



Center for the Human Rights of  
Users and Survivors of Psychiatry <sup>1</sup>

## Relevance to Older Persons of the Convention on the Rights of Persons with Disabilities

### 1. Coherence of standards

Increasingly, the practice within the United Nations human rights system is to seek coherence of standards across treaty bodies and Special Procedures. As the most up to date standards on the rights of persons with disabilities, the CRPD elaborates on states' obligations to guarantee equal enjoyment of all human rights to persons with disabilities. An increasing number of concluding observations by treaty bodies, and reports issued by Special Procedures, draw on the CRPD standards for guidance in interpretation and application of their own mandates.

Regional bodies as well have taken account of the CRPD in applying their own mandates. The OAS Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities (CEDDIS) has gone so far as to re-interpret a contradictory provision of its own governing Convention in the context of CRPD Article 12. CEDDIS issued a General Observation on the need to interpret Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.<sup>2</sup> The article of the Inter-American Convention stated that legal incapacitation did not constitute discrimination, and this was found to contravene the recognition of universal legal capacity in the CRPD.

Coherence of standards applies to more than ensuring that standards directly applicable to a single situation under different treaties are consistent with each other. It also means that the development of standards is informed both by expertise in a specific subject matter, including expertise developed in response to lived experience of violations, and by the treatment of this subject matter in other contexts. For example, the approach to legal capacity in the CRPD was informed by the text and General Recommendations of CEDAW on this subject (CEDAW Article 15), and with respect to children, by the text of the CRC (CRC Article 12). Similarly, standards for the rights of older persons should be informed by the human rights-based approach of the CRPD that emphasizes the provision of supports that respect an individual's autonomy, will and preferences, to facilitate equal opportunities to participate in all aspects of life to the extent the person desires.

### 2. Overlap between persons with disabilities, and older persons

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<sup>1</sup> For information about submitting organizations, see Annex I.

<sup>2</sup> See Annex II.

A large number of older persons are persons with disabilities. Many individuals acquire age-related disabilities or may be perceived as having cognitive, psychosocial, sensory or physical impairments.

Individuals who acquired their disabilities at a younger age experience double discrimination as they become older, and also have particular needs and concerns as older persons, including a likelihood that they will experience concerns as older persons at a younger chronological age than others. This may be due to the nature of a person's impairment, social factors or a combination. Persons with psychosocial disabilities who use psychiatric medications may experience a number of health problems as adverse effects of these medications, including problems of the neurological, endocrine, metabolic, and cardiovascular systems and cognitive difficulties. The use of psychiatric medications, particularly neuroleptics, is also associated with a shortening of the life span. According to a recent UK study, neuroleptics are administered "off-label" to around 180,000 people with dementia diagnoses in the UK every year. This drugging leads to the premature deaths of 1,800 of these people each year<sup>3</sup>.

The most discriminatory treatment against older persons is directed against older persons who have or are perceived as having disabilities, particularly those who may need a great deal of support. In particular, restriction of legal capacity and institutionalization without the person's prior free and informed consent are practices used against older persons as well as younger persons with disabilities. It is rarely the case that age alone is the reason for such measures to be taken, they are almost always motivated by a perception that the person has some type of disability, whether an age-related or non-age-related disability.

The Convention on the Rights of Persons with Disabilities directly applies to all older persons who are persons with disabilities or who are targeted for discrimination because they are perceived as persons with disabilities.<sup>4</sup> Any further elaboration on the rights of older persons must not derogate from the rights guaranteed to older persons with disabilities under the CRPD. Older persons who experience discrimination based only on age will likely benefit from an extension of the paradigm found in the CRPD, since it is grounded in non-discrimination and encompasses both formal and substantive equality. It is a paradigm that promotes respect for inherent human dignity, requires equitable distribution of resources, and encourages both social solidarity and recognition of the contributions made to society by individuals who otherwise may be relegated to a marginal existence.

### 3. Legal capacity and freedom from institutionalization in the CRPD

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[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_108302.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_108302.pdf)

The US Food and Drug Administration has also warned that use of neuroleptics increases the rate of death among elderly people by 60 to 70 percent:

<http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/DrugSafetyInformationforHeathcareProfessionals/PublicHealthAdvisories/ucm053171.htm>

<sup>4</sup> CRPD/C/ESP/CO/1, paragraphs 19-20; CRPD/C/CHN/CO/1, paragraphs 25-26.

The Convention on the Rights of Persons with Disabilities was developed to redress all forms of discrimination against persons with disabilities, including those who need a great deal of support to live in the community and to exercise their legal capacity. The CRPD treats these issues within a framework of non-discrimination, accommodation and support that respects the person's autonomy, will and preferences.

CRPD Article 12 provides that persons with disabilities:

- Are entitled to be recognized everywhere as persons before the law
- Must be recognized as having equal legal capacity as others in all aspects of life
- Must be provided with access to support that the individual may need in exercising her or his legal capacity
- Are assured protection against any abuse of their right to have and exercise legal capacity, including by standards requiring that all measures respect the person's autonomy, will and preferences; are tailored to the person's own needs; and provide opportunities for review to ensure that the support arrangements are working satisfactorily.

The Committee on the Rights of Persons with Disabilities has clarified the requirements for implementation of Article 12 in the context of Concluding Observations addressed to states parties. Its most detailed elaboration of these requirements, which is relevant to all countries, the Committee said:

The Committee urges the state party to adopt measures to repeal the laws, policies and practices which permit guardianship and trusteeship for adults and take legislative action to replace regimes of substituted decision-making by supported decision making, which respects the person's autonomy, will and preferences, in the exercise of one's legal capacity in accordance with Article 12 of the CRPD. In addition, the Committee recommends the state party in consultation with DPOs to, prepare a blueprint for a system of supported decision-making, and legislate and implement it which includes:

- a. Recognition of all persons' legal capacity and right to exercise it;
- b. Accommodations and access to support where necessary to exercise legal capacity;
- c. Regulations to ensure that support respects the person's autonomy, will and preferences and establishment of feedback mechanisms to ensure that support is meeting the person's needs;
- d. Arrangements for the promotion and establishment of supported decision-making.<sup>5</sup>

CRPD Article 14 provides that persons with disabilities:

- Are entitled to liberty and security of the person on an equal basis with others
- Must not be deprived of their liberty based on a disability (including involuntary institutionalization and hospitalization)

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<sup>5</sup> CRPD/C/CHN/CO/1, paragraph 22. See also CRPD/C/HUN/CO/1, paragraphs 25-26.

- If deprived of their liberty through any process, have a right to equal guarantees as others, and to be treated in compliance with the CRPD standards including by provision of reasonable accommodation.

As an application of the equal right to both liberty of the person and security of the person, Article 14 requires states to abolish involuntary institutionalization and to ensure that all mental health services are based on the free and informed consent of the person concerned.<sup>6</sup> (CRPD Articles 15, 17 and 25 also prohibit forced psychiatric interventions and require that mental health services, and any other health care or services provided to persons with disabilities, are based on free and informed consent of the person concerned.)<sup>7</sup>

Article 14 may also require that positive measures be taken to allocate financial resources to persons with psychosocial and intellectual disabilities who require a high level of support, so that they are neither confined in institutions nor confined in their own homes.<sup>8</sup>

CRPD Article 19 provides that persons with disabilities:

- Have the right to live in the community with choices equal to others
- Must have the opportunity to choose where and with whom to live, and not be compelled to live in a particular living arrangement
- Must be provided with access to in-home, residential and community support services needed to live in the community, including personal assistance (which can include advocacy support)
- Must be inclusively served by community services and facilities for the general population.

Article 19 requires states to put in place a wide range of supports and accommodations that people with disabilities may need to live in the community.<sup>9</sup> Financial resources must be placed at the service of such programs, and re-examination of the allocation of funds may be required to shift resources from institutions to programs that support independent living in the community.<sup>10</sup>

#### 4. Issues of concern affecting older persons

WNUSP would like to raise issues that come within our work advocating the rights of users and survivors of psychiatry, which includes the rights of older persons with psychosocial disabilities, and any older persons who are confined in psychiatric institutions or who are being administered psychiatric drugs.

Article 5 of the CRPD protects older persons with disabilities against discrimination based on age as well as against discrimination based on disability; therefore older persons with

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<sup>6</sup> CRPD/C/ESP/CO/1, paragraph 36; CRPD/C/HUN/CO/1, paragraph 28; CRPD/C/CHN/CO/1, paragraph 26.

<sup>7</sup> CRPD/C/TUN/CO/1, paragraphs 28-29; CRPD/C/PER/CO/1, paragraphs 30-31; CRPD/C/CHN/CO/1, paragraphs 27-28 and 37-38.

<sup>8</sup> CRPD/C/CHN/CO/1, paragraph 26.

<sup>9</sup> CRPD/C/PER/CO/1, paragraphs 32-33.

<sup>10</sup> CRPD/C/HUN/CO/1, paragraphs 33-35; CRPD/C/CHN/CO/1, paragraphs 31-32.

disabilities have a right to not be institutionalized against their will based on age, disability, or a combination of any such factors. Older persons with disabilities must not be placed against their will in psychiatric institutions, social care homes, nursing homes, rehabilitation facilities or any other housing arrangement or discriminatory detention regime.

WNUSP members report that older persons are confined at a high rate in psychiatric institutions, where many of them are placed in restraints for long periods of time, due to the effects of medications, which increase the likelihood of falls. It is also common for older persons in any institutional setting, including hospitals and rehabilitation centers as well as nursing homes, “old age homes,” social care institutions and psychiatric institutions, to be heavily medicated with psychiatric drugs, including neuroleptics, without the person’s free and informed consent.<sup>11</sup>

Psychiatric institutionalization and forced medication has especially targeted people with dementia. In Japan, access to personal assistance services and other disability-related services is more restricted for older persons than for younger persons with disabilities; older persons who need wheelchairs receive an inferior type of chair that is not designed for the individual and not appropriate for persons with disabilities, and they have insufficient access to personal assistance services, leading to institutionalization, especially in psychiatric institutions where people with dementia are expected to remain until they die.

Psychiatric drugs are used improperly as a chemical restraint and management tool, and they are also given routinely a sedative to blunt anxiety and distress, without considering whether alternative supports are available to meet emotional needs and deal with difficult life issues, so that individuals would have a range of options necessary for true free and informed consent. Humane and practical alternative forms of support exist; in the case of dementia, there is clear evidence that non-drug options can provide respite without damaging health and shortening the life span<sup>12</sup>.

Psychiatric drugs have serious adverse effects, and are particularly detrimental for older persons; effects can be exacerbated when a number of psychoactive drugs are given at the same time (polypharmacy) and when psychiatric drugs interact with drugs prescribed for other reasons. Electroshock (electro-convulsive therapy or ECT) is also administered disproportionately to older persons, particularly older women, as a treatment for depression.<sup>13</sup>

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<sup>11</sup> <http://www.telegraph.co.uk/health/healthnews/6264962/Scandalous-abuse-of-the-elderly-prescribed-antipsychotics-in-hospital-exposed.html>

<http://www.nytimes.com/2011/05/10/health/policy/10drug.html>

<sup>12</sup> In the UK, Focused Intervention Training and Support (FITS) has been developed as a humane replacement for the neuroleptic drugging people diagnosed with dementia. This approach is based on the understanding that an individual’s “symptoms“ may be due to the care that person is receiving, their environment and social interactions. Non-drug support involves one-on-one conversation and stimulating activities matched to the person’s interests, abilities, history and personality. It also attends to potential underlying health issues and environmental triggers. For more information, see <http://alzheimers.org.uk/FITS>

<sup>13</sup> Weitz, D. (1997). Electroshocking elderly people: another psychiatric abuse. *Changes: International Journal of Counselling Psychology and Psychotherapy*, (May) vol.15, no.2. See also this more recent newspaper report: “In the fiscal year 2010-2011, the most recent year for which statistics are available, 16,259 ECT treatments were administered throughout Ontario, an increase

Electroshock has been found to cause physical damage to the brain, as well as cognitive impairment and permanent memory loss.<sup>14</sup>

These practices violate the human rights of older persons, including the right to be free from torture and ill-treatment. The Special Rapporteur on Torture has recently called for an absolute ban on forced and nonconsensual psychiatric interventions, including the nonconsensual administration of psychosurgery, electroshock and mind-altering drugs including neuroleptics, as well as restraints and solitary confinement for short or long periods of time.<sup>15</sup> He furthermore called for revision of laws that allow detention on mental health grounds or in mental health facilities,<sup>16</sup> and clarified in a separate statement that such detention is unjustified, and in particular cannot be justified by either the severity of the disability or by a motivation to protect the person or others.<sup>17</sup>

Another issue raised by WNUSP members is that older women and persons with psychosocial disabilities in some countries are labeled as witches and targeted for persecution and killing on this basis.<sup>18</sup> These practices too constitute torture and ill-treatment; states have an obligation to exercise due diligence to prevent such mistreatment even when state actors are not directly involved.

Finally, older persons in many countries are deprived of basic necessities and even the means of survival, such as food and water; they are prevented from getting equal and equitable access to resources, violating the right to an adequate standard of living and ultimately the right to life.

These violations of the human rights of older persons provide ample reason for the creation of a new binding instrument. Such an instrument must be informed by the best available standards that already apply to the rights of older persons, including those in the CRPD, and by the self-advocacy and lived experiences of older persons, including those older persons who need a great deal of support, and including older persons with psychosocial, intellectual, cognitive, sensory and physical disabilities.

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of more than 350 per cent in seven years. A breakdown by age and gender reveals startling subsets, especially a 1,300-per-cent treatment increase for patients in the 55-59 age cohort. The statistics also reveal that women outnumber men nearly two to one in the 60-to-64 age bracket.” [http://www.thestar.com/news/gta/2012/12/13/electroshock\\_therapy\\_more\\_prevalent\\_in\\_ontario\\_but\\_guidelines\\_are\\_minimal.html](http://www.thestar.com/news/gta/2012/12/13/electroshock_therapy_more_prevalent_in_ontario_but_guidelines_are_minimal.html)

<sup>14</sup> Sackeim article; Linda Andre

<sup>15</sup> A/HRC/22/53, paragraph 89(b).

<sup>16</sup> A/HRC/22/53, paragraph 89(d).

<sup>17</sup> Statement of Mr. Juan Mendez, Special Rapporteur on Torture, available at: [https://dk-media.s3.amazonaws.com/AA/AG/chrusp-biz/downloads/277461/torture\\_english.pdf](https://dk-media.s3.amazonaws.com/AA/AG/chrusp-biz/downloads/277461/torture_english.pdf).

<sup>18</sup> See E/2012/51, paragraph 16.

## **Annex I, Information on organizations making this submission**

The **World Network of Users and Survivors of Psychiatry (WNUSP)** is an international organisation of users and survivors of psychiatry, advocating for human rights of users and survivors, and representing users and survivors worldwide.<sup>19</sup> The organisation has expertise on the rights of children and adults with psychosocial disabilities, including on the latest human rights standards set by the CRPD, which it played a leading role in drafting and negotiating. WNUSP is a member organisation of IDA and has special consultative status with ECOSOC. WNUSP supports its members to advocate before UN treaty bodies, and has provided expertise to UN bodies including the Special Rapporteur on Torture, the Subcommittee on Prevention of Torture and the Committee on the Rights of Persons with Disabilities. WNUSP is currently engaged with processes for review of the Standard Minimum Rules on the Treatment of Prisoners and for the development of an instrument on the rights of older persons.

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The **Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP)** provides strategic leadership in human rights advocacy, implementation and monitoring relevant to people experiencing madness, mental health problems or trauma. In particular, CHRUSP works for full legal capacity for all, an end to forced drugging, forced electroshock and psychiatric incarceration, and for support that respects individual integrity and free will.

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<sup>19</sup> In its statutes, “users and survivors of psychiatry” are self-defined as people who have experienced madness and/or mental health problems, or who have used or survived mental health services.

## **Annex II: CEDDIS General Observation No. 1**

FIRST SPECIAL MEETING OF THE COMMITTEE  
FOR THE ELIMINATION OF ALL FORMS OF  
DISCRIMINATION AGAINST PERSONS WITH  
DISABILITIES  
May 4 and 5, 2011

OEA/ Ser.L/XXIV.3.1  
CEDDIS/doc.12(I-E/11) rev.1  
28 April 2011  
Original: Spanish

General Observation of the Committee for the Elimination of All Forms of Discrimination against  
Persons with Disabilities on the need to interpret Article I.2(b) *in fine* of the Inter-American  
Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the  
context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities

## I. Background

Within the framework of the First Meeting of CEDDIS Working Groups, held in October 2010, the delegates attending it began a dialogue to address the regulatory and conceptual discrepancy between the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the United Nations Convention on the Rights of Persons with Disabilities with respect to the institution of legal incompetence and protection rules as a mechanism for the exercise of the legal capacity of persons with disabilities.

Pursuant to Article I.2(b) of the Inter-American Convention adopted in 1999, declaration of a person as legally incompetent does not constitute discrimination, a provision that the Committee regards as obsolete following the adoption of the United Nations Convention of 2006. Given that the process of reforming the Inter-American Convention could be complex and cumbersome, for the time being the Committee members present suggested crafting other more viable proposals that could be approved at the Committee's next meeting. Accordingly, it was suggested that they, as a Committee, adopt an interpretation criterion that could be disseminated on a massive scale.

This interpretation criterion should annul, for practical purposes, the first explanatory part of Article I.2(b) of the Inter-American Convention, in such a way as to initiate a transition process, particularly since it was not possible to propose an immediate change, given the existence of a very large number of people declared to be legally incompetent. To that end, it will first be necessary to ask states to compile information on the number of legal incompetence cases decided by their domestic courts.

It was also suggested, along with this interpretation criterion, to construct an alternative support system to replace the legal incompetence concept, given the latter institution's serious implications, as explained in the course of the presentation. It was pointed out that one thing many countries in the region have in common is that their Civil Codes derive from Roman Law or from the Napoleonic Code, both of which wrongly regarded as legally incompetent persons with hearing or language disabilities whom, nowadays, with the help of an interpreters, there would be no reason to consider legally incompetent.

The Committee is aware that amendments to the domestic laws and regulations of the States Parties to the Convention will take a long time. Nevertheless, that does not preclude making it clear, right away, that the legal incompetence concept constitutes discrimination for persons with disabilities and that what should be advocated is not a set of protection regulations but, rather, a system of representation. The assertion that this set of protection regulations is discriminatory is based on the fact that, in order to have legal representation after they come of age, persons with disabilities have to be declared legally incompetent or insane; for that reason, it is suggested that a representation model be found that is unrelated to insanity or legal incompetence and is similar to legal representation of anyone else.

After various statements by Committee members on the connotations that the upcoming opinion should have, the representative of Argentina and Second Vice Chair of the Committee, Pablo Rosales, distributed to those attending the First Meeting of the CEDDIS Working Group a draft document entitled "Opinion of the OAS Committee of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities regarding the need to interpret Article I.2(b) *in fine* in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, which clearly establishes that:

- The fact that the United Nations Convention is in force implies a change of paradigm away from substitution of a person's will (which characterizes the protection model in most Civil Codes in Latin America) to the new paradigm based on decision-making with support and safeguards set forth in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

- That most Civil Codes, especially in Latin America, still retain in their legal provisions institutions such as declaration of insanity and protection as a way to afford legal representation to persons with disabilities, particularly persons with hearing or mental disabilities, and that said institutions need to be revised in light of the provisions of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, as mandated in Article 4.1(a) and (b) of said Convention.

That most OAS member states have signed the United Nations Convention and that, for that reason, one of the first steps the states must take is to conduct the required in-depth examination of their local domestic laws and policies in light of the instrument they have ratified, which will have to be considered not only article by article but, above all, in terms of its overall significance. It will not suffice just to amend legislation. The amendments will have to come with the judicial, administrative, educational, financial, and social measures needed to enforce it.

## **II. Adoption of the interpretation criterion**

At their First Special Meeting, held in San Salvador, El Salvador, in May 2001, the members of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities reviewed the proposal originally presented by Argentina and subsequently revised by Brazil, Costa Rica, Panama, and Peru, and after an exchange of views with the Committee members present at the meeting, decided to adopt the following interpretation criterion:

### **Opinion of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities**

WHEREBY:

Article I.2 of the OAS Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities establishes that:

#### *2. Discrimination against persons with disabilities*

*a) The term "discrimination against persons with disabilities" means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.*

*b) A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.."*

That Article 2 of the United Nations Convention on the Rights of Persons with Disabilities established a modification of the criterion upheld in the OAS Convention because it states that "... 'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability

which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field";

That this new paradigm delves deeper into the de facto capacity of persons with disabilities, in the sense of capacity to exercise their rights, in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, which establishes that:

*Article 12 - Equal recognition before the law*

*1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

*2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*

*3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

*4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

*5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

- That most Civil Codes, especially in Latin America, still retain in their legal provisions institutions such as declaration of insanity and protection as a way to afford legal representation to persons with disabilities, particularly persons with hearing or mental or intellectual disabilities, and that said institutions need to be revised in light of the provisions of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, as mandated in Article 4.1(a) and (b) of said Convention;

This Committee declares that the criterion established in Article I.2(b) *in fine* of the OAS Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, inasmuch as it establishes that "*If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination*", **seriously contradicts the provisions of Articles 2 and 12 of the United Nations Convention, and the Committee therefore construes that the aforementioned criterion must be reinterpreted in light of the latter document currently in force.**

CONSIDERING:

- That the entry into force of the United Nations Convention as of May 3, 2008 implies a change of paradigm away from substitution of a person's will (which characterizes the protection model in most

Civil Codes in Latin Americas) to the new paradigm based on decision-making with support and safeguards set forth in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities;

That Article 12 of the Convention on recognition as persons before the law, legal capacity, and the exercise thereof is central to the structure of the Convention, because of its instrumental value for ensuring enjoyment of the human rights of persons with disabilities and its significance for the transformation, in form and substance, of domestic (civil and criminal) legislation, and that most OAS member states have signed the United Nations Convention;

For that reason, and in the context of aforementioned Article 4.1(a) and (b) and for the purpose of adequately implementing the Convention, one of the first steps that states must take is to conduct an in-depth review of their domestic legislation and policies in light of the instrument they have ratified, which should be reviewed not just article by article but, above all, in terms of its overall significance as a body of international law. That review must take as its guideline the purposes of that Convention (Article 1) and its general principles (Article 3), always within the framework of an overarching conception of human -- civil and political, economic, social, and cultural -- rights, that recognizes their interdependence and indivisibility (Preamble to the Convention).

It follows from the above that, except in cases in which the rights and principles upheld in the Convention are already protected under domestic law, a State Party is under an obligation to introduce the changes needed, at the regulatory and operational levels, to ensure conformity with the United Nations Convention. This is because it is not enough to amend legislation; those amendments have to be accompanied by judicial, administrative, educational, financial, social, and other measures.

For its part, Article 16 of the International Covenant of Civil and Political Rights -- prior to the new Convention -- states that "everyone" shall have the right to recognition [everywhere] as a person before the law. However, a specific new treaty was needed to refer to persons with disability in a precise provision (Article 12) on such an important matter, given the ineffectiveness and invisibility of persons with disabilities in the human rights system and in society.

Article 12 of the United Nations Convention reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law in the dual sense of persons enjoying that right and persons actually exercising that right. The States Parties recognize persons with disabilities as persons before the law, with legal capacity on an equal basis with others in all aspects of life. In paragraphs 3 and 4 of Article 12, the states commit to providing access by persons with disabilities to the support or assistance they may require in exercising their legal capacity, as well as to appropriate and effective safeguards to prevent abuse.

A recent United Nations Report entitled "Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities" (A/HRC/10/48 of January 26, 2009)" asserts that:

*"Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12, paragraph 2, " so that states should amend or abolish norms that violate the duty of states to respect the human right to legal capacity of persons with disabilities.*

Moreover, in accordance with Article 12, paragraphs 3, 4, and 5, measures are to be adopted *"that protect and fulfil this right [...] This includes: legal recognition of the right of persons with disabilities to self-determination; of alternative and augmentative communication; of supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with*

*respect to personal or legal matters; and the establishment of regulations clarifying the legal responsibilities of supporters and their liability."*

In stark contrast to respect for the human right to legal capacity of persons with disabilities is the "handout approach" (*asistencialismo*), which is widely recognized as one of the most entrenched obstacles to implementation of the Convention. It is characterized as actions by those who represent others without either consulting them or allowing them to participate. They simply "replace" them, always with "the best intentions," assuming that they can decide for them what they want, choose, and need.

What the United Nations Convention demands is that support be based on trust, provided with respect, and never against the will of the person with disabilities.

Persons with disabilities do very often need support, but not replacement. The support envisioned by the Convention as "appropriate" focuses on abilities (more than on disabilities) and on elimination of obstacles in the environment so as to facilitate access and pro-active inclusion in social life (the physical and cultural environment, justice system, housing and transportation, social and health services, educational and labor opportunities, cultural, professional, and political life, sports, and recreation).

Unlike substitutive protection systems, in which people are trapped and objectified as wards, support guided by the new human rights approach is geared toward increasing personal freedoms in people's lives, broadening the spheres in which they can decide for themselves, and enhancing recognition of the value of their contribution to the society they form part of as citizens and "as part of human diversity and humanity" (Articles 3(d), 8.1(c), and 8.2(a) iii of the Convention).

Mindful that the adoption of a paradigm of universal legal capacity that includes all persons with disabilities was objected to during the preparation of the Convention because it was feared that it would not adequately address the issues of those persons most in need of support, paragraph 3 of Article 12 established the obligation of the States Parties to provide support and paragraph 4 added the obligation to provide safeguards to prevent any abuse deriving from said support. Indeed, if the new Convention had not focused on the support and safeguards system, the persons with disabilities most in need of support would have risked being excluded from full recognition as persons before the law with legal capacity.

The Convention views disability as a social phenomenon, since it addresses the circumstances of persons with a range of impairments (physical, sensory, mental, and intellectual) who, in their social interaction, encounter various types of legal, judicial, physical, attitudinal, architectural and other barriers that hinder enjoyment of their rights on an equal basis with others. That is the reason for the assertion that full and effective implementation of the Convention requires that domestic legislation regard disability as a social phenomenon, which means relinquishing both solely medical definitions centered on type of impairment and those focusing on day-to-day activities (the inability to carry them out being associated with "disability").

The Convention (Article 1) specifies that persons with disabilities include, at a minimum, those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The social model (or social barriers) redefines (s) the concept of rehabilitation or habilitation by establishing that the goal must be to transform society, not persons. From this standpoint, both universal design and universal accessibility become crucial factors for preventing disability.

Regarding the question of whether the United Nations Convention guarantees legal capacity for all persons with disabilities, it should be noted that Article 2 of the Convention ("Definitions") does not include a definition of disability.

However, an "includes" definition can be found in Article 1. This definition of persons with disabilities includes those who have long-term physical, mental, intellectual or sensory impairments. Evidently, the strategy used in the Convention is to make explicit mention of certain groups in the definition, to highlight their greater vulnerability to discrimination and the more pressing need to design strategies for strengthening these groups' ability to exercise and claim their rights. A review of domestic legislations and of the actual practices of states shows that it is precisely these groups to whom legal capacity is denied. The deliberations surrounding the Convention show that a need was felt to develop a specific Convention for persons with disabilities, because already existing human rights treaties did not include disability and did not provide grounds for questioning domestic legislations that excluded it. In light of this global commitment to the goal of including persons with disabilities in the Convention, it is only reasonable to conclude that Article 12 was drafted with that broader objective of the Convention in mind.

A review of the work done in the run up to the Convention reveals that there were objections to adopting a universal legal capacity paradigm for all persons with disabilities, due to a fear that not enough attention would be paid to those persons most in need of support. It was precisely in order to address that fear that Article 12.3 obliges states to provide support, and 12.4 calls for a series of safeguards against possible abuse derived from said support. Without provision for such support and safeguards, the group of persons most in need of support could have been excluded from full recognition as persons before the law with legal capacity. However, if one takes the definition of disabilities in conjunction with the obligation to provide support, it is fair to conclude that the drafting of Article 12 includes all persons with disabilities.

**That being so, Article I.2(b) in fine of the OAS Inter-American Convention on the Elimination of All Forms of Discrimination against Persons With Disabilities needs to be reinterpreted in light of the new paradigm set forth in the aforementioned Article 12.**

It is not just a matter of analyzing the prospect of assessing each State Party's domestic legislation with respect to declaration of legal incompetence and protection measures. Apart from the legal issues, it is also a question of analyzing the practical implications of these state measures.

The rules regarding capacity or incapacity to exercise rights under particular circumstances should not be confused with the quest for a different way of representing persons with disabilities, one that supports their autonomy, recognizes them fully as persons before the law with legal capacity, and proposes support and safeguards only when they are necessary. That means starting from what people are able to do, what they can do for themselves, and only then determining the circumstances under which they do need support, along with safeguards.

## RESOLUTION

As regards the legal mandate, the Committee resolves:

1. To urge the states parties to conduct a comparative study of their domestic laws and the domestic laws of the other States Parties to the Inter-American Convention, with regard to the provisions on the legal capacity of persons with disabilities, in order to ensure that they maintain regulations based on their needs in all their social strata and on their country's institutional capacity, but within the framework of Article 12 of the United Nations Convention.

As regards the practical mandate, the Committee resolves:

2. To request the OAS Secretary General to order a revision, by the appropriate legal bodies, of Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, with a view to aligning it with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and recommending whichever is best: its non-application in practice or its repeal.

3. To urge the States Parties to the Inter-American Convention to adopt measures, in keeping with Article 12 of the United Nations Convention, to guarantee recognition of universal legal capacity, including that of all persons with disabilities, regardless of the type or extent of disability, and, consequently, to initiate without delay a process for replacing the practice of declaring legal incompetence, guardianship, or any other form of representation that impairs the legal capacity of persons with disabilities, with a practice based on decision-making with support.

The foregoing entails taking steps to:

1. Train the general public, and justice system operators in particular, regarding the new paradigm in effect with respect to the legal capacity of all people with disabilities, including those with severe impairments, through recourse to decision-making support systems.

2. Adopt urgent measures of a regulatory nature to ensure that the judicial system disallows the approval of new declarations of legal incompetence and to foster the gradual development of decision-making support systems, as well as the regulation and implementation of institutions and mechanisms to safeguard against abuse.

3. Facilitate the review of cases in which persons with disability have been declared legally incompetent, with a view to aligning them with the new paradigm, with particular emphasis on those in which there are queries as to the existence of abuse or manipulation of interest .

4. Report to this Committee on measures adopted and any progress made in this process.