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Promotion and protection of all human rights, civil
political, economic, social and cultural rights,
including the right to development

Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

In the present study, the Office of the United Nations High Commissioner for Human Rights sets forth the standards on equality and non-discrimination of persons with disabilities under article 5 of the Convention on the Rights of Persons with Disabilities. It aims at providing guidance for implementation of article 5 of the Convention, identifying good practices and making recommendations.

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I. Introduction

1. In its resolution 31/6, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) that its next annual study on the rights of persons with disabilities focus on article 5 of the Convention on the Rights of Persons with Disabilities, in consultation with States parties and other relevant stakeholders, regional organizations, the Special Rapporteur on the rights of persons with disabilities, civil society organizations, including organizations of persons with disabilities, and national human rights institutions. The Council also requested OHCHR to require that contributions be submitted in an accessible format and be made available together with the report in an easy-to-read-version on the OHCHR website prior to the thirty-fourth session of the Council.

2. Pursuant to the request of the Human Rights Council, OHCHR solicited contributions and received 27 responses from States parties, 15 from national human rights institutions and 29 from civil society organizations and other stakeholders.¹ The present study focuses on equality and non-discrimination in relation to the implementation of the Convention on the Rights of Persons with Disabilities.

II. Equality and non-discrimination under international law

A. Equality

3. The Convention on the Rights of Persons with Disabilities brings about several innovations that take the notions of equality and non-discrimination forward in the field of international human rights law. All of its provisions inform a strengthened vision of substantive equality, including in its mandate to eliminate discrimination, and also in the private sector.

4. Equality constitutes a fundamental and underlying principle of the notion of human rights, together with human dignity and universality. As stated in article 1 of the Universal Declaration of Human Rights, “all human beings are born free and equal in dignity and rights”. Hence, every human person is of equal worth and should be afforded equal rights by States. Equality can also be conceived in terms of societal goals, whereby States are obligated to develop policies and actions to ensure that the value of equality is reflected in the concrete living conditions of all persons.

5. Equality is complemented by the principle of non-discrimination, which underlies all human rights treaties and seeks to prevent any distinction, exclusion, restriction or preference that nullifies or impairs the equal recognition and exercise of rights on different grounds such as race, ethnicity, gender and nationality, among others, without any objective justification. While State actions based on the principle and towards the goal of equality are ongoing and develop progressively, the principle of non-discrimination provides for immediate obligations. The application of this principle has not been subject to any condition for other constituencies. In practice, however, persons with disabilities are still subjected to encompassing conditions that undermine the principle of non-discrimination as applicable to them; for example, no woman may be deprived of her liberty on the basis of

¹ The submissions received by the Office of the High Commissioner are available at www.ohchr.org/EN/Issues/Disability/Pages/EqualityAndNonDiscrimination.aspx.

her sex, while most domestic laws allow for persons with psychosocial disabilities to be detained on the basis of their impairment.²

6. Persons with disabilities continue to be systematically excluded from all areas of life. National laws and policies generally perpetuate exclusion, isolation, discrimination and violence against persons with disabilities, despite international human rights law standards. Factors such as deprivation of legal capacity, forced institutionalization, exclusion from general education, pervasive stereotypes and prejudices and lack of access to employment prevent persons with disabilities from enjoying their rights fully, on an equal basis with others. In particular, women and girls with disabilities face considerable restrictions on the exercise of their rights relative to men and other women and girls, due to, for instance violence, abuse or neglect, and have fewer opportunities in terms of education and employment.³

7. The 2030 Agenda for Sustainable Development presents a unique opportunity to strengthen equality for persons with disabilities and to increase their inclusion and participation in society. The principles of equality and non-discrimination for persons with disabilities is a cross-cutting feature in all Sustainable Development Goals, and is not limited to those explicitly addressing inequality (Goals 5 and 10) or those referring to persons with disabilities. In this regard, international cooperation is of key importance; donors should mainstream the rights of persons with disabilities and foresee disability-specific funds in their programmes. Disability markers to monitor mainstream international cooperation efforts can contribute to these ends.

B. Evolution of equality and non-discrimination under international law

8. Article 7 of the Universal Declaration of Human Rights recognizes that all persons are “equal before the law and are entitled to equal protection of the law” and to “equal protection against discrimination”. Article 2 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights obligate States to guarantee the exercise of rights without discrimination. The Covenants expanded the list of forbidden grounds of discrimination to include the “other status” clause, enabling the inclusion of grounds not explicitly mentioned therein. This clause was crucial for the advocacy and development of the rights of persons with disabilities under international human rights law long before the adoption of the Convention on the Rights of Persons with Disabilities. Disability was first adopted as a forbidden ground for discrimination in the Convention on the Rights of the Child. The Human Rights Committee, in its general comment No. 18 (1989), recognized the autonomous character of the right to non-discrimination under article 26 of the International Covenant on Civil and Political Rights, making it applicable to all areas of law or in fact. As equality and non-discrimination are a core aspect of human rights treaties, no reservations, understandings or interpretations are admissible in this domain, as any would be contrary to the object and purpose of the treaty involved.⁴ In addition, the Human Rights Committee, in its general comment No. 29 (2001) found that there are “elements or dimensions of the right to non-

² See Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities (available on the Committee webpage at www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx), para. 6.

³ See Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), paras. 6 and 9.

⁴ Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, paras. 8, 9 and 19.

discrimination that cannot be derogated from in any circumstances”, an aspect that would require further analysis by the Committee on the Rights of Persons with Disabilities.

9. International and regional human rights law and domestic law have contributed to the development of the notion of equality and to the identification of different forms of discrimination. Current standards go beyond the promotion of formal equality, which requires that similarly situated persons be treated equally. International human rights law endorses a vision of substantive equality, “a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined [discriminatory] paradigms”.⁵ In order to achieve substantive equality, “special measures” that favour specific right-holders over others were first reflected as a tool in the International Convention on the Elimination of All Forms of Racial Discrimination.

10. International human rights law identifies different forms of discrimination. Discrimination can be direct or indirect, structural, or affect specific individuals. At the same time, discrimination can be based on more than one forbidden ground, entailing multiple and intersecting forms of discrimination.⁶

III. Equality and non-discrimination under the Convention on the Rights of Persons with Disabilities

A. Equality

11. The Convention on the Rights of Persons with Disabilities supersedes previous international developments, such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities or the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. Nowadays, the Convention on the Rights of Persons with Disabilities represents the most advanced international human rights instrument on the rights of persons with disabilities.

12. The Convention expands previous human rights standards to ensure the exercise of all human rights for persons with disabilities, and explicitly includes in its principles equality and non-discrimination, which underpin all of its provisions. It develops substantive equality for persons with disabilities starting from article 5 (1), which includes both equality of opportunities and equality of outcomes.⁷ It requires the transformation of existing social structures, systems and conceptions, such as ableism,⁸ that perpetuate discrimination against persons with disabilities.

13. According to the Convention, State parties must reform and develop legal frameworks and policies to ensure equality for persons with disabilities, in this process consulting closely with and actively involving persons with disabilities through their representative organizations. Attitude barriers prevent respect for the equality of persons with disabilities. The Convention, under article 8, provides for measures to combat stereotyping and to promote positive perceptions of persons with disabilities, which contribute to promote respect towards difference and acceptance of human diversity. Achieving substantive equality requires the elimination of barriers, including physical and

⁵ Committee on the Elimination of Discrimination against Women, general recommendation No. 25 (2004) on temporary special measures, para. 10.

⁶ *Ibid.*, para. 12. See also general recommendation No. 28, paras. 18 and 26.

⁷ See Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 9.

⁸ A/71/314, para. 31.

communicational ones. Implementing accessibility measures and providing support help to secure the full enjoyment of rights on an equal basis with others.

14. Substantive equality also requires the exercise of enabling rights, such as equal recognition before the law, which allow for making decisions and entering into contracts. The rights to inclusive education and to work and employment, also supported by Sustainable Development Goals 4 and 8, are key factors in developing overall equality. For example, inclusive education systems enable persons with disabilities to increase their participation. The right to education requires equality measures, such as the provision of accessible learning materials, support and teachers' training, and is complemented by anti-discrimination measures, such as reasonable accommodation and the prohibition of exclusion from general education, followed by system reform.⁹ Article 27 on work and employment promotes equality by developing inclusive employment markets, providing for flexible working schedules and support when necessary, and developing the potential of all persons with disabilities.

15. The Convention reinforces equality for women and girls with disabilities, acknowledging that they face more barriers than men and boys, and requires measures for their development, advancement and empowerment.¹⁰ The adoption of a twin-track approach to policies, crucial in this regard, consists both of mainstreaming the rights of women and girls with disabilities in general policies, including those on gender equality, and adopting specific policies. For example, States should include women with disabilities in their mainstream sexual and reproductive health policies, and also include specific frameworks when needed "to legally provide for the performance of certain reproductive health services"¹¹ without discrimination.

16. In addition, the Convention has a specific focus on children with disabilities, establishing that States must adopt measures to ensure their exercise of human rights on an equal basis with others. This entails implementing equality measures in all areas, respecting the best interests of the child and their own views on matters affecting them, and providing disability and age-appropriate assistance for this purpose.

17. The non-State sector is important for achieving equality, in particular in such areas as education, employment, health and housing, and the provision of goods and services. States should seek active collaboration with the non-State sector, including by increasing cooperation with chambers of commerce, labour unions, private school federations and religious institutions, among others. The provision of technical assistance, guidelines and information, in particular on reasonable accommodation, accessibility and universal design, is crucial to advance equality and to reduce dependency on legal actions to enforce rights. Joint private–public initiatives are also pivotal to develop more inclusive organizational cultures, markets and services.

Specific measures to achieve de facto equality under article 5 (4) of the Convention

18. Specific measures to achieve de facto equality – that is, measures that establish preference over others and that are not considered discrimination – can contribute significantly to achieving substantive equality and combating structural discrimination. States are greatly encouraged to continue to take them when identifying inequalities that

⁹ Committee on the Rights of Persons with Disabilities, general comment No. 4 (2016) on the right to inclusive education.

¹⁰ Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016) on women and girls with disabilities.

¹¹ Committee on the Elimination of Discrimination against Women, general recommendation 24 (1999) on women and health, para. 11.

have an impact on persons with disabilities. A wide range of diverse measures favouring persons with disabilities – and their households – is called for in order to increase the level of enjoyment of their rights, in accordance with the Convention. They might address situations ranging from systemic discrimination (for example, a low employment rate) to specific concerns affecting the rights of persons with disabilities (for example, the high cost or lack of adapted vehicles).

19. “Specific measures” in the Convention include, but are not limited to, “temporary special measures”,¹² as seen in previous treaties. The latter are meant to have a limited duration: once equality has been reached, they are no longer justified. The Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities abandoned the term “temporary”, given that permanent measures are also required to ensure equality for persons with disabilities. For instance, quota systems to increase access to employment by persons with disabilities can be temporary (until no longer necessary), while tax exemptions for importing vehicles or assistive devices usually are not. In the area of political participation, innovative specific measures are also starting to be implemented, such as the reservation of seats in parliament or other areas of government for representatives of persons with disabilities, as in the case of Uganda.

20. These measures must be consistent with all the principles and provisions of the Convention; for example, measures in education must not lead to segregated practices (such as special schools or classes). Furthermore, while quota systems are desirable to promote equality, they should not include reserved working positions or tasks exclusive to persons with disabilities, which reproduce stereotypes and stigmatization, lead to an impasse in career development and do not value the skills of the employee.

21. In its general comment No. 3 (2016), the Committee on the Rights of Persons with Disabilities highlighted the lack or insufficiency of specific measures to promote the education and employment of women with disabilities. These measures can also promote their equality with men with disabilities and other women.

B. Non-discrimination

22. Generally speaking, current national laws and practices do not provide for strong protection against discrimination on the basis of disability, and do not include disability as a forbidden ground of discrimination in accordance with the Convention. Furthermore, reasonable accommodation is usually absent in legislation, or is misconstrued or confused with other concepts, such as accessibility.

23. The Convention provides a robust non-discrimination framework, and innovates by including denial of reasonable accommodation as a form of discrimination. Article 5 (2) bans all discrimination on the basis of disability and requires equal and effective legal protection against discrimination on all grounds, referring to other non-discrimination obligations. This includes providing access to remedies, and ensuring that, when a person has enough evidence to prove *prima facie* discrimination, the burden of proof shifts to the respondent.¹³

24. Article 2 of the Convention defines discrimination on the basis of disability as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect

¹² Terms such as “affirmative action”, “positive discrimination” and “preferential treatment” are usually used in domestic contexts to refer to this kind of measure.

¹³ See for example CERD/C/ISL/CO/18, para. 14, and CCPR/C/CHL/CO/5, para. 18.

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.” All forms of discrimination are included, such as direct discrimination, indirect discrimination, discrimination by association, structural or systemic discrimination,¹⁴ discrimination on the basis of perceived impairment, disability-based exclusion and segregation in any field of social life,¹⁵ disability-based violence,¹⁶ denial of access,¹⁷ denial of reasonable accommodation (see para. 44 below) and failure to provide procedural accommodation in the context of access to justice.

25. Discrimination by association covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics, such as disability, and can also be committed by indirect discrimination.¹⁸ Legal frameworks in Ecuador, Spain and Ireland already include this concept. Recent developments in the field of employment suggest that the duty to provide reasonable accommodation also applies to the relatives of persons with disabilities.¹⁹

26. In its general comment No. 3 (2016), the Committee on the Rights of Persons with Disabilities defined multiple discrimination as being committed when a person is subject to discrimination on two or more grounds. The Committee added that intersectional discrimination referred to a situation where several grounds operate and interact with each other at the same time, in such a way that they are inseparable. Spain, Croatia and the European Union have acknowledged this as a more serious form of discrimination, to be addressed by policy.

1. Discrimination by denial of reasonable accommodation

27. Reasonable accommodation is an intrinsic part of the duty of non-discrimination and, as such, is applicable to all rights. The denial of reasonable accommodation in connection to any right therefore constitutes discrimination on the basis of disability.

28. Reasonable accommodation emerged in national practice as part of the framework on non-discrimination in specific areas of law, in particular religious rights, and was first considered in the case of persons with disabilities in employment and the provision of services. During the negotiations on the Convention, 14 States reported that they had reasonable accommodation as part of their anti-discrimination framework. In the United States of America, the Americans with Disabilities Act established that failure to provide reasonable accommodation to persons with disabilities entailed discrimination. Examples of reasonable accommodations include making existing facilities and information accessible for the person concerned in a particular situation; adapting or acquiring equipment; reorganizing activities; re-scheduling work; customizing learning materials; adapting curricula to the capabilities of the person; adjusting medical procedures; implementing specific communication modalities; and enabling access of support personnel to facilities restricted to the public.

¹⁴ Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016), para. 17.

¹⁵ See CRPD/C/HRV/CO/1, para. 8.

¹⁶ See Committee on the Elimination of Discrimination against Women, general recommendation No. 19 on violence against women, para. 1.

¹⁷ See Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014) on accessibility, para. 26.

¹⁸ European Court of Human Rights, *Guberina v. Croatia*, judgment of 22 March 2016.

¹⁹ CRPD/C/EU/CO/1, paras. 78-79. See also *Luis Castro-Ramirez v. Dependable Highway Express, U.S.A.*, California, 2nd App. Dist., April 6 2016 and August 29 2016.

29. At the international level, the Committee on Economic, Social and Cultural Rights, in its general comment No. 5 (1994) on persons with disabilities, introduced “denial of reasonable accommodation based on disability” as a form of discrimination, cross-cutting to all rights recognized by the International Covenant. At the European level, it was enshrined in article 5 of European Union Directive 2000/78/EC, limited to the right to employment, which has been a matter for interpretation by the European Court of Justice.²⁰ These two precedents also had an impact on negotiations on the Convention itself.

30. Article 2 of the Convention defines reasonable accommodation as the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” Other United Nations treaty bodies,²¹ the European Court of Human Rights,²² the European Court of Justice²³ and various national legislations as in Peru, Belgium and Finland have referred to or included this concept.

31. “Disproportionate or undue burden” should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. “Disproportionate” and “undue” should be considered synonyms. National practices at the moment of the adoption of the Convention employed different terms, such as “disproportionate burden”, “undue burden” or “undue hardship”, to refer to the same idea: the possible excessive weight of the requested accommodation on the entity responsible for providing it. The adopted draft was the result of an agreement among Member States to ensure that the concept could be related to different national uses.

32. Reasonable accommodation should not be confused with “specific measures”, including “affirmative action measures” or the like. While specific measures and affirmative action imply a preferential treatment of persons with disabilities over others, reasonable accommodation aims at providing an individual with a disability with the necessary and appropriate adjustment or modification for the enjoyment of a specific right, to avoid discrimination.

33. Reasonable accommodation should not be confused with accessibility.²⁴ Accessibility duties relate to groups, imply progressive implementation and are unconditional, that is, they are not subject to a proportionality test. Instead, reasonable accommodation is individualized, applies immediately to all rights and is limited by its disproportionality. Making transportation, public and private buildings or other facilities communicational and physically accessible takes time. In the meantime, reasonable accommodation “can be used as a means of ensuring accessibility for an individual”.²⁵ For instance, service providers (such as hospitals or restaurants) should gradually make their facilities and services accessible, and in the meantime they should be prepared to provide reasonable accommodation immediately (for example, have a removable ramp as a reasonable accommodation).

34. Along the same lines, reasonable accommodation should not be confused with provision of support. Different rights may require the provision of support, for example, a support teacher in education, personal assistance under the right to live independently and be included in the community, or support to exercise legal capacity. As support systems or

²⁰ See European Court of Justice, *Chacón Navas v Eurest Colectividades SA*, Decision of 11 July 2006.

²¹ See for example CEDAW/C/HUN/CO/7–8, para. 29 (c), and CRC/C/DEU/CO/3–4, para. 51 (b).

²² See *Çam v Turkey*, paras. 38, 65 and 67.

²³ For example, *Ring v Denmark*, paras. 5, 30–32, 53.

²⁴ See Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 26.

²⁵ *Ibid.*

services may not yet be developed, reasonable accommodation may function as a means of providing support in a particular case.

35. Similarly, reasonable accommodation should not be confused with procedural accommodations in the context of access to justice, as this would fall short of the full provisions enshrined in the right. During the negotiations on the Convention, the term “reasonable” was intentionally left aside in the framing of article 13. Article 13 requires “procedural accommodations”, which are not limited by the concept of “disproportionate or undue burden”. This differentiation is fundamental, because the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights. Failure to provide a procedural accommodation therefore constitutes a form of discrimination on the basis of disability in connection with the right of access to justice.

36. Reasonable accommodation, as seen, plays a bridging role between immediate and progressive obligations. As part of non-discrimination, reasonable accommodation applies immediately to all rights, including economic, social and cultural rights. Secondly, as it may require positive action (with or without cost), it blurs the idea that civil and political rights imply only negative duties, and economic, social and cultural rights only positive duties. From a practical perspective, the systematic implementation of reasonable accommodation contributes to fostering compliance with progressive obligations; for example, the provision of reasonable accommodation as a means to ensure accessibility may benefit others beyond the individual concerned.

2. Elements of the implementation of reasonable accommodation in practice

37. To date, no globally accepted justification has been made of the elements of reasonable accommodation, in particular of what constitutes “undue and disproportionate burden”. Indeed, the evaluation of whether an accommodation is “necessary and appropriate” or imposes an “undue or disproportionate burden” depends on several factors, and the evaluation will differ from case to case. A review of national legislation reveals that certain criteria are used across countries to guide such evaluations. The most commonly used criteria – although only indicative and not to be considered an exhaustive list – are described below.

38. In a comparative analysis, reasonable accommodation has several key elements. A reasonable accommodation must be possible or feasible, from both a legal and a practical perspective (not contrary to the law, and not impracticable). Furthermore, it must be relevant, that is, necessary and appropriate for the exercise of the right on an equal basis with others. It must not constitute a “disproportionate or undue burden” upon the entity responsible for its provision (including from the financial and economical perspectives). It should be noted that reasonable accommodations usually have either a low cost or none at all.²⁶

39. National laws and regulations should provide guidance on these elements and on desirable steps in providing reasonable accommodation. Rights, duties and time frames for each of the parties involved should be clearly stated. States should seek to develop policy guidelines, specific training and awareness-raising activities to disseminate relevant information in order to promote inclusive attitudes and environments and to ensure that their own agencies and non-State actors are prepared to provide reasonable accommodation.

²⁶ See United States Department of Labor, “Employers and the ADA: Myths and Facts” (available from www.dol.gov/odep/pubs/fact/ada.htm).

40. Reasonable accommodation is in practice triggered, as a minimum, when a person with disability requires an accommodation that addresses their particular needs in order to remove concrete barriers to the enjoyment of that person's rights. In the United States of America and in South Africa, regulations recommend that entities offer accommodation without waiting for a request; this should be regarded as good practice. Both the requesting and the obligated parties should then engage in a dialogue. Given the reverted burden of proof applicable in non-discrimination, the entity responsible for providing the accommodation must justify its denial through an objective analysis to avoid incurring discrimination.

41. States should promote the recording of the accommodation request process, putting that burden on the obligated entity. Throughout the process, both parties must act in good faith and provide for clear communication. Accommodation needs may vary over time for persons with different impairments. Consequently, reasonable accommodations can be ended, modified, expanded or replaced, as needed.

42. Confidentiality must be ensured throughout the process of providing reasonable accommodation. During the dialogue, the person with a disability may be requested to inform on their accommodation needs or to provide sensitive personal data. Disclosure of accommodation needs or sensitive personal data must be up to the individual concerned.

43. Persons with disabilities are often reluctant to request accommodations because it could require the disclosure of a condition that is highly stigmatized; for example, persons with psychosocial disabilities usually do not request accommodations because laws and regulations may exclude them from participating in specific contexts or even imply that they could be subjected to forced treatment and institutionalization. In addition to establishing confidentiality measures, those responsible for providing accommodation should also work to create inclusive environments and to address such issues as stigmatization, bullying, exclusion and unconscious bias towards persons or measures. For example, if an employee with disability requires an accommodation, the manager could, in agreement with the person concerned, inform other employees that the accommodation was provided on the basis of disability to enable the person with disability to perform his or her job.

(a) Requesting reasonable accommodation

44. A person with a disability should, if not approached, address a request for reasonable accommodation orally or in writing, without further formal requirements, to the entity responsible for providing it. The entity responsible should be clearly identified under law, regulation or internal policy in order to avoid burdening the person concerned with this task. If the request is wrongfully addressed within an organization (for example, in a hospital), the recipient should forward it immediately to the area in charge.

(b) Dialogue

45. After an accommodation has been requested, the person concerned and the entity responsible for its provision should engage in a dialogue to establish the person's needs and the most appropriate response to them. Persons with disabilities are experts on evaluating their own needs, and often already know which modifications and adjustments are necessary and appropriate. Dialogue may be formal and extensive (usually in a context where long-term relations are established) or more informal and brief; for instance, when a wheelchair user attempting to enter a restaurant realizes that the main entrance is inaccessible, the restaurant manager offers a removable ramp to remedy the situation.

46. The provision of reasonable accommodation should not be subject to holding certification of any kind. In exceptional cases, when the entity responsible for the provision

is unable to ascertain whether the accommodation is relevant, more support information may be requested from the person concerned. The assessment must not be based solely on medical information, but rather on functionality, that is, focused on needs and existing barriers. States should design regulatory frameworks to prevent the cost of assessment from falling on the person concerned and to ensure that the assessment is performed by a relevant authority.

(c) Objective justification of denial of reasonable accommodation

47. The requested party can deny an accommodation without incurring in discrimination on the basis of disability by demonstrating that it is either not feasible (legally or in practice) or relevant (“necessary” and “appropriate”), or that it would impose a “disproportionate or undue burden”. The justification of the denial must be based on objective criteria and analysis, and communicated in a timely fashion to the person with the disability concerned.

48. The above-mentioned criteria may be closely intertwined in practice, in particular during exchanges between parties, as needs, contexts and alternatives may be extremely diverse and contingent. Failure to meet one criterion may suffice, however, to justify the denial of reasonable accommodation without incurring discrimination (for example, if the accommodation is clearly not relevant to the exercise of the right at stake, there is no need to prove another element).

49. These criteria, as reflected in current national practices – for example as suggested in regulations in Belgium – include a set of different factors, which should not be considered exhaustive. Furthermore, they should take into account the right at stake and the context of the provision of reasonable accommodation. The factors to be considered must be clear, objectively measurable and neither vague nor ambiguous in order to avoid arbitrariness and prevent discrimination; for example, legislation should not include clauses such as “the moral of other employees”, “any other factor affecting efficiency, productivity, success and competitiveness” or “overall economic climate”, as they do not allow for objective assessment.

50. Factors that are discriminatory, whether in law or de facto, due to their negative or disproportionate impact on persons with disabilities should be repealed. National practices discriminate against persons with disabilities when they include such criteria as “degree and kinds of effects on other students” (in education) or when productivity assessments for employment are applied only to persons with disabilities (or have a disparate impact on them owing to elements not related to the core aspects of the job, namely, without any objective justification).

(d) Legally and materially possible

51. No person providing an accommodation may be obligated to breach the law. A request of reasonable accommodation should be made in accordance with existing laws, regulations or agreements. Practices in the United States of America, Canada, Australia and Belgium are clear in this regard. For instance, a requested party may deny an accommodation that entails the acquisition of certain products (for example, accessibility-related software) if its importation is not allowed by customs laws. States should include in their legislation the possibility of requesting waivers to allow for the provision of reasonable accommodation, including in private agreements. Requested parties should make efforts in good faith to obtain such waivers.

52. At the same time, a requested party may only provide accommodations that are materially possible; if the entity that is supposed to provide the accommodation proves that it is materially impossible, it would therefore not incur discrimination. An accommodation

must therefore exist and be available; for instance, some isolated areas, such as small islands, might not dispose of sign language interpreters or augmentative communication support people, in which case the service would not be available to provide an accommodation within a short period of time or immediately, given that its provision is materially impossible in the time frame. As stated earlier, however, those in charge should make good faith efforts to provide an accommodation.

(e) Relevant (“necessary” and “appropriate”)

53. As a criterion, relevance seeks to assess whether a requested accommodation is tailored to the purpose of ensuring the exercise of rights on an equal basis with others, and not unrelated to it. An accommodation must be both necessary to remove a particular barrier and appropriate to (or effective in) ensuring the realization of the right in question.

54. These important elements should be considered during any dialogue to assess alternative accommodations. National practices in New Zealand, Scotland and South Africa consider the effectiveness of the adjustment requested.

(f) Proportional (“not imposing a disproportionate or undue burden”)

55. Determining whether an accommodation would entail a “disproportionate or undue burden” requires an assessment of the proportional relationship between the means employed (including time, cost, duration and impact) and the aim, which is the enjoyment of the right concerned. A case-by-case approach is therefore required.

56. National practices take different factors into consideration; for example, laws in Finland and in the United States of America refer to the cost of measures. Other factors, such as the time required to implement an accommodation and its duration and frequency, are highlighted in practices followed in, for instance, Australia, the Netherlands and Belgium. In this regard, States have other obligations under the Convention that are weighted in favour of determining the proportionality of the measure;²⁷ for example, if an accommodation would improve general accessibility, there is an enhanced obligation to provide it, as it advances a general duty. Furthermore, reasonably predictable indirect benefits to the entity in charge of providing an accommodation could weigh in favour of its implementation (such as increased sales, by allowing access to persons with disabilities as consumers, enterprise leadership and increased brand value).

57. Regulations in Finland, the United States of America, the European Union, Canada, Scotland and the Netherlands also take into account the size of the organization (for example, by the number of employees). Some also consider the impact of the measure on the requested party and its operations, the positive effect on the person concerned and any other beneficiaries.

58. With regard to employment, national practice has showed that a cost–benefit analysis seeking to assess “the cost of reasonable accommodation in relation to a perceived benefit to the employer and the employee”²⁸ might lead to hypothetically discriminatory decisions; consequently, it should be precluded. Moreover, distributing non-essential tasks among other employees is a frequently required accommodation.

59. Financial feasibility focuses on the possible financial options for the requested party in providing reasonable accommodation. This includes assessing their cash flow as it

²⁷ See CRPD/C/12/D/5/2011, appendix (dissenting opinion), para. 5. Such a criterion has also been adopted in national law in Australia.

²⁸ United States Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, 2002, para. 45.

develops over time and focusing the assessment on the net cost of the accommodation. External financial support – such as loans, subsidies and grants from either public or private sources – might be available. Information on these options should be disseminated by States to facilitate compliance by non-State actors. If the entity in charge of providing the accommodation proves that it imposes a significant difficulty or expense, it may deny it without incurring discrimination. The practices of the European Union, and of many States, including Algeria, Australia, Belgium, Canada, Denmark and Finland, and in the jurisprudence of the Committee on the Rights of Persons with Disabilities refer both to financial impact and financial support as important factors.

60. Economic feasibility looks at overall assets rather than cash flow alone. If an accommodation were to jeopardize the existence of the required party or, as a minimum, substantially undermine the performance of its core functions, it may be denied without incurring discrimination. This criterion can be found in existing regulations (for instance in Austria).

61. Overall assets rather than just the resources of a unit or a department within an organizational structure must be considered; this is particularly important in the case of State institutions, where the responsible party is the State as a whole. In this sense, stricter standards exist for States when justifying a denial of reasonable accommodation. Similarly, large companies may not avoid the duty to provide for reasonable accommodation by claiming lack of resources in their units without considering its overall resources. Practice in the private sector has shown that centralized funds at headquarters relieve the burden on smaller units, encouraging managers to provide accommodations without affecting their own budgets.

IV. National implementation

62. Substantive equality for persons with disabilities requires States to take proactive steps in all areas of law and public policy by adopting a twin-track approach, including persons with disabilities in all policy plans and programmes and developing disability-specific policies. The principles of the Convention should inform all legislation and policies with regard to persons with disabilities, and guide their interpretation. General measures on accessibility, and the enjoyment of enabling rights (such as the rights to equal recognition before the law, education and employment), contribute to equal and inclusive communities. In its concluding observations, the Committee on the Rights of Persons with Disabilities has provided guidance for implementing article 5 of the Convention and in connection with other rights.

63. States should closely consult with and actively involve persons with disabilities, including children, through their representative organizations, in the development, implementation and evaluation of legislation, regulations and policies. National human rights institutions can play a pivotal role in ensuring that draft legislation and policies are compliant with international standards on the rights of persons with disabilities, and in supporting their participation. Persons with disabilities should be empowered to support and monitor the implementation of the Convention by being provided with accessible information on equality and non-discrimination. They should in addition be informed of the work of equality bodies, ombudsman offices and the judiciary, especially on how to bring complaints and to gain access to justice, including through training and capacity-building

for themselves and their organizations.²⁹ In particular, policies for empowerment should target women and girls with disabilities (as is the case in Thailand).

64. States should promote a positive perception and raise awareness of the scope of equality and non-discrimination for persons with disabilities, including by combating stereotyping and stigmatization. In this sense, the Committee on the rights of Persons with Disabilities has recommended that States develop campaigns to fight discrimination against persons with disabilities and provide training and guidance for the public and private sectors on anti-discrimination, including mandatory training on multiple discrimination, and the legal obligation to provide reasonable accommodation in all sectors, at every level of government. Eliminating barriers in attitude requires further efforts under article 8 of the Convention, and entails a critical approach to negative perceptions of persons with disabilities. In 2016, the Social Forum raised the importance of working with the media sector to increase their visibility and contribute to the elimination of existing stereotypes of them.³⁰

65. Article 31 of the Convention requires States to collect data, including statistical and research data, to assess the de facto equality of persons with disabilities and to identify situations of structural discrimination. Data collected should contribute to the development of human rights indicators in order to assess comprehensively compliance with the Convention. Information should be disaggregated by, inter alia, sex, age and impairment, clearly presented and disseminated in accessible formats.

66. Specific measures have proven to be effective in reducing inequality for persons with disabilities. Adopting further specific measures, including temporary measures and affirmative actions – notably when identifying situations of structural discrimination such as a low employment rate) and of disadvantage (for example, the failure of social protection schemes to cover disability-related costs) – can accelerate the process of reducing inequality. In this area, legislation could incentivize employers to hire persons with disabilities (as seen in the case of Spain and Portugal). Measures could address other areas, such as political participation, social housing and social protection. The introduction of social protection floors that are inclusive of persons with disabilities, consider their support needs and are compliant with the Convention is fundamental to reducing inequality.

67. Affirmative action has contributed to an increase in awareness and the exercise of rights in a number of States, with different results. Mandatory quotas, which are common in the field of employment, have been adopted in, inter alia, the Republic of Korea, China, Croatia, France, Ecuador and Ukraine. Once the quotas have been adopted in legislation, States should ensure that they are implemented, with clear targets based on comparable disaggregated data.

68. Legal harmonization is essential to ensure compliance with the principle of non-discrimination, including by private persons, organizations and private enterprises. States should repeal discriminatory laws and provisions that deny rights and prevent participation and inclusion on the ground of disability,³¹ and incorporate a definition of “discrimination on the basis of disability”.³² Furthermore, legislation should (a) explicitly address all forms of discrimination, including discrimination by association,³³ and recognize multiple and intersectional discrimination as an aggravated form of discrimination;³⁴ (b) ensure

²⁹ See CRPD/C/UKR/CO/1, para. 10; CRPD/C/CZE/CO/1, para. 12; and CRPD/C/DOM/CO/1, para. 9.

³⁰ See A/HRC/34/69.

³¹ CRPD/C/COK/CO/1, para. 10 (c).

³² CRPD/C/SRB/CO/1, para. 10; CRPD/C/UGA/CO/1, para. 9 (a); CRPD/C/TUN/CO/1, para. 13.

³³ CRPD/C/ARE/CO/1, para. 12 (a); CRPD/C/MUS/CO/1, para. 10; CRPD/C/BEL/CO/1, para. 12.

³⁴ CRPD/C/GTM/CO/1, para. 16; CRPD/C/SVK/CO/1, para. 18.

protection in a cross-cutting way for all rights and areas of life;³⁵ and (c) explicitly cover all persons with disabilities, including children, indigenous people, women and girls, hard-of-hearing persons, deaf persons and people with psychosocial disabilities.

69. In particular, legislation should set out explicitly the obligation to provide reasonable accommodation with regard to all rights as immediately enforceable,³⁶ stating that denial of reasonable accommodation constitutes discrimination on the basis of disability. States could make an arbitrary denial of accommodation punishable by law.³⁷ States should furthermore regulate the criteria for the provision of reasonable accommodation,³⁸ identifying the entities responsible and addressing the specific context of implementation. The implementation of reasonable accommodation calls for flexible policies, clear guidelines and protocols, specific resources and the efficient and timely management of funds in order to respond immediately to requests for it. In the United Kingdom of Great Britain and Northern Ireland, the public Access to Work programme provides grants to cover the costs of reasonable accommodation incurred by employers who hire persons with disabilities. New Zealand has allocated public funds to the provision of sign language for specific situations, and has formulated guidelines for the implementation of reasonable accommodation.

70. States must develop policies to prevent the exclusion of persons with disabilities and to combat discrimination against them,, in particular multiple and intersectional discrimination based on disability, age, gender, indigenous background and rural isolation, ethnicity, Afro-descendant origin or migrant status, among others. In particular, social protection schemes should include older persons with disabilities, for instance by ensuring coverage of disability-related costs when transitioning to retirement. Policies should also prevent discrimination among persons with disabilities; for example, disability-related services and benefits should be provided irrespective of the cause or kind of impairment.³⁹ Along these lines, policies should envisage budget allocations and markers for women with disabilities and for children with disabilities. For example, in Togo, the *Fond national de finance inclusive* explicitly targets women with disabilities, facilitating their access to funding. The European Disability Strategy (2010-2020) includes several provisions on children with disabilities.

71. States must also ensure the proper monitoring of compliance with legislation and policies on equality and non-discrimination, including the provision of reasonable accommodation. Discrimination against and the stereotyping of persons with disabilities can be rooted in customs and beliefs, including those held by public officials. Monitoring should have an enhanced focus on the situation of the most marginalized (such as persons with albinism, in certain contexts, and those with psychosocial disabilities). Persons with disabilities should have access to information and simple and effective remedies to assess governmental action.

72. Monitoring bodies operating under article 33 (2) of the Convention should have sufficient powers to carry out investigations and impose sanctions on public or private bodies that commit acts of discrimination,⁴⁰ and could indeed serve as an effective alternative means of recourse for persons with disabilities to obtain redress without

³⁵ CRPD/C/GAB/CO/1, para. 13 (a).

³⁶ CRPD/C/DEU/CO/1, para. 14 (b).

³⁷ CRPD/C/UKR/CO/1, para. 10.

³⁸ CRPD/C/MEX/CO/1, para. 52 (e).

³⁹ CRPD/C/HRV/CO/1, para. 8.

⁴⁰ CRPD/C/ECU/CO/1, para. 15.

recurring to courts. States should provide them with appropriate resources,⁴¹ ensuring their effectiveness and accessibility.⁴² Mediation and conciliation mechanisms could serve as an effective tool, and should provide appropriate redress for victims of discrimination.

73. The Committee on the Rights of Persons with Disabilities has requested States parties to collect and disseminate disaggregated data on case law on discrimination, including that involving multiple and intersectional discrimination.⁴³ This complaint-based information is helpful in assessing outcomes of complaint mechanisms and in identifying trends in discrimination, and should to be broadly disseminated (as in Mexico and Belgium). Most cases of discrimination, however, go unnoticed and are not registered owing to a lack of awareness of rights and of access to justice. Further studies, both quantitative and qualitative, are therefore required in order to assess and combat discrimination against persons with disabilities (as has been done in Spain and Argentina).

74. States should ensure the availability and accessibility of legal remedies, and of effective reparation and redress for victims of discrimination. Lawyers, judges and agents of justice should be targeted in capacity-building efforts to ensure their understanding of the human rights-based approach to disability, particularly of the unconditional application of the principle of non-discrimination to persons with disabilities. Remedies should aim at changing attitudes towards persons with disabilities, and steps must be taken to ensure that persons with disabilities are able to seek injunctions and can receive damages.⁴⁴ Remedial schemes should also address the aggravated nature of multiple and intersectional discrimination. Class or collective actions or similar judicial procedures are useful tools to raise awareness and address situations of structural discrimination. States should consider providing favourable frameworks with broad legal standing.

75. In addition, States should waive or reduce costs of lawsuits and take other measures to ensure that persons with disabilities can initiate a claim before the courts.⁴⁵ Eligibility criteria for reducing or waiving schemes should not have a negative impact on persons with disabilities; for example, if an income threshold is established as a criterion, it should exclude disability-related benefits from the calculation in order to avoid conflict with social protection ends.

V. Conclusions and recommendations

76. The Convention on the Rights of Persons with Disabilities takes an innovative approach to the principles of equality and non-discrimination in international human rights law. It lays out a powerful vision of substantive equality, calling for action to transform current societal structures, systems and conceptions. States should, in consultation with persons with disabilities, adopt laws and policies in accordance with the Convention to reduce inequalities, including by facilitating accessibility, working actively to change negative perceptions and attitudes, and providing for inclusive environments. They should ensure the exercise of enabling rights— such as the right to equal recognition before the law, to education and to employment – which are the key to achieving substantive equality.

⁴¹ CRPD/C/KOR/CO/1, para. 12; CRPD/C/GTM/CO/1, para. 18.

⁴² CRPD/C/BOL/CO/1, para. 12.

⁴³ CRPD/C/DNK/CO/1, para. 17.

⁴⁴ CRPD/C/BEL/CO/1, para. 12.

⁴⁵ CRPD/C/KOR/CO/1, para. 12.

77. According to article 5 (4) of the Convention, specific measures to achieve de facto equality go beyond “affirmative actions”. States parties should take specific measures to address inequalities and to combat discrimination, particularly structural discrimination. They should, in addition, provide effective monitoring tools and remedies to improve the enforcement of these specific measures.

78. Persons with disabilities are subject to all kinds of discrimination. The Convention expands on previous human rights treaties and includes denial of reasonable accommodation and discrimination by association as forms of discrimination on the basis of disability. States parties should ensure protection against all kinds of discrimination by domesticating the Convention in national law; providing tools and guidelines to implement its innovative aspects; empowering persons with disabilities with regard to their rights; building the capacity of public officials, including judges and monitoring agents; and ensuring effective remedies and proper redress and reparation to victims of discrimination.

79. The innovative aspect of the Convention on reasonable accommodation must not be confused with other concepts, such as accessibility, specific measures, or support and procedural accommodation. Reasonable accommodation requires further development in international human rights law. Existing national practices should allow the identification of some elements that could contribute to its implementation. States should improve or adopt legal and regulatory frameworks that clearly identify those responsible for providing accommodation in all areas of the law; provide guidelines and protocols for their implementation; assure flexibility in their policies and budgets to accommodate specific requests; and lay out appropriate procedures and criteria to assess when a requested accommodation imposes a “disproportionate or undue burden”, ensuring a case-by-case approach. Reasonable accommodation funds might prove useful to ensure appropriate funding, when required.

80. The collection of disaggregated data (including on cases on discrimination, to inform human rights indicators) is crucial to monitor the equality of, and discrimination against, persons with disabilities – and, in particular, to identify situations of systemic discrimination. States should develop national human rights indicators under the Convention and disaggregate data by, inter alia, age, gender and impairment, to assess implementation of the Convention.

81. Independent monitoring mechanisms and/or national human rights institutions can play a pivotal role in promoting equality of and non-discrimination against persons with disabilities, in particular by raising awareness, providing technical guidance and capacity-building to persons with disabilities, public officials, judges and legal professionals and other stakeholders. States should provide them with appropriate resources and ensure their independence in order to fulfil their mandates and to facilitate access to justice.

82. The 2030 Agenda for Sustainable Development presents a unique opportunity to reduce inequality for persons with disabilities and to ensure their inclusion and participation. States and stakeholders must ensure that the principles of equality and non-discrimination for persons with disabilities are implemented in a cross-cutting way in all goals. International cooperation should both mainstream the rights of persons with disabilities and increase disability-specific funds, implementing disability markers to monitor the implementation of programmes.