerations.²⁸ Moreover, case law under the HRC indicates that Article 26 may also be described as 'open-ended', in that it prohibits any discrimination on any ground unless a reasonable and objective justification can be established by the defendant Contracting State.²⁹ Thus a distinction based on disability is

²⁵ Contracting States to both the ICCPR and the ICESCR are obliged to submit periodic reports to the relevant organs of the United Nations outlining their level of compliance with the rights and freedoms enshrined within the Covenants. In addition, the UN Commission on Human Rights can, in appropriate cases, make a thorough study of situations which reveal a 'consistent' pattern of violations of human rights, report, and make recommendations on these violations to the UN Economic and Social Council following the procedure laid down by Economic and Social Council resolution 1503 (XLVIII) 27 May 1970.

²⁶ J Wadham and P Leach, 'Protecting Human Rights in the United Kingdom', 146 *New Law Journal*, (1995), pp. 1133-6.

²⁷ L Despouy, *Human Rights and Disabled Persons*, *Human Rights Study Series 6*, United Nations Press, New York, 1993, and the *Global Survey of Government Action on Disability Policy*, Office of the UN Special Rapporteur on Disability, 1997.

²⁸ See *Spenger v. The Netherlands*, Views adopted 1992; and General Comment CCPR/C/21/Rev. 1/Add. 1, Adopted by the Human Rights Committee under Article 40(4) of the ICCPR at its meeting 21 November 1989 at para. 12.

²⁹ See Communication No. 516/1992 *Simunek v. The Czech Republic*, Views adopted 1995; Communication No. 395/1990, *Spenger v. The Netherlands*, op. cit. Communication No. 182/1984, *Zwaan de Vries v. The Netherlands*, Views adopted 1987; Communication No. 172/

prohibited by Article 26 unless a 'reasonable and objective' justification can be made by the Contracting State concerned.³⁰

In assessing whether or not a 'reasonable and objective' justification can be established, reference should be made to the nature of the right to which the principle of non-discrimination is applied. In this respect, the decisions of the HRC suggest that States are provided with greater leeway, or a wider 'margin of appreciation', in the social and economic context due to the progressive character of social and economic rights.³¹ At the same time, it is clear that a hard line will be taken, even in the social and economic context, if the discrimination is based upon issues or rights which can be described as 'internationally suspect'.³² Grounds of discrimination within this classification are treated more seriously and receive a greater degree of attention in determining whether or not the distinction can be justified by the defendant State. Thus, although disability-based discrimination is less firmly rooted in international human rights law, disability NGOs should focus on raising its profile to the same level as discrimination based on race or gender; grounds of discrimination that have been accepted within the 'internationally suspect' classification.³³

It would appear, therefore, that Article 26 can provide a basis for a relatively secure protection against disability discrimination by Contracting States. Moreover, individuals within Contracting States may argue that the *absence* of domestic legislation prohibiting disability discrimination (lack of 'equality') or the *inadequacy* of existing national measures in this respect (lack of 'effectiveness') creates a *de facto* breach of Article 26 of the ICCPR. Encouragement in this respect may be gained from Article 2(2) ICCPR which requires positive state action where necessary, thus:

'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance

1984, *Broeks v. The Netherlands*, Views adopted 1987; Communication No. 180/1984, *Danning v. The Netherlands*, Views adopted 1987.

³⁰ One should note that the prohibition will also apply to distinctions having an adverse impact on disabled people, if the equality norm in Article 26 ICCPR is held to embrace 'indirect' forms of discrimination (discussed *infra*).

³¹ See Communication No. 395/1990, *Springer v. The Netherlands*, *op. cit.* and Communication No. 425/1990, *Doesburg Lannoois Neefs v. The Netherlands*, Views adopted 1994.

³² A Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', *11 Human Rights Law Journal*, (1990), pp. 1-34, 18-24.

³³ See Communication No. 415/1990, *Dietmar Pauger v. Austria*, where inequality between the sexes regarding the social and economic right to a pension was held to have breached Article 26 ICCPR. Indications as to whether a particular ground can be classified as 'internationally suspect' can be obtained from a number of sources such as treaties and other international instruments having a bearing on human rights, the decisions from the treaty bodies such as the HRC presiding over the rights and freedoms protected by a given treaty, and case law from judicial bodies such as the International Court of Justice. One should however note the absence of disability from the grounds of discrimination listed in the exceptions under Article 4 (1) ICCPR in respect of the state's ability to derogate from its obligations under the Covenant.

with its constitutional processes and with the provisions of the present Covenant, *to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*' [Emphasis added].

Reflected in the wording of two General Comments issued by the HRC on the interpretation of the Covenant,³⁴ Article 2(2) arguably places an obligation upon Contracting States to ensure that protection from discrimination encompasses not only the activities of the State but also the relations between private parties. It is the potential, therefore, to regulate the private sphere which renders the practical application of Article 26 to disability rights most significant. Given that the typical structure of national statutes adopted by legislators to combat discrimination based on disability incorporates, *inter alia*, private contexts such as accommodation, the provision of services, employment, and transportation,³⁵ it is clear that an obligation on Contracting States to introduce or improve such legislation in line with Article 26 would be a beneficial development. Moreover, while the form of regulation discussed above is via the Contracting State's obligations under the Covenant, one may argue that in the light of the penultimate recital to the preamble of the ICCPR,³⁶ Article 26 will enable private individuals in monist jurisdictions to enforce their right to non-discrimination directly against other private entities by virtue of the international provision alone and, in this sense, produce horizontal *direct effect*.

The apparent limitation of Article 26, however, is that its protection does not, *prima facie*, appear to demand anything beyond the requirements relating to 'formal equality'. While the prohibition of all forms of discrimination is clearly a valid objective, it should be noted that the demands of 'formal equality' alone may have an adverse effect on the rights and interests of people with disabilities. By not adequately addressing the concept of 'indirect' or 'adverse impact' discrimination, the Covenant will fall woefully short of achieving any full notion of equality. In the words of one commentator:³⁷

'Active promotion of equality thus goes further than mere prohibition of less favourable treatment of individuals or groups.'

To date, it is unclear whether the prohibition provided by Article 26 would embrace 'indirect' discrimination. While the HRC's General Comment on non-discrimination makes express reference to the 'effect' of a distinction in creating discriminatory behaviour and therefore goes beyond the superficial requirement of identifying disparate treatment,³⁸ such a

³⁴ See General Comment 3/13, A/36/40, (1981), 109, and the General Comment on non-discrimination 18, A/45/40, (1989) at § 9. Similar inferences may be drawn in respect of the European Convention on Human Rights (discussed in Part II of this article).

³⁵ See the Americans with Disabilities Act 1990, the Australian Disability Discrimination Act 1992 (Cth), and the United Kingdom's Disability Discrimination Act 1995.

³⁶ Which provides as follows: 'Realising that the individual, *having duties to other individuals and to the community to which he belongs*, is under a responsibility to strive for the *promotion and observance of the rights recognised in the present Covenant.*' [Emphasis added].

³⁷ A Hendricks, 'Disabled Persons and Their Right to Equal Treatment', 1 *European Journal of Health Law*, [1995], pp. 153-173.

philosophy has not been reflected in a number of cases which have come before it.³⁹ In any event, it should be noted that the inability to prohibit indirect discrimination would render Article 26 impotent in the context of many modern forms of discrimination, including discrimination based on disability. It is hoped, therefore, that the HRC will reconcile this uncertainty in favour of prohibiting both 'direct' and 'indirect' forms of discrimination in the near future.

A further uncertainty exists in relation to the non-discrimination principle under Article 26 and the relevance of the concept of 'reasonable accommodation' to its application.

Reasonable accommodation currently pervades domestic disability discrimination legislation - such as the Americans with Disabilities Act 1990 - and has been deployed as a corollary to the right of non-discrimination in the furtherance of equality of opportunity for people with disabilities. Arguably a prerequisite for any type of measure designed to combat both 'direct' and 'indirect' discrimination based on disability, this concept requires an equitable (reasonable) compromise between the disadvantage imposed by the disability and the freedom of the employer, or service provider to treat everybody on equal grounds. Tempered by the limitation of undue hardship, the concept of 'reasonable accommodation' provides a realistic and common sense method of regulating relations in both public and private spheres, by preventing an overly restrictive application of the non-discrimination principle in the context of disability. Nevertheless, despite express recognition and approval of this concept by the equivalent of the HRC under the sister Covenant, the International Covenant on Economic, Social and Cultural Rights 1966 (discussed below), doubts remain as to the inclusion of this concept within the application of Article 26 and the extent of its protection against disability-based discrimination. A similar statement in this respect by the HRC would be a positive step in the right direction.

The achievement of equality of opportunity in its fullest sense may also require the introduction of affirmative action measures for groups - such as disabled people - who have historically suffered from *de facto* discrimination. A distinction should therefore be drawn in this context between *de jure* discrimination, which may be eliminated by the creation and enforcement of relevant legislation (as illustrated above), and *de facto* discrimination, which is evidenced through material inequalities and individual prejudice, and therefore necessitates long-term social and educational programmes aiming to eliminate discrimination in a progressive manner.

Clearly, Article 26 will not prohibit distinctions in the form of affirmative action measures which can be reasonably and objectively justified. During discussions surrounding its draft it was made clear that Article 26 was intended to ensure equality, not identical treatment, and would not, therefore, prohibit reasonable differentiation between individuals or groups of individuals on grounds that were relevant and material.⁴⁰ In the General Comment on non-discrimination, the HRC made the following interesting observation on affirmative

³⁸ Op. cit. at § 7. See also Communication in *Bhinder v. Canada* (1989) where support can be found for the relevance of 'indirect' discrimination in determining whether a violation of Article 26 can be established.

³⁹ See Communication No. 212/1986, *P.P.C. v. The Netherlands*, Views adopted 1988 at p. 244, and Communication No. 218/1986, *Vos v. The Netherlands*, Views adopted 1989 at p. 232.

⁴⁰ UN Doc 10 GAOR, Annexes. A/2929, 1955, § 179.

action programs:

'...the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.'⁴¹

This is further reinforced by the existence of Article 2(2) of the ICCPR (see above).

Notwithstanding the clear evidence of the potential of Article 26 to be used proactively to develop the rights and freedoms of disabled people, caution as to the full extent of this potential will continue to be exercised until the HRC has produced an unequivocal statement regarding its protective coverage.

While each of the remaining provisions of the ICCPR cover both able-bodied and disabled individuals within Contracting States, the following would appear to have particular relevance to disabled people:⁴²

'No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7)

No-one shall be subjected without his free consent to medical or scientific experimentation (Article 7)

Everyone has a right not to be subjected to arbitrary and unnecessary arrest or any other kind of institutional abuse (Article 9)

States must recognise the right of men and women of marriageable age to marry and found a family (Article 23)

States must recognise the right of everyone to take part in the conduct of public affairs, directly or through freely chosen representative, to vote, and to have access, on general terms of equality, to public service in their country (Article 25).'

2.2.2 ICESCR

The ICESCR covers what are generally known as 'second generation' or 'social and economic' rights and refers to quality of life issues such as the right to food, warmth, clean air and water, health care, education, and so forth. Although *binding* on Contracting States, the ICESCR cannot be described as an *accessible* instrument. However, the introduction of an Optional Protocol - similar to that under the ICCPR providing a facility to hear individual complaints - does remain under serious consideration and there is general agreement that such a measure would be a beneficial development.⁴³ While the absence of such a facility renders

⁴¹ CCPR/C/21/Rev. 1/Add. 1 (1989) § 10.

⁴² See Quinn, 1995 *supra* fn. 21.

⁴³ See Konate, E/C.12/1991/SR.13 at 10, para. 51; Bonoan-Dandan, E/C.12/1991/SR.14, at 14, para.67. The text of a draft optional protocol to the ICESCR can be found in doc E/CN.

interventionist lobbying by interest groups difficult, the ICESCR does operate a supervisory mechanism similar to that under the ICCPR, and may likewise provide the same advantages in that respect. Moreover, unlike the ICCPR, the Committee on Economic, Social and Cultural Rights ('the Committee'), enables both written and oral submissions from NGOs regarding State (non)-compliance with the Covenant.

Once incorporated into domestic law, either by national statute or by virtue of State ratification, those provisions under the ICESCR which can be considered 'justiciable' will provide *self-executing* rights to individuals within the Contracting State. An example of such a provision, which has particular relevance to the present discussion, is that contained within Article 2 (2), the right to non-discrimination. Article 2 (2) ICESCR, like Article 26 ICCPR (above), lists a number of prohibited grounds of discrimination and concludes with the words 'or *other status*', thus:

'...all such rights will be exercised without discrimination of *any kind as to* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' [Emphasis added]

In contrast to Article 26 ICCPR, however, Article 2 (2) cannot be pleaded in isolation as it only prohibits discrimination in respect of one or more of the other rights enumerated within the Covenant. Moreover Article 2 (2) cannot be described as open-ended due to the use of the words 'as to' instead of the wording 'such as' contained within Article 26 ICCPR. Nevertheless the inclusion of the words 'or other status' clearly implies that the prohibited grounds of discrimination are not exhaustive and, therefore, the possible inclusion of further grounds remains open.

Arguably the question as to whether disability can be included within the definition of 'other status', has been settled affirmatively by virtue of the General Comment issued in 1994 by the Committee.⁴⁴ This Comment offers an authoritative statement of the Committee's understanding of the ICESCR's application to disabled people, together with an expansive definition of disability discrimination:

'For the purposes of the Covenant, 'disability-based discrimination' may be defined as *including* any distinction, exclusion, restriction or preference *or denial of reasonable accommodation based on disability* which has the *effect* of nullifying or impairing the recognition, enjoyment or exercise of economic, social and cultural rights [Emphasis added].

In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all State parties.'

⁴⁴ 4/1997/105. Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No.5, 1994, E/C.12/1994/WP.13.1 December 1994. At this stage, however, it is unclear as to the precise effect which such General Comments will have on the application and supervision of the rights protected under ICESCR.

The significance of the second paragraph is that the General Comment calls upon Contracting States to provide comprehensive legislation to combat discrimination on the basis of disability. Clearly, therefore, any positive State action, such as the introduction of affirmative action measures, would not violate Article 2(2) of the Covenant. Moreover, the express reference in the first paragraph to the word 'effect' suggests that the prohibition against discrimination extends beyond the requirements of formal equality and would arguably embrace the concept of 'indirect' discrimination. More importantly, the General Comment clearly encompasses the concept of 'reasonable accommodation' within the definition of disability; a concept which will provide the benefits outlined above in respect of the ICCPR. Although the General Comment is not binding, and governments may therefore ignore its content,⁴⁵ it is to be hoped that Contracting States will, in the light of this General Comment, adopt a more purposive approach to their anti-discrimination provisions as they affect people with disabilities.

While each of the remaining provisions of the ICESCR cover both able-bodied and disabled citizens of contracting states, a number of them appear to have particular relevance to disabled people:

'the right of everyone to just and favourable conditions of work, ensuring a decent living for themselves and their families, and equal opportunity to be promoted to an appropriate higher level (Article 7)

the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12)

the right of everyone to education (Article 13)

the right of everyone to take part in cultural life (Article 15)

One should note, however, that a justification for non-compliance with the rights protected by the ICESCR is provided by Article 2(1) on the basis of non-availability of resources. In this respect, Article 2(1) encourages Contracting States:

'To take steps *to the maximum of its available resources* with a view to achieving progressively the full recognition of the rights recognised in the covenant [Emphasis added].'

This economic 'get-out clause' applies to all of the rights enshrined within the Covenant. Whilst this may be a realistic and reasonable limitation with respect to some of the rights contained in the ICESCR, for example health care,⁴⁶ such an argument is harder to sustain with regard to other rights, such as the right to education.⁴⁷ Moreover, given that the

⁴⁵ P Alston, 'Disability and the International Covenant on Economic, Social and Cultural Rights', in T Degener and Koster-Dreese, 1995, *supra* fn. 11.

⁴⁶ Whittle 1998 *supra* at fn. 4.

Committee views the non-discrimination provision under Article 2 (2) as imposing obligations that should be implemented with immediate effect,⁴⁸ it is arguable that discriminatory behaviour in respect of any of the rights protected by the Covenant would breach the Covenant notwithstanding the 'get-out clause'. A distinction should nevertheless be drawn between *de jure* and *de facto* discrimination (see above). In this respect, it would perhaps be unreasonable to expect Contracting States to eradicate all forms of *de facto* discrimination with 'immediate effect'.⁴⁹ By its very nature, *de facto* discrimination requires a more progressive approach to realising full equality. *De jure* discrimination, on the other hand, should not be provided with the same level of tolerance.

The effect of the ICESCR on developing a new rights culture towards disabled people has been painfully slow:

'Whether because of the very general terms in which the relevant rights are stated or because of the alleged vagueness of this obligation, the great majority of governments have not moved rapidly or in a carefully focused manner to take measures to ensure that persons with disabilities are able to enjoy the full range of economic, social and cultural rights.'⁵⁰

We suggest, however, that the rights contained within the Covenant, together with the non-discrimination provision in Article 2(2) should, in future years, provide a valuable tool in furthering the social and economic rights and interests of people with disabilities.

2.3 United Nations agencies

In their 1995 report to the World Summit on Social Development in Copenhagen, the pressure group Disability Awareness in Action, reflected on the UN agencies in the following terms:

'The United Nations agencies have played a substantial role in the international disability field. Throughout the decade, annual inter-agency meetings allowed discussion of policy and programmes between the agencies and the international

⁴⁷ A non-qualified right to education has recently been recognised at the highest appellate court in United Kingdom. Thus in *Re T (a Minor) HL*, Times Law Report, 21.5.98; *R v East Sussex CC, ex parte Tandy*, New Law Journal Law Reports, NLJ, 6842, Vol 148, p. 781, the House of Lords held that resources should not be taken into account when determining the educational needs of children who, by reason of illness, are unable to attend the compulsory educational facilities provided by the State.

⁴⁸ General Comment No.3, ESCOR, Supp. 3, Annex III, at 4, para. 5, UN Doc. E/C.12/1990/8 (1991). As a result, Article 2(2) represents an important exception to the general terms of Article 2(1) and is crucial to an argument in favour of instituting an optional protocol allowing for individual and collective complaints.

⁴⁹ See M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995.

⁵⁰ P Alston, 'Disability and the International Covenant on Economic, Social and Cultural Rights,' fn. 45.

non-governmental organisations related to disability. These meetings raised the priority of disability programmes within the agencies and stimulated action. The exchange of information and the networking that took place were as valuable as many of the programmes themselves. Indeed, it is regrettable that these meetings have been discontinued. The agencies have also produced important international instruments in specific areas.'

The most important UN agencies for these purposes are the ILO and UNESCO. Whilst the World Health Organisation (WHO) also has an important part to play, its focus upon the medical model of disability reduces its impact as a vehicle for the assertion of basic rights and freedoms for people with disabilities.⁵¹

2.3.1 The International Labour Organisation (ILO)

While the term 'human rights' does not appear in the ILO Constitution, it has nevertheless been one of the few specialized UN agencies which has adopted a specific profile in this respect (primarily in the context of labour and employment) through a series of conventions (see below).

Moreover, the UN Special Rapporteur on Disability, describes the role of the ILO in respect of disabled people as follows:⁵²

' Since its establishment over 70 years ago, the ILO has never ceased to advocate that disabled persons, whatever the cause or nature of their disability, should be afforded every opportunity for vocational rehabilitation, including vocational guidance, training or re-adaptation as well as opportunities for employment, whether open or under sheltered conditions.'

Convention 111 concerning discrimination in respect of employment and occupation, 1958

Under this Convention a ratifying country undertakes to declare and pursue a national policy designed to promote - by methods appropriate to national conditions and practice - equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof.⁵³

Convention 142 concerning vocational guidance and vocational training in the development of human resources, 1975

⁵¹ It should be noted, however, that the WHO's classification of Impairments, Disabilities and Handicaps is currently under revision and the early drafts in this respect demonstrate a clear recognition of the 'social model' of disability.

⁵² Despouy *supra* fn. 27.

⁵³ The United Kingdom has not ratified this Convention.

Under this Convention a ratifying country agrees to establish and develop open, flexible, and complementary systems of general, technical and vocational education, educational and vocational guidance and training. These activities may take place within or outside the formal education system.⁵⁴

Convention 159 concerning vocational rehabilitation and employment (disabled persons), 1983

Under this Convention a ratifying country agrees to adopt a national policy on vocational rehabilitation and employment of disabled persons, not only in specialised institutions and sheltered workshops but also alongside non-disabled people in mainstream training centres and in open employment. The state agrees to put such a policy into action and to review and monitor its implementation on a regular basis. Of particular importance is Article 4 which states that any positive action taken to equalise opportunities for disabled workers cannot be regarded as wrongful discrimination against their non-disabled peers.⁵⁵

2.3.2 The United Nations Educational, Scientific and Cultural Organization (UNESCO)

The primary concern of UNESCO is the promotion and protection of cultural rights and in particular:

'To contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.'

According to Degener:⁵⁶

'It can fairly be said that UNESCO is one of the most active United Nations organizations with respect to the subject of disability.'

The *UNESCO Convention against Discrimination in Education*, the only binding instrument on education, came into force in 1962. Disabled students are not mentioned explicitly but the general discrimination clause can be said implicitly to include disability, thus:

'discrimination in education is a violation of the right of *every person* to education'
[Emphasis added]

⁵⁴ The United Kingdom has ratified this Convention.

⁵⁵ The United Kingdom has not ratified this Convention.

⁵⁶ See Degener and Koster-Dreese, 1995, *supra* fn. 11.

It goes on to declare that:

'discrimination in education includes depriving any person or group of persons of access to education of any type or at any level... or limiting any person or group of persons to education of an inferior standard... or inflicting on any person or group of persons conditions which are incompatible with the dignity of man (Article 1)'

As Article 2, which enumerates legitimate grounds for segregated education systems, does not mention disability, one may conclude that segregation on grounds of disability is therefore a breach of the Convention.⁵⁷

3. Summary

It is clear that the extent to which GIL will have a positive influence over the rights and freedoms of disabled people will vary depending upon whether the given instrument can be described as *binding* upon a particular government, *accessible* to the individual, and *self-executing* in nature. The influence of binding instruments with *self-executing* provisions in jurisdictions operating a monist legal system is particularly acute in this respect. The indirect application of binding instruments which have not been incorporated in dualist legal systems has also been noted.

Irrespective of their status, both *binding* and *non-binding* instruments have the potential to provide an indirect benefit in terms of empowering disabled people at a national level (by virtue of an interpretive obligation) if held to constitute customary international law.

Moreover, both *binding* and *non-binding* instruments are capable of giving rise to political and moral pressure that may be exerted on national governments of recalcitrant Contracting States by relevant NGOs at both a national and international level.

At an international level, the role of NGOs is of particular relevance in respect of *binding* instruments as the supervisory mechanisms under each instrument require, *inter alia*, the submission of periodic reports detailing the Contracting State's level of compliance with the provisions embraced within the instruments. While only the ICESCR, through the Economic and Social Council of the UN (ECOSOC) formally recognizes the ability of NGOs to submit written and oral statements in relation to the rights protected by the Covenant, it is clear that the members of HRC under the ICCPR may have access to those reports in their capacity as experts.⁵⁸ Moreover, both the ECOSOC and the HRC may gain access to the reports of the UN Special Rapporteur on disability who will no doubt be influenced by the activities of NGOs.

Finally, one should also recognise the potential impact which both *binding* and *non-binding* instruments of GIL are likely to have on the development of European Community law and policy in the context of disability, a potential impact which is further

⁵⁷ This Convention has been ratified by the United Kingdom.

⁵⁸ J Del Prado, 'United Nations Conventions on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties', 7 *Human Rights Quarterly*, 1985, p. 500.

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discussed in Part II of this article.

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