

The Activity, Progressiveness and
Consistency of the Human Rights Policy
of Finland: The Rights of Persons with Disabilities



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Preface

Finland, together with many other countries, has included the universal promotion and protection of human rights and fundamental freedoms as one of its central foreign policy goals. Accordingly, human rights are, allegedly, taken into account not only in the Finnish foreign human rights policy but in all sectors of the foreign policy. The aim of the Government of Finland is an active, competent, consistent and progressive human rights policy. According to the main priorities of its human rights policy, the Government of Finland has committed itself to promote and protect the rights of indigenous peoples, various minorities, including sexual and gender minorities, women, children and other vulnerable groups, actively and consistently.

The capacity and credibility of a government's action to promote the respect for human rights at the international level is inseparably related with the promotion and protection of human and fundamental rights at the national level. In the Government report to Parliament on the human rights policy of Finland of 2004, it is noted that Finland has the capacity and credibility needed to promote the respect for human rights at international fora. In line with its officially adopted position, Finland has worked actively for the development of structures and mechanisms for enhancing the international promotion and protection of human rights. The Finnish initiatives to create a European Roma and Travellers Forum and an office of a Commissioner for Human Rights, both within the framework of the Council of Europe, represent perhaps the most concrete examples of the activity of Finland in building international human rights structures.

Despite a relatively active international role when promoting respect for human rights, there are signs that indicate that the standard of the protection of human and fundamental rights at the national level does not always correspond to the standard promoted by Finland at international fora. Consequently, and despite the occasional statements commending its human rights record, human rights treaty monitoring bodies of the United Nations and the Council of Europe, including the European Court of Human Rights, have repeatedly reminded Finland of certain international treaty obligations that are inadequately taken care of.

It illustrates certain inconsistency or indeed ignorance towards recommendations issued by international human rights monitoring bodies that while receiving criticism Finland has simultaneously promoted actively all these questions at various international fora. However marginal, such inconsistency or ignorance does not go unnoticed and may eventually lead to a loss of a government's credibility.

In addition to the international monitoring bodies, also national courts and other national bodies constantly remind the Government of certain inconsistencies and failures in meeting its human rights obligations. In their decisions, the Parliamentary Ombudsman and the Ombudsman for Minorities, for example, both draw regularly the Government's attention to shortcomings in laws and regulations.

Despite the numerous bodies monitoring its human rights record, the Government of Finland has, occasionally, been, for a variety of reasons, relatively slow or sometimes even reluctant to take corrective measures. This is the case despite the fact that the Government has repeatedly emphasized the importance of human rights treaties and of the work carried out by the expert bodies monitoring the compliance of a state party with these treaties.

The present research report on the rights of persons with disabilities results from the author's ongoing study on the activity, progressiveness and consistency of the human rights policy of Finland. The Finnish Ministry for Foreign Affairs has granted the present author an extraordinary permit of access to any documentation produced by the Ministry for Foreign Affairs that may be of relevance for the carrying out of the research which will later result in a monograph. The author presents his gratitude to the trust placed on him. The author is also indebted to Kone Foundation for having awarded funding to carry out the study.

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M.L.

1 Strengthening the international protection of the rights of persons with disabilities

Promoting and protecting the rights of persons with disabilities was, in 2004, for the first time included as a priority area of the human rights policy of the Government of Finland. As stated in the Government report to Parliament on the human rights policy of Finland of 2004, the Government of Finland aims at a multiple approach to the protection and development of the rights of persons with disabilities by, among other things, mainstreaming the rights in the different sectors of life and in all national and international programmes and guidelines.¹

Already in the report by the Minister for Foreign Affairs to the Foreign Affairs Committee of Parliament on human rights in the foreign policy of Finland, submitted in 2000, it was considered important for persons with disabilities to be able to take part at all levels of decision making which affects them. Particular attention was already then devoted to the position of those who are more often than others subjected to discrimination. This also applies to persons with disabilities. The Government of Finland has also considered it insufficient to state that persons with disabilities have the same rights as others. Equality should be ensured by giving persons with disabilities equal opportunities, in other words, enabling them to participate actively in society and contribute to the community, rather than seeing them as a burden.² However, persons with disabilities are still being, in particular, subjected to indirect and institutionalized discrimination.

The exclusion which characterises the situation of persons with disabilities takes many forms. The most common forms being a lack of access to certain services or programmes as the particular needs of persons with disabilities are not sufficiently taken into account, or placement in institutions which reduce their opportunity for social integration and increase the risk of degrading treatment.

An increasing number of countries have adopted anti-discrimination legislation to ensure equal treatment and to protect persons with disabilities from being subjected to discriminatory practices. Legislation providing special arrangements for persons with disabilities complements the non-discrimination legislation. The Finnish policy for the disabled aims at promoting the independent life of the disabled, their equal opportunities and their participation in society. The Government's disability policy is based on the principles of non-discrimination and ensuring equal rights for all, full participation and inclusion of persons with disabilities in society and, in particular, in the decision making in questions affecting themselves, and the right of people with disabilities to necessary services and positive supportive measures in order to ensure *de facto* equality.³

¹ Government report to Parliament on the human rights policy of Finland 2004, p. 188-197.

² Human Rights and Finland's Foreign Policy, 2000, p. 125-128. With regard to the 1998 report on Finland's human rights policy, concern had been expressed about the fact that the promotion and protection of the rights of persons with disabilities had not been included among the priority areas of the Finnish human rights policy. Written statement by Kynnys ry of 17 November 1998 submitted to the Foreign Affairs Committee of Parliament concerning the report Human rights and Finland's foreign policy; Foreign Affairs Committee of Parliament, opinion 3/2001 vp. The only reference in the 1998 report to persons with disabilities is found under the section of the rights of the child where it is noted that Finland will continue to emphasize the importance of the rights of the child in its development cooperation including the "promotion of human rights and rehabilitation for children and young people". Human rights and Finland's foreign policy, 1998, p. 45.

³ Government report on disability policy, 2006, p. 30-31.

There has been a slow but steady shift from an approach motivated by charity towards persons with disabilities to one that acknowledges persons with disabilities as holders of rights.⁴ At the international level, this was probably best illustrated by the introduction of the concept of “equalization of opportunities” in the World Programme of Action concerning Disabled Persons⁵ and later by the United Nations Standard Rules on the Equalization of Opportunities for People with Disabilities adopted by the General Assembly in 1993.⁶ The Standard Rules, which “imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities”⁷ and the implementation of which is monitored by the Special Rapporteur on disability of the Commission for Social Development, have vitally contributed to raising consciousness about the human rights of persons with disabilities.

In 2001, the General Assembly noted that although the Standard Rules on the Equalization of Opportunities for People with Disabilities “play an important role in influencing the promotion, formulation and evaluation of policies, plans, programmes and actions at the national, regional and international levels to further the equalization of opportunities by, for and with persons with disabilities” the efforts made “have not been sufficient to promote full and effective participation by and opportunities for persons with disabilities”.⁸ Consequently, the General Assembly decided to establish a working group to consider options for a legally binding instrument on the rights of persons with disabilities⁹ leading, in 2006, to the adoption of the Convention on the Rights of Persons with Disabilities.

Within the framework of the European Union, non-discrimination of persons with disabilities was introduced in the Treaty of Amsterdam in 1997. The aim of the Union’s disability policy is, similarly as at the international level, to ensure equal opportunities for people with disabilities. A central directive with regard to non-discrimination, including also non-

⁴ Human Rights and Disability, 2002, pp. 1. For a historical presentation of the development of thinking with regard to persons with disabilities, see, *e.g.*, Bengt Lindqvist, 1995, p. 63-68. The Declaration on the Rights of Mentally Retarded Persons adopted by the General Assembly in 1971 acknowledges that “[T]he mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings” represents one of the earliest signs of the shift towards a rights-based approach with regard to persons with disabilities. General Assembly resolution 2856 (XXVI) of 20 December 1971. The Declaration on the Rights of Disabled Persons adopted by the General Assembly four years later, in 1975, asserts that disabled persons have the same civil and political rights as other human beings and, more significantly, it asserts that persons with disabilities are “entitled to the measures designed to enable them to become as self-reliant as possible”. General Assembly resolution 3447 (XXX) of 9 December 1975.

⁵ General Assembly resolution 37/52 of 3 December 1982. The World Programme of Action defines the concept of “equalization of opportunities” in the following way: “Equalization of opportunities means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all”.

⁶ General Assembly resolution 48/96 of 20 December 1993.

⁷ Standard Rules, paragraph 14.

⁸ In his report of 2002, the Special Rapporteur on disability proposed a supplement to the Standard Rules identifying certain short-comings that needed to be addressed. UN doc. E/CN.5/2002/4, paragraphs 108-109 and annex.

⁹ General Assembly resolution 56/168 of 19 December 2001.

discrimination of persons with disabilities, is the Council Directive on equal treatment in employment and occupation.¹⁰

Also the Council of Europe has a wide range of activities with regard to the promotion and protection of the rights of persons with disabilities. Besides the recommendations adopted by the Committee of Ministers,¹¹ the European Committee of Social Rights, the body monitoring the compliance of states parties of the European Social Charter, has dealt extensively with the situation of persons with disabilities in Finland, but has found no instances where the law and practice was not in conformity with the provisions of the Social Charter.

1.1 A special procedure on human rights and disability

In 2002, Finland supported a proposal contained in an early version of the draft resolution on human rights of persons with disabilities to establish a special procedure mandate of the Commission on Human Rights on human rights and disability. The proposed special rapporteur was to work in close cooperation with other special procedure mandate holders and with the Special Rapporteur of the Commission for Social Development on Disability.¹² However, due to the limited support given to the proposal, it was not included in the version of the resolution adopted by the Commission on Human Rights.¹³ In the adopted resolution, reference was merely made to the study on human rights and disability that had been commissioned by the Office of the High Commissioner for Human Rights to review international human rights treaties, standards and mechanisms in the context of persons with disabilities which, in its concluding section, recommended the establishment of a special procedure mandate on human rights of persons with disabilities.¹⁴ According to the report commissioned by the Office of the High Commissioner, the Commission on Human Rights would, by such an appointment, indicate “the gravity and urgency with which the Commission treats the issue of disability” and that this would contribute to the fact that people with disabilities would “enjoy visibility in the world’s foremost human rights organ”.¹⁵

The Commission on Human Rights did not, during the remaining years of its existence, establish a special procedure mandate on the rights of persons with disabilities nor was any such proposal anymore put forward. Instead, the attention of all was on strengthening the role of the existing treaty monitoring bodies in taking into account the concerns of persons with

¹⁰ The Finnish Non-discrimination Act (Act No. 21/2004) that entered into force on 1 February 2004, gave effect to the provision of Council Directive (2000/43/EC) implementing the principle of equal treatment of persons irrespective of racial or ethnic origin, and Council Directive (2000/78/EC) establishing a general framework for equal treatment in employment and occupation.

¹¹ See, *e.g.*, Recommendation No. R (92) 6 on a coherent policy for people with disabilities adopted by the Committee of Ministers on 9 April 1992 and Recommendation Rec(2006)5 on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society adopted by the Committee of Ministers on 5 April 2006.

¹² Ministry for Foreign Affairs, COREU CFSP/HEL/0071/02, 4.4.2002.

¹³ Ministry for Foreign Affairs, GENC029-12, 16.4.2002; GEN0018-72, 30.5.2002. Commission on Human Rights resolution 2002/61.

¹⁴ “The Commission [on Human Rights] should consider appointing a special rapporteur on the human rights of persons with disabilities”. Gerard Quinn and Teresia Degener, 2002, p. 8, 179 and 290.

¹⁵ Gerard Quinn and Teresia Degener, 2002, p. 179.

disabilities and, in particular, in drafting a legally binding instrument on the rights of persons with disabilities.

Since its fifty-fourth session held in 1998, the Commission on Human Rights had, nonetheless, invited all special procedure mandate holders, in carrying out their mandates, to take into account the human rights of persons with disabilities.¹⁶ The Commission also invited the Special Rapporteur of the Commission for Social Development on disability to address the Commission on Human Rights on the human rights dimension of work carried out by the mandate holder¹⁷ and to regularly provide the Commission with reports of experience on the human rights dimension gained by the Special Rapporteur.¹⁸ The utilization of the expertise provided by the Special Rapporteur of the Commission for Social Development together with the attention devoted to the drafting of an international legally binding instrument may have contributed to the reluctance towards proposing the establishment of a special procedure on the rights of persons with disabilities anymore after the attempt in 2002.¹⁹

1.2 An international legal instrument on the rights of persons with disabilities

In its resolution 61/106 of 13 December 2006, the General Assembly adopted the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention.²⁰ The Convention was the result of a drafting process characterized by an unusual speed²¹ that lacked, however, at the beginning of the process, the transparency required for such an exercise.²² Although “an international legal instrument could be a useful and effective tool in promoting and protecting the rights of persons with disabilities”²³ as was stated by the

¹⁶ Commission on Human Rights resolutions 1998/31, paragraph 12; 2000/51, paragraph 12; 2002/61, paragraph 24; 2003/49, paragraph 8; 2004/52, paragraph 12; 2005/65, paragraph 11.

¹⁷ Commission on Human Rights resolutions 2000/51, paragraph 4; 1998/31, paragraph 4.

¹⁸ Commission on Human Rights resolutions 2005/65, paragraph 12; 2004/52, paragraph 13; 2003/49, paragraph 9; 2002/61, paragraph 4.

¹⁹ On how the existence of a specific treaty does not exclude the establishment of a special procedure on the same issue, see, *e.g.*, Miko Lempinen, 2001, p. 267-269.

²⁰ By adopting the Optional Protocol, a State Party recognizes the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention. Finland signed the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto on 30 March 2007. Ministry for Foreign Affairs, HEL5907-23, 11.9.2006.

²¹ On the occasion of the adoption of the Convention, in December 2006, the Deputy Secretary-General noted that it was “the most rapidly negotiated human rights treaty in the history of international law”. UN doc. A/61/PV.76.

²² At a later stage of the negotiation process, non-governmental organizations and persons with disabilities became an integral part of the delegations in accordance with the principle “nothing about us without us” as was also noted by the representative of Finland, on behalf of the member states of the European Union, on the occasion of the adoption of the Convention. UN doc. A/61/PV.76; Ministry for Foreign Affairs, HEL 5907-20, 12.9.2006.

²³ The representative of Belgium, on behalf of the member states of the European Union. A/C.3/56/SR.55, paragraph 63. The representative of the United States also regretted the speed by which the ad hoc committee was established by noting in the same meeting that “it was premature to set up a mechanism for elaborating a convention when the need for such a convention has yet to be firmly established, and that it would have been

Member States of the European Union at the General Assembly in 2001, the process leading to the establishment of the ad hoc committee that was given the task to draft the convention was accused of a “lack of transparency”. The speed and lack of transparency with which the process was initiated did not, for instance, allow for a thorough study to be made that would have examined the best option to proceed with ensuring a more efficient promotion and protection of the rights of persons with disabilities.

When the representative of Mexico announced on 16 November 2001 that his delegation “intended to submit a proposal for the preparation of an international convention for the promotion and protection of the rights and dignity of disabled persons”²⁴ it was, in other words, generally felt that the timing of the initiative launched was not necessarily the best possible. This was the case, in particular, because the study on human rights and disability commissioned by the Office of the High Commissioner for Human Rights and which was expected to make an inventory and evaluation of existing standards and institutions in relation to the rights of persons with disabilities had not yet been submitted.²⁵ That the initiative was taken before the finalization of the study could be considered to undermine the above study.

In its resolution 56/168 of 19 December 2001, the General Assembly, nonetheless, decided to establish an ad hoc committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities”. The operative paragraph establishing the ad hoc committee was orally revised by the representative of Mexico by replacing the words “for the purpose of elaborating” a convention to the adopted wording of “to consider proposals for” a convention and by adding the words “and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development” at the end of that paragraph.²⁶ This was done in order to meet, at least partly, the desire of a number of governments, including the Government of Finland, who wanted to study carefully the different options available for a more efficient promotion and protection of the rights of persons with disabilities. The possible advantages and disadvantages of drafting a separate convention on the rights of persons with disabilities or of, for example, an optional protocol to one or several existing human rights treaties, as an alternative to a separate treaty on disabled persons, were never sufficiently studied.²⁷

In principle, Finland gave its support, from the very beginning of the drafting process, to the proposal to elaborate a legally binding instrument – not necessarily a separate convention – on the rights of persons with disabilities.²⁸ Finland, along with a number of other governments,

more appropriate to review the studies under way within the United Nations system before taking such a step”. UN doc. A/C.3/56/SR.55, paragraph 64.

²⁴ UN doc. A/C.3/56/SR.42, paragraph 26. See also the statement by Vicente Fox, President of Mexico, during the general debate of the fifty-sixth session of the General Assembly, 10 November 2001. UN doc. A/56/PV.44.

²⁵ The preliminary findings of the study commissioned by the Office of the High Commissioner for Human Rights were presented only on 14 January 2002. UN doc. E/CN.4/2002/18/Add.1.

²⁶ UN doc. A/56/583/Add.2, paragraph 92; A/C.3/56/SR.55, paragraph 61.

²⁷ Ministry for Foreign Affairs, HELD1245-25, 27.6.2002.

²⁸ Ministry for Foreign Affairs, HELD2385-89, 17.10.2001; HELD2385-97, 29.10.2001; YKE0025-17, 8.11.2001; HELD2385-117, 9.11.2001. At the national level, the usefulness of a separate instrument on the rights of persons with disabilities and available options to it had been discussed thoroughly.

did not want to exclude the option of drafting an optional protocol to one or several of the already existing human rights conventions.²⁹ As noted by the Government of Finland in December 2002, “the implementation and the monitoring of the existing human rights conventions should be developed so that they would more than now protect and promote the rights of persons with disabilities”. It was also not seen as a realistic option to amend the existing treaties. It was, however, considered premature to decide whether the new instrument should be in the form of a separate treaty or an optional protocol to one or more existing treaties.³⁰ Finland was of the view that the future legally binding instrument on the rights of persons with disabilities ought to have its focus on the special provisions of disabled persons avoiding a repetition of already existing human rights provisions.³¹

As was also stated in a position paper of July 2002, the Member states of the European Union wished to keep “an open mind on the ultimate shape and content of this legal instrument” meaning that the EU member states did not want to exclude the option of drafting, for example, an optional protocol to one or several of the existing international human rights instruments. In addition, it was considered to be of “the utmost importance that any process of elaborating a convention should take place in parallel with concrete efforts to further mainstream the disability perspective into the monitoring mechanisms of the six core United Nations human rights conventions”.³²

In the joint Nordic statement delivered at the fifty-eighth session of the Commission on Human Rights in 2002, the Nordic countries had already, however, given their support to the proposal to negotiate a convention on the rights of persons with disabilities as this was considered to be the most efficient way to enhance the protection of the rights of disabled persons. It was also stated that a comprehensive and integrated convention on the rights of persons with disabilities, together with a strengthening of the focus on the rights of persons with disabilities by the already existing human rights monitoring bodies, should be pursued simultaneously.³³

In its position presented shortly before the second session of the ad hoc committee in June 2003, Finland noted that it was “in principle in favour of a short and concise text which would complement the existing conventions as far as the rights of persons with disabilities are concerned”.³⁴ The Convention on the Rights of Persons with Disabilities has fifty articles. The desire for a short and concise text was not, in other words, realized. With regard to some other proposals, Finland, together with its EU partners, was more successful.

With regard to the contents of the Convention, Finland, together with some other member states of the European Union, wanted to see an explicit reference to “sign language, Braille

²⁹ Ministry for Foreign Affairs, YKE0026-14, 29.7.2002.

³⁰ Ministry for Foreign Affairs, COREU CFSP/HEL/0277/02, 19.12.2002.

³¹ Ministry for Foreign Affairs, YKE0026-14, 29.7.2002.

³² UN doc. A/AC.265/WP.2.

³³ Statement by the observer for Denmark, on behalf of the Nordic countries at the fifty-eighth session of the Commission on Human Rights, 23 April 2002. Ministry for Foreign Affairs, GEN0010-34, 24.4.2002, annex. UN doc. E/CN.4/2002/SR.52, paragraph 81.

³⁴ Ministry for Foreign Affairs, COREU CFSP/HEL/0126/03, 6.6.2003.

and other modes and means of communication of their choice” in the convention.³⁵ This was also achieved as the article providing for the right to freedom of expression and opinion provides also for the right to use sign language, Braille, augmentative and alternative communication and to any other accessible means, modes and formats of communication.³⁶ Perhaps the clearest Finnish contribution to the Convention is, however, the separate article on rehabilitation and habilitation.³⁷ The Finnish proposal on rehabilitation and habilitation was not included as such in the final version of the Convention, but the contents of this initiative was.³⁸

Other provisions were much more difficult to agree upon. The perhaps most difficult negotiations concerned the legal capacity as found in Article 12,³⁹ the right to health, in particular concerning sexual and reproductive health as found in Article 25, and the provision concerning the international monitoring of the treaty provisions as found in Article 34. There was, hence, throughout the whole negotiating process a well founded concern that the agreed provisions would undermine already existing international human rights standards. If this would have happened, an instrument that was aimed at strengthening the situation of persons with disabilities would, in fact, have weakened their protection. Although several provisions are open for interpretation, the adopted text was considered to be good, and, as a whole, the Government of Finland was satisfied with the Convention on the Rights of Persons with Disabilities as adopted in December 2006.⁴⁰

³⁵ Ministry for Foreign Affairs, HEL1024-4, 17.1.2005; HEL1024-6, 8.2.2005.

³⁶ Article 21(b) of the Convention on the Rights of Persons with Disabilities on freedom of expression and opinion, and access to information reads as follows: "States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by: ... (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions";

³⁷ See, *e.g.*, Hilde Reiding, 2007, on the difficulties attached to assessing the substantial contribution of a particular government to particular negotiations on international human rights instruments.

³⁸ The Finnish proposal of 11 January 2005 (Article 21 bis) on rehabilitation and habilitation reads as follows: "States Parties to this Convention shall take appropriate measures to ensure access to rehabilitation programs and services, including counselling and assistive technologies, aiming at enabling persons with disabilities to improve and maintain their physical, sensory, mental or social activities." States Parties shall take appropriate measures to organize rehabilitation services and programs in such a way that (a) rehabilitation services and programs are based on the assessment of personal needs, (b) rehabilitation services and programs support participation and inclusion in the community and all aspects of society." Ministry for Foreign Affairs, HEL1024-4, 17.1.2005, annex; HEL5907-1, 7.2.2005; HEL5907-20, 12.9.2006. The initiative to the proposal came from the Action Plan to promote the rights and full participation of people with disabilities in society within the framework of the Council of Europe that was, at the time, under preparation.

³⁹ On the concern about the provision on the equal recognition before the law, see, *e.g.*, the statement by the Ministry of Justice of 27 October 2006. Ministry of Justice, OM 21/87/2006, 27.10.2006.

⁴⁰ Ministry for Foreign Affairs, HEL5907-20, 12.9.2006.

2 The situation of persons with disabilities in Finland

Despite the fact that the position of persons with disabilities has traditionally been considered to be fairly good in Finland, persons with disabilities do face discrimination on the basis of their disability in their everyday lives.⁴¹ The discrimination is often indirect and institutionalized⁴² which means that certain functions of society are conducive to exclude a person with disabilities from participating fully in society. As was also noted in the Government report to Parliament on the human rights policy of Finland of 2004, institutions may indirectly or passively be conducive to discrimination, even if these institutions, as such, were not discriminative.⁴³ The rights of persons with disabilities to live equally with others are, therefore, not fully realized. Discrimination, be it institutionalized, direct or indirect arising from attitudes, ignorance, lack of understanding, indifference and even fear is found, among other things, in employment, issues relating to privacy and integrity, education and training, the structures of our living environment and services.⁴⁴

The Constitution of Finland contains a general anti-discrimination clause.⁴⁵ Discrimination based on a person's disability is also explicitly prohibited. Accordingly, everyone shall be equal before the law and no one shall, without an acceptable reason, be treated differently from other persons on the ground of, among other things, health, disability or any other reason that concerns his or her person. Although the provision does not differentiate between direct and indirect discrimination, the provision covers both forms of discrimination.⁴⁶ In addition to the anti-discrimination clause, there is a separate section on the right to one's language and culture. According to Section 17 of the Constitution, the rights of persons using sign language and persons in need of interpretation or translation aid owing to disability shall be guaranteed

⁴¹ Government report to Parliament on the human rights policy of Finland, 2004, p. 194. For a comprehensive overview of the rights of persons with disabilities in Finland, see, *e.g.*, Jukka Kumpuvuori and Marika Högbäck, 2003.

⁴² Juha-Pekka Kontinen, 2007, p. 70.

⁴³ Government report to Parliament on the human rights policy of Finland, 2004, p. 196.

⁴⁴ Government report on disability policy, 2006, p. 8-10. With regard to cases of a building environment unsuitable for persons with disabilities, see, *e.g.*, decisions dnro 2428/4/01 and 3124/4/01 of 28 November 2003 and dnro 619/4/03 of 29 April 2004 by the Parliamentary Ombudsman.

⁴⁵ Act No. 731/1999, Section 6. Government Bill HE 309/1993 vp.

⁴⁶ The prohibition of discrimination is also to be understood as a prohibition to treat similarly persons whose situation is different. See the reasoning in the case of *Thlimmenos v. Greece* by the European Commission of Human Rights where the following was noted: "...the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification, but also when States without an objective and reasonable justification, failed to treat differently persons whose situations were different". Paragraph 38 of the judgement by the European Court of Human Rights in the case of *Thlimmenos v. Greece* (Application no. 34369/97) of 6 April 2000. Jukka Kumpuvuori has noted that the principle reflected in the case of *Thlimmenos v. Greece* could be interpreted so that it is not only allowed to take positive measures but that it is the duty of states to take such measures. Jukka Kumpuvuori, 2003, p. 14. See also Martin Scheinin, 2003 (a), pp. 502.

by law.⁴⁷ A general non-discrimination clause is also found, for instance, in the Penal Code⁴⁸ and in the Non-Discrimination Act.⁴⁹

Positive discrimination, on the other hand, is allowed, where an acceptable ground for this is shown.⁵⁰ Accordingly, the authorities are obligated to take steps in order to provide equal opportunities for persons with disabilities.⁵¹ Despite the numerous legislative measures to provide equal opportunities for persons with disabilities, the Parliamentary Ombudsman noted in 2004, that the aim to reach equal treatment has not yet been realized.⁵² Also Juha-Pekka Konttinen has concluded that the constitutional provision, together with the Non-Discrimination Act and the Penal Code do not sufficiently protect the rights of persons with disabilities.⁵³

In order to advance equality of persons with disabilities and their opportunities to influence matters concerning themselves, a disability policy programme entitled *Towards a Society for All* was drawn up by the National Council on Disability in 1995.⁵⁴ However, in the Government Report on Disability Policy of 2006, it was noted that the programme drawn up twelve years earlier in 1995 and which had its basis in the United Nations Standard Rules on the Equalization of Opportunities for People with Disabilities adopted by the General Assembly in 1993⁵⁵ "continues to be topical as all goals set in the programme have not been achieved". One reason given for the failure to implement the programme drawn up in 1995 fully was that the Finnish disability policy is still seen as a policy provided for a special group although it is the environment, products and services that ought to be such that they are accessible also for persons with disabilities. In the report, it was also noted that Finland lacks a concrete disability programme in which the disability policy goals for the next few years

⁴⁷ Section 17, chapter 2 of the Constitution of Finland. Finland became, in 1995, only the third country in the world to include sign language in its constitution. Ministry for Foreign Affairs, HEL1024-74, 23.12.2004.

⁴⁸ Act No. 39/1889 including amendments up to and including Act No. 578/1995. According to the Penal Code, discrimination in trade or profession, service of the general public, exercise of official authorities or other public functions or in the arrangement of a public amusement or meeting without a justified reason is prohibited. Although disability is not explicitly mentioned in the Penal Code, the national courts have, through their work, ensured that disability is among the prohibited grounds for discrimination.

⁴⁹ Act No. 21/2004. According to the Non-Discrimination Act, discrimination is prohibited in matters related to employment, education and trade union activities and the authorities shall foster equality in all their activities.

⁵⁰ Juha-Pekka Konttinen, 2007, p. 71-72.

⁵¹ See, e.g., the Act on Services and Assistance for the Disabled (Act No. 380/1987) and the Act on Special Care for Mentally Handicapped Persons (Act No. 519/1977). When adopted in 1987, the Act on Services and Assistance for the Disabled was considered progressive and ensured basic services for persons with disabilities. Jukka Kumpuvuori and Marika Högbacka, 2003, p. 16-17.

⁵² Parliamentary Ombudsman Dnro 1118/5/04, 4 May 2004.

⁵³ Juha-Pekka Konttinen, 2007, p. 73.

⁵⁴ The National Council on Disability (Valtakunnallinen vammaisneuvosto, VANE) is a co-operative organ for authorities, disability organisations and organisations for relatives of disabled people. It closely follows the decision-making in the society, gives statements and promotes rights of persons with disabilities. The Council is working in close connection with the Ministry of Social Affairs and Health.

⁵⁵ General Assembly resolution 48/96 of 20 December 1993.

would be clearly defined.⁵⁶ As noted in the Government report on disability policy of 2006, separate solutions are only a secondary option.⁵⁷

The vast number of separate legislation for ensuring the rights of persons with disabilities has not solved all concerns that persons with disabilities are facing. Partly, this is caused by the fact that municipalities have been granted extensive duties with regard to the providing of health care services. While the financial resources available, the priorities set, and the systems used to assess needs and grant assistance varies from municipality to municipality, the result – as illustrated by the example of the system of personal assistant and the example of persons in institutional care – is inequality and restrictions which are not in conformity with national law and the Government's international human rights obligations.

2.1 The system of personal assistant for severely disabled

A system of a personal assistant is an utmost important support provided for a severely disabled person.⁵⁸ The aim of the system of personal assistant provided under the Act on Services and Assistance for the Disabled is to promote the possibilities of a person with severe disabilities to live and function on equal terms with others.⁵⁹ In practice, the help can mean, for example, assisting the person to get out of bed, helping with the daily hygiene, eating, changing positions, moving, getting dressed, and any other task that a person with severe disabilities is unable to do by him or herself.⁶⁰

The responsibility for providing the system of personal assistant belongs to the municipalities and the costs from hiring a personal assistant can be compensated, wholly or partly, from the general annual allowances of the municipalities. The self-determination of the municipalities and the annual fluctuation of funds available for different forms of aid together with the dependence of those budgetary funds whose use is under free consideration has led to a situation where the system of personal assistant does not necessarily always correspond with the constitutional provision of guaranteeing the means necessary for a life of dignity.

⁵⁶ According to the Government programme of Vanhanen II, a disability programme will be drafted. Chapter 10.3 of the Government programme of 19 April 2007. It was also noted that there is a need to examine the status of the National Council on Disability and the potential need for a Disability Ombudsman. Government report on disability policy, 2006, p. 33. In its report of 7 October 2004 on the Government report to Parliament on the human rights policy of Finland of 2004, the Foreign Affairs Committee of Parliament noted that attention ought to be given, among other things, to the possibility to extend the mandate of the Ombudsman for Minorities to cover also issues relevant to persons with disabilities. UaVM 12/2004 vp.

As a comparison can be noted that since 1994 Sweden has had a Disability Ombudsman who monitors the issues relevant to the rights and interests of people with disabilities. The Disability Ombudsman Act (1994:749).

⁵⁷ Government report on Disability Policy, 2006, p. 8-9 and 28-33.

⁵⁸ As a severely disabled person is understood a person who is not in need of constant institutional care, but who, because of his or her severe disability, is not capable to take care of daily tasks and is, therefore, in need of constant care of a technical nature.

⁵⁹ See the Act (Act No. 380/1987) and Decree (Decree No. 759/1987) on Services and Assistance for the Disabled.

⁶⁰ According to the statistics for 2004, around 4000 persons had a personal assistant. Government Report on Disability Policy, 2006, p. 21.

In order to provide persons with severe disabilities with equal opportunities and in order to avoid variations between municipalities, organizations representing persons with disabilities have demanded that the system of personal assistant for persons with severe disabilities is provided as a subjective right and that all costs related to the hiring of a personal assistant be covered.⁶¹ Kaarlo Tuori has noted that the current situation with regard to the right to a personal assistant as guaranteed under the Act on Services and Assistance for the Disabled is, indeed, in violation of Section 19 of the Constitution of Finland which guarantees, as a subjective right, "the right to receive indispensable subsistence and care" for those severely disabled persons who cannot obtain the means necessary for a life of dignity.⁶²

In the Government programme of 2003, it is stated that the personal assistant and care will be guaranteed for those severely disabled who are dependent on it and that particular attention will be devoted to the system of personal assistant when reviewing the Act on Services and Assistance for the Disabled.⁶³ The intention of the review, as stated in the Government programme, was also to eliminate any possible overlaps in the Act on Services and Assistance for the Disabled, on the one hand, and the Act on Special Care for Mentally Handicapped Persons, on the other, as well as to clarify the contents of the legislation in order to correct identified defects and to ensure that the legislation corresponds better with provisions on fundamental rights and liberties.

The amendments made, in 2006, to the Act on Services and Assistance for the Disabled⁶⁴ did not, however, touch upon the system of personal assistant. Thus, the situation remains a concern for those in need of the service, despite the fact that the Government programme of 2003 had indicated that plans to a more comprehensive review of the Act were forthcoming.⁶⁵ It remains to be seen whether the Government that came into office in 2007 will fulfil its programme according to which the system of personal assistant will be developed in stages and that the funding of services and assistant for persons with disabilities will be reviewed.⁶⁶

2.2 Restrictions on the right to choose the place of residence

Freedom of movement, including the right freely to choose one's place of residence, is of fundamental character and included in international human rights instruments⁶⁷ as well as in

⁶¹ Rammat Panterit, 29 September 2006. Statement on file with author. Transport services, service housing and necessary alterations to flats, as well as interpreter services are currently guaranteed as subjective rights for persons with severe disabilities. Ministry for Foreign Affairs, HELD2385-30, 1.6.2001.

⁶² Kaarlo Tuori, written statement of 23 November 2005, submitted to Henkilökohtaisten Avustajien Liitto ry. Statement on file with author. See also Jukka Kumpuvuori and Marika Högbäck, 2003, p. 49.

⁶³ Chapter 4.4 of Government programme of Vanhanen I, 24 June 2003. See also Government Report on Disability Policy, 2006, p. 36.

⁶⁴ Act No. 1267/2006.

⁶⁵ Chapter 4.4 of the Government programme of Vanhanen I, 24 June 2003. Juha-Pekka Kontinen, 2007, p. 92.

⁶⁶ Chapter 10.3 of the Government programme of Vanhanen II, 19 April 2007.

⁶⁷ See, for example, International Covenant on Civil and Political Rights, Article 12, Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 18 of the Convention on the Rights of Persons with Disabilities which guarantees the right of persons with disabilities the "freedom to choose their residence...on an equal basis with others".

the Constitution of Finland.⁶⁸ However, the provisions of the Home Municipality Act⁶⁹ are in violation of the Constitution to the extent that the provisions restrict a person residing in a social and health care institution from freely changing his or her place of residence. The place of residence depends, under the Home Municipality Act, on the need for care of the person concerned and consequently on the municipality providing the services and support measures. A person placed in institutional care may, therefore, have been considered, by the concerned person's home municipality, to having changed his or her place of residence and as a consequence lost his or her rights provided by the home municipality under the Act on Service and Assistance for the Disabled.

Martin Scheinin has noted that regional differences in providing the service and care under the Social Welfare Act⁷⁰ and the Act on Services and Assistance for the Disabled may, indeed, have led to disagreement when trying to determine the person's home municipality.⁷¹ As noted in the Government report to Parliament on the human rights policy of Finland of 2004, the Government has expressed its intention to have the conformity of the Home Municipality Act with the Constitution examined as the Government's objective is that everyone ought to have the right to choose his or her place of residence.⁷²

In clarifying the relationship between the constitutional provision on the freedom of movement, on the one hand, and the restriction to this freedom contained in the Home Municipality Act, on the other, the Working Group on home municipality concluded in 2005 that the current restrictions with regard to a person's right to choose his or her place of residence is not in conformity with Section 9 of the Constitution of Finland which guarantees the freedom of movement. The Working Group recommended, therefore, that the legislation be amended so that a person's place of residence would change only in case this was the wish of the person in question. Because the restrictions are not possible to remove without simultaneously solving the issue concerning the distribution of costs between municipalities, the proposal made by the Working Group on home municipality in 2005 has not, at the time of writing, led to any improvement.⁷³

With regard to the issue of municipal differences, the Committee on Economic, Social and Cultural Rights expressed its concern in 2000 precisely on the issue by noting in its concluding observations on the fourth periodic report of Finland that "certain municipalities allocate insufficient funds to health care services". The Committee continued by noting that this has resulted in inequality with regard to the level of health care service depending on the place of residence and that those who have suffered from this are, in particular, children, persons with physical and mental disabilities and older persons. The Committee

⁶⁸ Section 9, chapter 1, of the Constitution reads as follows: "Finnish citizens and foreigners legally resident in Finland have the right to freely move within the country and to choose their place of residence".

⁶⁹ Act No. 201/1994.

⁷⁰ Act No. 710/1982.

⁷¹ Martin Scheinin, 1999, p. 301.

⁷² Government report to Parliament on the human rights policy of Finland, 2004, p. 196.

⁷³ Working Group on home municipality, final report, 2005, pp. 40 (Kotikuntatyöryhmä). It is possible that the issue of the freedom to choose one's place of residence will cause some delay in Finland's ratification of the Convention on the Rights of Persons with Disabilities.

recommended the Government of Finland "to ensure that municipalities provide adequate health services, especially to vulnerable groups such as children, older persons and persons with physical and mental disabilities".⁷⁴ This was not, however, the first time Finland had been reminded on this issue. The predecessor of the Committee on Economic, Social and Cultural Rights, the sessional working group on the implementation of the International Covenant on Economic, Social and Cultural Rights, had in 1981 during the consideration of the initial report of Finland raised the issue as to what the central Government in Finland did when the financial resources of the municipalities were proven inadequate to fulfil the services they had to provide.⁷⁵

When examining the second periodic report of Finland in 2000, the Committee on the Rights of the Child made an important observation when it noted that the delegation of responsibilities to local and regional authorities may indeed enhance the involvement of the local authorities but, as the Committee continued, this delegation "seems to hamper the full and equal implementation of the principles and provisions of the Convention [on the Rights of the Child] owing to local and regional differences in its interpretation, its application and budgetary allocations". The Committee on the Rights of the Child noted further that because all municipalities do not provide the same level of social policies and services for the most vulnerable groups in society, including persons with disabilities, the significant delegation of powers from the central level to the municipalities the services provided by local authorities leads to unequal treatment where the level of services is dependable on a person's place of residence. The Committee urged the Government of Finland to guarantee every child equal access to the same standards of services, irrespective of where he or she was living.⁷⁶

3 Preliminary observations: is a separable treaty the best way forward?

The proposal put forward in 2001 to draft a convention on the rights of persons with disabilities was by no means the first of its kind. A similar initiative had been made already in 1987 when a Global Meeting of Experts to Review the Implementation of the World Programme of Action of the Decade on Disabled Persons had, among other things, proposed that an international convention on disabled persons be drafted.⁷⁷ Consequently, at the forty-second session of the General Assembly the same year, the need for a convention on the rights of disabled persons was raised by the Government of Italy. It was considered that "such a convention could contribute to the elimination of some of the obstacles which impede the equalization of opportunities for the disabled".⁷⁸ The proposal was not, however, given much

⁷⁴ UN doc. E/C.12/1/Add.52, paragraphs 20 and 32.

⁷⁵ UN doc. E/1981/WG.1/SR.10, paragraph 54. When the catalogue of fundamental rights was incorporated into the constitution, both the Government Bill (HE 309/1993 vp) and the statement by the Constitutional Law Committee of Parliament (PeVM 25/1994 vp) contained the understanding that when municipalities are given tasks it must be ensured that the municipalities are capable to carry out the tasks entrusted them. See also written statement by Kaarlo Tuori of 11 May 2004 submitted to the Constitutional Law Committee of Parliament on the Government report to Parliament on the human rights policy of Finland of 2004.

⁷⁶ UN doc. CRC/C/15/Add.132, paragraphs 10-16.

⁷⁷ UN doc. CSDHA/DDP/GME/7 of 1 September 1987. See also UN doc A/42/561, paragraph 14. The expert meeting had been the first meeting in the history of the United Nations in which the majority of the participating experts were persons with disabilities, and in which sign language interpretation, documentation in Braille and audio cassettes had been used. UN doc. A/C.3/42/SR.14, paragraph 13.

⁷⁸ UN doc. A/C.3/42/SR.16, paragraphs 6-9.

support and no mention of the need to draft a convention on the rights of persons with disabilities was included in the resolution on disabled persons adopted by the General Assembly that year.⁷⁹

The statements of 1987 on the proposal to draft a legally binding instrument on the rights of persons with disabilities illustrate well that governments did not, at the time, see any meaning in such an exercise. In 1987, the Government of Australia “had reservations” about the proposal to draft an international convention on disabled persons,⁸⁰ the Government of Japan “hardly saw the merit of the plan to draft an international convention”,⁸¹ the Government of the Federal Republic of Germany “found it difficult to support the proposal”,⁸² the Government of France noted that the issue of the disabled “was not a human rights issue warranting the drafting of further legal instruments”⁸³ and the Nordic countries attached “the greatest importance to recognition of the human rights of disabled persons, but they were not convinced of the need for another convention because the human rights of all persons were already set forth in the Universal Declaration of Human Rights and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights”.⁸⁴

At the time, positions were, however, fluctuating back and forth. It took, for instance, only two years for the Government of Sweden to change fundamentally its approach to the issue. Consequently, the Government of Sweden proposed, at the forty-fourth session of the General Assembly, in 1989, that “[L]egally binding international regulations must be laid down to guarantee the full implementation of existing international instruments on the rights of disabled persons”.⁸⁵ The proposal made in 1989 was, however, only supported by the Ukrainian Soviet Socialist Republic.⁸⁶ The representative of Belgium being among the few government representatives commenting on the need for a convention on the rights of persons with disabilities expressed her delegations “reservations on the legal justification on the value of an international convention on the rights of handicapped persons”.⁸⁷ The representative of the Government of the Libyan Arab Jamahiriya on his turn noted that “[H]is delegation had great respect for the proposal made in the Committee [Third Committee of the General Assembly] for the elaboration of an international convention on the rights of disabled persons. There could be no doubt of its worthy motives or of the humanitarian record of its sponsor, namely Sweden. There was, however, no pressing and immediate need for such a step. The existing human rights instruments automatically guaranteed the rights of disabled persons since they acknowledged no distinction on grounds of disability.” The representative of the

⁷⁹ UN doc. A/42/774. General Assembly resolution 42/58 of 30 November 1987; Draft resolution A/C.3/42/L.25 adopted by the Third Committee and recommended for the General Assembly for adoption.

⁸⁰ UN doc. A/C.3/42/SR.14, paragraph 84.

⁸¹ UN doc. A/C.3/42/SR.18, paragraph 28.

⁸² UN doc. A/C.3/42/SR.19, paragraph 53.

⁸³ UN doc. A/C.3/42/SR.18, paragraph 12.

⁸⁴ UN doc. A/C.3/42/SR.19, paragraph 12.

⁸⁵ UN doc. A/C.3/44/SR.16, paragraphs 8-11.

⁸⁶ UN doc. A/C.3/44/SR.18, paragraph 19.

⁸⁷ UN doc. A/C.3/44/SR.13, paragraph 9.

Libyan Arab Jamahiriya continued, however, by noting that “[T]he idea itself was nevertheless a valuable one, and there might be a need for such a step if the goals of the Decade [United Nations Decade of Disabled Persons] were not ultimately attained”.⁸⁸ No mention of the desire to draft a convention on the rights of persons with disabilities was thus included in the resolution on disabled persons adopted by the General Assembly that year.⁸⁹

By the year 2001, it had become strikingly evident that, despite the numerous existing international human rights instruments, the rights of persons with disabilities were far from being realized and the drafting of a legally binding instrument – not necessarily a separate convention – on the rights of persons with disabilities did not meet the same kind of opposition as the initiatives in the late 1980s had met.⁹⁰ It is unfortunate that a proper debate on the options available for enhancing the promotion and protection of the rights of persons with disabilities was not allowed to take place. On the other hand, states that oppose initiatives concerning particularly vulnerable groups, despite valid reasons for doing so, are increasingly treated as standing out of the community of so called civilized nations. The drafting of human rights treaties for specific groups might represent an illustration of a prevailing belief that general human rights treaties do not cover individuals belonging to specific groups and that there, therefore, is a need to have separate human rights treaties for each and every group of individuals.⁹¹ Another reason underlining the alleged importance of a separate treaty on the rights of persons with disabilities is that also the existing treaty bodies have shown a certain reluctance to address the issue properly despite, for example, repeated requests by the Commission on Human Rights.⁹²

For a number of years, the Commission on Human Rights addressed the need for increased attention by the existing treaty monitoring bodies to the promotion and protection of the rights of persons with disabilities. The Commission on Human Rights repeatedly encouraged all treaty monitoring bodies to monitor the compliance of states with their treaty obligations in order to ensure the full enjoyment of the rights provided for in the treaties by persons with disabilities.⁹³ The Commission invited the treaty bodies to take into account the concerns of

⁸⁸ UN doc. A/C.3/44/SR.20, paragraph 53. This was probably considered the case at the Commission’s fifty-fourth session in 1998 when the observer for the Libyan Arab Jamahiriya stated that a convention on the rights of persons with disabilities should be drafted. UN doc. E/CN.4/1998/SR.25, paragraph 59.

⁸⁹ General Assembly resolution 44/70 of 8 December 1989; See also draft resolution A/C.3/44/L.20 by the Third Committee.

⁹⁰ In the Government report to Parliament on the human rights policy of Finland of 2004, it is peculiarly stated that there was "political unanimity on the need of the convention" (p. 191). This is peculiar because views had been put forth questioning the appropriateness of a separate instrument for persons with disabilities both at the national level and at the international level. In addition, the Government of Finland was of the view that in case a new instrument was to be drafted, there ought to be discussion on whether it should take the form of a convention.

⁹¹ In November 2006, the European Roma and Travellers Forum adopted a view according to which there was a need to draft a legally binding instrument on the rights of Roma people.

⁹² Juha-Pekka Kontinen, 2007, p. 78-81.

⁹³ Commission on Human Rights resolutions 1998/31, 1996/27, 1994/27, 1992/48. The General Assembly had already in its resolution 37/53 of 3 December 1982 requested all competent organs of the United Nations, including thus all human rights bodies and mechanisms, to take into account the unfavourable conditions in which most persons with disabilities are living and urged those bodies and mechanisms to adopt measures to correct the situation

persons with disabilities in their list of issues and concluding observations, to consider drafting general comments and recommendations on the full enjoyment of human rights by persons with disabilities⁹⁴ and to integrate a disability perspective into their monitoring activities.⁹⁵ The Commission on Human Rights also urged governments to cover fully the question of the human rights of persons with disabilities in complying with their reporting obligations under the relevant human rights treaties.⁹⁶ Theresia Degener has, nonetheless, noted that the reports submitted under the International Covenant on Civil and Political Rights are still rather weak with regard to references to the situation of persons with disabilities. Finland is among the only six countries mentioned by Degener having contained detailed information about new laws and their implementation with regard to persons with disabilities.⁹⁷

In addition, the Commission on Human Rights urged governments to consider nominating persons with disabilities for election to the treaty monitoring bodies.⁹⁸ It has been reasoned that persons with disabilities as expert members in the different treaty bodies could make the rights of persons with disabilities more visible and increase the expertise of the treaty bodies in questions relevant to persons with disabilities. Thereby, the rights of the disabled could be more effectively reflected in the concluding observations and recommendations made by the treaty bodies, and, consequently, also in the implementation of the treaty obligation at the national level. The Government of Finland has given its strong support to this initiative⁹⁹ which was also included in Article 34 of the Convention of the Rights of Persons with Disabilities. According to Article 34, consideration shall be given to experts with disabilities

⁹⁴ The Committee on Economic, Social and Cultural Rights is the only treaty body that has adopted a General Comment explicitly on Persons with Disabilities. General Comment No. 5 was adopted in 1994. Some references to persons with disabilities are found also in other General Comments. See, for example, General Comments No. 8, 19, 20 and 25 of the Human Rights Committee.

⁹⁵ Commission on Human Rights resolutions 2005/65, paragraph 13; 2004/52, paragraph 14; 2003/49, paragraph 10, 2002/61, paragraph 22.

⁹⁶ Commission on Human Rights resolutions 2005/65, paragraph 14; 2004/52, paragraph 15; 2003/49, paragraph 11; 2002/61, paragraph 23.

⁹⁷ Theresia Degener, 2002, p. 44-51. The Government of Finland has included information on the realization of the rights of persons with disabilities in its periodic reports submitted to the different treaty monitoring bodies. For instance, the rights of children with disabilities were an integral part of the second and third periodic reports of Finland on the implementation of the Convention on the Rights of the Child (UN docs. CRC/C/70/Add.3 and CRC/C/129/Add.5) considered by the Committee on the Rights of the Child in 2000 and 2005 respectively as well as of the fifth periodic report considered by the Committee on Economic, Social and Cultural Rights in 2007 (UN doc. E/C.12/FIN/5). The fourth periodic report (E/C.12/4/Add.1) had contained information on the situation of persons with disabilities in a slightly more modest manner. The fifth periodic report of Finland on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women scheduled to be examined at the fortieth session of the Committee on the Elimination of Discrimination against Women in 2008 deals also extensively with the rights of disabled women (UN doc. CEDAW/C/FIN/5) whereas the issue is slightly more modestly dealt with in the fifth periodic report submitted to the Human Rights Committee (UN doc. CCPR/C/FIN/2003/5).

⁹⁸ Commission on Human Rights resolutions 2003/49, paragraph 12 and 2002/61, paragraph 9.

⁹⁹ Ministry for Foreign Affairs, HEL1028-17, 18.10.2002; Government report to Parliament on the human rights policy of Finland, 2004, p. 192. The Parliamentary Ombudsman has urged the Government of Finland to deal more thoroughly with the rights of persons with disabilities in its periodic reports submitted to the international monitoring bodies. Written statement submitted to the Foreign Affairs Committee of Parliament, 4 May 2004, dnro 1118/5/04.

when electing members to the established Committee on the rights of Persons with Disabilities.

It is not, however, only the states parties and the treaty bodies that need to enhance their attention in order to ensure an improvement in the realization of the rights of persons with disabilities. Also persons with disabilities and the organizations representing them have an important role in this endeavour. It is a further disadvantage if a specific group of persons does not, for one reason or another, take advantage of certain international norms and procedures although they would be fully entitled to do so. It has been noted that persons with disabilities and organizations representing them have more or less completely overlooked the work and role of the Human Rights Committee¹⁰⁰ and other treaty monitoring bodies. This, as pointed out by Theresia Degener, is well illustrated by the strikingly low number of individual complaints submitted under the Optional Protocol of the International Covenant on Civil and Political Rights that concern discrimination based on a persons disability.¹⁰¹ The number of complaints concerning persons with disabilities that have been submitted to the Committee against Torture under Article 22 of the Convention against Torture and Other Cruel, Degrading Treatment or Punishment is even lower than in the case of the Human Rights Committee¹⁰² and the Committee on the Elimination of Racial Discrimination has not dealt with a single case concerning the issue of disability.¹⁰³

In its response to a request for information on measures undertaken at the national level to implement the rights of persons with disabilities, the Government of Finland has noted that the existing international human rights treaties and their monitoring bodies are in a central position and “serve as useful tools” in the international promotion and protection of the rights of persons with disabilities. It was, nonetheless, also noted that more efficient means of mainstreaming the rights of persons with disabilities in the work of the existing treaty bodies should nevertheless be found. The Government of Finland, furthermore, has noted that “the instructions concerning the preparation of periodic reports could be revised so that the contracting parties are specifically requested to report on the implementation of the rights of the disabled, which should further enhance the protection of their rights”.¹⁰⁴ Simultaneously, Finland gave its support to the drafting of a separate international instrument on the rights of

¹⁰⁰ Gerard Quinn, 1995, p. 80-93; Theresia Degener, 2002, pp. 37. See also Jukka Kumpuvuori and Marika Högbäck, 2003, p. 25.

¹⁰¹ Theresia Degener, 2002, p. 48-51. According to Degener, eight of the communications ever considered by the Human Rights Committee have dealt with disability issues. The cases have dealt with issues concerning discrimination in employment, discrimination relating to compensation of war veterans, discrimination relating to welfare benefits as well as torture or inhuman and degrading treatment. All but two of the cases have been declared inadmissible. See Communication Nos. 548/1993, 573/1994, 601/1994, 606/1994, 616/1995, 741/1997, 824/1998, 834/1998, 947/2000. Since the completion of the study of 2002, at least one case has dealt with discrimination on ground of disability. Communication no. 1024/2001 was declared inadmissible on 30 March 2004.

¹⁰² According to Christina Burke and Gerard Quinn, only one single complaint submitted to the Committee against Torture has dealt with the situation of a person with disabilities. Christina Burke and Gerard Quinn, 2002, p. 99-100.

¹⁰³ Joshua Castellino, 2002, p. 143.

¹⁰⁴ Ministry for Foreign Affairs, HEL1028-17, 18.10.2002; Government report to Parliament on the human rights policy of Finland, 2004, p. 192

persons with disabilities.¹⁰⁵ In the Government report to Parliament on the human rights policy of Finland issued in 2004, the Government gives its cautious support to the exercise to draft an international convention on the rights of persons with disabilities by noting that new human rights conventions should not be excluded "as they may serve as means to strengthen the implementation of existing rights in respect of certain groups of persons (such as the persons with disabilities or indigenous peoples) or to strengthen the monitoring mechanisms (e.g. the system of regular visits relating to the prohibition of torture)".¹⁰⁶ Simultaneously, the work of the existing treaty monitoring bodies must be developed in order to protect and enhance the rights of persons with disabilities more effectively.¹⁰⁷

As pointed out by Chris Ingelse, it is preferable to leave the further development of human rights law to independent monitoring bodies than to do so by the creation of a new human rights treaty.¹⁰⁸ While acknowledging that the Human Rights Committee has been more flexible than the Committee against Torture, Chris Ingelse has noted with regard to the need for a separate convention on the prohibition of torture that "[O]f course, States were right to invest time and energy (and a budget) in making the prohibition of torture more effective. It would have been preferable, however, to invest the time and energy in making an existing authoritative treaty body more effective. Instead of investing in the Committee against Torture, States could have invested in expanding the mandate of the Human Rights Committee".¹⁰⁹ Also Martin Scheinin has expressed his scepticism about the ability, and willingness, of states to agree on genuinely progressive new human rights standards. While considering the need for further protection of minority rights, Scheinin prioritises the "full use of the dynamic potentials of the already existing normative framework".¹¹⁰

In addition, a special convention, for instance, on the rights of persons with disabilities easily marginalizes the rights of persons with disabilities as a special issue rather than as an essential component of mainstreaming international human rights instruments. As Martin Scheinin has noted with regard to minority rights, emphasis on the need for further standard setting easily results in a "minority-insensitive" reading of general human rights treaties.¹¹¹ The same is probable to happen as a result of the establishment of a separate treaty body monitoring the Convention on the Rights of Persons with Disabilities. As also noted by Martin Scheinin, it would have been preferable not to adopt a new monitoring body. Instead, a purely procedural

¹⁰⁵ Ministry for Foreign Affairs, HELD2385-89, 17.10.2001; HELD2385-97, 29.10.2001; YKE0025-17, 8.11.2001; HELD2385-117, 9.11.2001.

¹⁰⁶ Government report to Parliament on the human rights policy of Finland, 2004, p. 16.

¹⁰⁷ Government report to Parliament on the human rights policy of Finland, 2004, p. 192.

¹⁰⁸ Chris Ingelse, 2001, p. 404-405. See also Hilde Reiding, 2007, p. 21.

¹⁰⁹ Chris Ingelse, 2001, p. 404. Finland gave its full support to the Swedish initiative of 1977 as found in draft resolution A/C.3/32/L.13 to authorize the Commission on Human Rights to draft a convention against torture. UN doc. A/C.3/32/SR.37, paragraphs 14-16.

¹¹⁰ Martin Scheinin, 2003 (a), p. 487.

¹¹¹ Martin Scheinin, 2003 (a), p. 490.

instrument would have been advisable where the existing treaty monitoring bodies had been entrusted with the responsibility for monitoring the special convention.¹¹²

Addressing the fifty-fourth session of the Commission on Human Rights in 1998, the Special Rapporteur of the Commission for Social Development on disability, Bengt Lindqvist, noted precisely on the issue of insufficient use of the general human rights treaties by pointing out that “before making such a proposal [to draft a specific treaty on the rights of persons with disabilities] it would be better to see whether tangible results could be achieved through the use of existing instruments”.¹¹³ The principles of full participation and inclusion, which are prominent concepts of contemporary disability policy, suggest that effective monitoring of the human rights of persons with disabilities is best accomplished as an integral part of existing monitoring mechanisms. Strengthening this belief, the Special Rapporteur noted, in his report to the Commission for Social Development in 2002, that “recommendations and criticism coming from the Committees monitoring the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights would probably have a greater impact on policies in Member States that could be achieved through a special mechanism on disability”.¹¹⁴

A similar reasoning is found in the final report on human rights and disabled persons, submitted in 1991, by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Leandro Despouy. In his report, the Special Rapporteur indeed notes that persons with disabilities find themselves in a “legal disadvantage” compared to other vulnerable groups that have been given protection through a special international instrument.¹¹⁵ The Special Rapporteur’s preferred solution was not, however, the drafting of a convention on the rights of persons with disabilities but to entrust the Committee on Economic, Social and Cultural Rights with the task of supervising the

¹¹² Draft International Convention on the full Enjoyment of All Human Rights and Fundamental Freedoms by Persons with Disabilities written drafted by Martin Scheinin in 2003. Article 7 of that draft reads as follows: “The States Parties to the present Convention undertake to include in their reports submitted pursuant to the provisions of the [existing human rights treaties] information on the measures they have adopted which give effect to the full enjoyment of human rights by persons with a disability and on the progress made in such enjoyment. This information may be provided either as a separate part of the reports in question or systematically integrated under the relevant provisions of the treaties in question”. Martin Scheinin, 2003 (b). See also Martin Scheinin, 2004. Scheinin has also stated similarly with regard to an optional protocol to the International Covenant on Economic, Social and Cultural Rights when he has presented the view that the Human Rights Committee, and not the Committee on Economic, Social and Cultural Rights, ought to be entrusted with the task of handling the possible complaints concerning the Covenant on Economic, Social and Cultural Rights. Martin Scheinin, 2006, p. 134.

¹¹³ UN doc. E/CN.4/1998/SR.25, paragraph 39. See also Jukka Kumpuvuori and Marika Högbacka, 2003, p. 129 and Jukka Kumpuvuori, 2003, p. 5 and 21.

¹¹⁴ UN doc. E/CN.5/2002/4, paragraph 65. Here it is worth noting the proposal presented by the Government of Canada according to which the rights of persons with disabilities were believed to be best ensured by “innovation through a linking of the existing treaty bodies through a system of experts”. UN doc. A/61/PV.76.

¹¹⁵ Leandro Despouy, 1993, paragraph 280; UN doc. E/CN.4/Sub.2/1991/31. By its resolution 1984/20, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to include on its agenda an item on “Human rights and disability” and to appoint a Special Rapporteur to undertake the thorough study requested by the Economic and Social Council in its resolution 1984/26 on the causal connection between serious violations of human rights and fundamental freedoms and disability. See also Commission on Human Rights resolution 1984/31 and its draft resolution III of 12 March 1984 recommended for adoption by the Economic and Social Council.

human rights of persons with disabilities either alone or in cooperation with “an international ombudsman for disabled persons”.¹¹⁶

The study commissioned by the Office of the High Commissioner for Human Rights that was finalized in 2002 and which has its focus on the bodies monitoring the six principal human rights treaties¹¹⁷ concludes that the promotion and protection of the rights of persons with disabilities could immeasurably be strengthened “if greater and more targeted use were made of these instruments”. The study also presents the debate on a disability-specific international instrument and notes, contrary to the positions presented by the Special Rapporteur of the Commission for Social Development and by the Special Rapporteur of the Sub-Commission, that there would be a decisive advantage for the promotion and protection of the rights of persons with disabilities if a thematic convention was drafted.¹¹⁸

It is true that the existing general human rights instruments have not been all that effective in offering genuine promotion and protection of the rights of persons with disabilities. This was also stated by the High Commissioner for Human Rights, Louise Arbour, in her statement in August 2006.¹¹⁹ Had organizations representing persons with disabilities used the general human rights treaties for their cause and had treaty monitoring bodies requested states parties to include more information on the realization of the rights of persons with disabilities in the periodic reports it is unlikely that there had been such a desire for a separate treaty for persons with disabilities.

It is essential to ensure that the importance of the existing general human rights treaties which have been developed to promote and protect the rights of all individuals, also those possibly belonging to a special group, is not jeopardized or marginalized through the development of special treaties.¹²⁰ It is, therefore, necessary to ensure that the entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol will not lead to a situation where the treaty bodies monitoring the general human rights treaties will devote even less of their attention to the rights of persons with disabilities and receive even less individual complaints with regard to cases concerning persons with disabilities. Now that the special treaty on the rights of persons with disabilities has been negotiated, the general treaties and the separate treaty must be understood as complementary.¹²¹

It would also be essential to avoid misleading statements according to which "disabled people had no automatic right to protection under international law" as was stated by the

¹¹⁶ Leandro Despouy, 1993, paragraphs 263, 284-285. On 25 November 1994, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 5 on persons with disabilities. UN doc. E/1995/22; E/C.12/1994/20, annex IV. According to Jukka Kumpuvuori, General Comment No. 5 could be seen as “a milestone in the process of developing disability as a human rights issue”. Jukka Kumpuvuori, 2003, p. 5.

¹¹⁷ International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child.

¹¹⁸ Gerard Quinn and Theresia Degener, 2002, p. 182.

¹¹⁹ United Nations Press Release, 23 August 2006.

¹²⁰ See also Jukka Kumpuvuori, 2003, p. 29-30.

¹²¹ In this regard, see also, *e.g.*, Jukka Kumpuvuori and Marika Högbacka, 2003, p. 16.

representative of Denmark at the fifty-fourth session of the Commission on Human Rights in 1998.¹²² The existing general human rights treaties provide rights for everyone and there should be no need to remind anyone that this includes also, for example, women, persons belonging to sexual or gender minorities and persons with disabilities. In other words, a person with disabilities has a right to protection under international law just as any other person.

In his statement after the adoption of the Convention on the Rights of Persons with Disabilities on 13 December 2006, the representative of New Zealand noted that "[T]heoretically there was no need for a new convention, because the existing human rights instruments apply to persons with disabilities in just the same way that they do to everyone else. The reality, unfortunately, has not followed the theory. The existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities". Following the same line of reasoning, the Deputy Secretary-General noted, on the same occasion, that "[O]n paper, they [persons with disabilities] may have enjoyed the same rights as others. In real life, they have often been relegated to the margins and denied the opportunities that others take for granted".¹²³ A further paper – the Convention on the Rights of Persons with Disabilities – will, unfortunately, not alone solve anything. What is needed is a change in attitude and approach towards persons with disabilities.¹²⁴ It remains to be seen whether a separate treaty on the rights of persons with disabilities can raise the awareness and visibility of the situation of human rights of persons with disabilities as well as to contribute to a change in attitude and approach. One could assume, or at least hope, that the very drafting process itself already contributed to this.

¹²² The representative of Denmark noted later in the same statement of his that "no national or international legal instrument must be interpreted to place persons with disabilities at a disadvantage or offer them less protection than was offered to other persons". UN doc. E/CN.4/1998/SR.25, paragraphs 45-48.

¹²³ UN doc. A/61/PV.76.

¹²⁴ Under Article 8 of the Convention on the Rights of Persons with Disabilities, States Parties undertake immediate, effective and appropriate measures in order to raise awareness concerning persons with disabilities, to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, and to promote awareness of the capabilities and contributions of persons with disabilities.

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