Introduction

This submission seeks to contribute to the discussions that will take place during the CRPD Committee sessions in Geneva in August 2017 on the draft General Comment on Article 5. The remarks in this paper follow the structure of the outline of the draft General Comment, according to the Committee’s proposed headings and paragraph numbering (highlighted below in bold). Not all headings are addressed.

Summary of the content of the submission

The Committee should carefully distinguish between various forms of discrimination. The Committee should comprehensively define the various elements of Article 5 and Article 2 CRPD. In particular, this submission notes the confusion that often arises in practice regarding the reasonable accommodation duty, most notably its interaction with indirect discrimination and in the application of the disproportionate burden test.

I. Introduction to the draft General Comment

- Principle of equality and non-discrimination in international law: Paragraph 1 of the outline of the draft General Comment on Article 5

The draft General Comment should clearly distinguish between various forms of discrimination (direct discrimination, indirect discrimination and unjustified failure to make a reasonable accommodation) and how combating these specific forms of discrimination relates to various forms/theoretical models of equality (formal/substantive/transformative equality). The developments that have taken place in that regard in international human rights law should be traced briefly.

It is suggested to change the heading of this section to read: ‘Equality and Non-Discrimination for Persons with Disabilities in International Human Rights Law’
- **The history of Article 5 of the Convention: Paragraph 2 of the outline of the draft General Comment on Article 5**

This section could helpfully refer to the drafting history of Article 2 of the Convention, since it contains the definition of disability-based discrimination and the definition of reasonable accommodation.

- **The human rights model of disability and the notion of equality: Paragraph 3 of the outline of the draft General Comment on Article 5**

The social-contextual model of disability should also be addressed in the heading and substance of this section. It should be linked to the human rights-based model of disability.¹ The implications of both models for the formulation of equality laws and policies in States Parties to the CRPD should be addressed.

It is suggested to change the heading of this section to read: ‘Ensuring Equality through the human rights-based and social-contextual models of disability.’

**II. Normative Content**

**Article 5 (1)**

- **Being equal before and under the law: Paragraph 5 of the outline of the draft General Comment on Article 5**

There is a subtle difference between equality before the law and equality under the law.² These two concepts should be explained separately, focusing on the difference between the two terms.

- **Equal protection and equal benefit of the law: Paragraph 6 of the outline of the draft General Comment on Article 5**

It is also suggested to define these concepts separately as they have distinct meanings. In particular, the term ‘equal benefit of the law’ in Article 5(1) of the CRPD is new to international human rights treaties and should be carefully explained.

**Article 5 (2)**

- **Forms of discrimination: direct; indirect; structural; systemic; denial of reasonable accommodation; distinction; exclusion or restriction: Paragraph 7.a of the outline of the draft General Comment on Article 5**


It is suggested that harassment and instruction to discriminate should also be included under this heading.

The dividing line between indirect discrimination and denial of reasonable accommodation is often very unclear and causes confusion amongst some academics and legal practitioners. It would be helpful if the Committee could clearly differentiate between the two norms, both in a theoretical and practical way.3

There has been much debate as to whether to classify the refusal to provide reasonable accommodation as direct discrimination, indirect discrimination or as a third, *sui generis* form of discrimination. The Committee may find it useful to clarify this point.

- **Grounds of discrimination:** age; disability; ethnicity; indigenous, national or social origin; gender identity; political or other opinion; race; migrant, refugee or asylum status; religion, sex, or sexual orientation: Paragraph 7.c of the outline of the draft General Comment on Article 5

It is important to include within this paragraph of the draft General Comment some reference to intersectional discrimination. When addressing intersectional discrimination, it is important to clarify the nuances between different terms (‘multiple discrimination,’ ‘cumulative discrimination,’ ‘compound discrimination,’ ‘combined discrimination,’ ‘additive discrimination’) in the context of disability, as the terms have subtly different meanings and are often confused by scholars and others.4

**Article 5 (3)**

- **Duty to provide reasonable accommodation:** individualized effective adaptation, based on individual negotiation: Paragraph 8 of the outline of the draft General Comment on Article 5

At the beginning of this section, attention should be drawn to the key strengths and weaknesses of the duty to accommodate in facilitating *de facto* equality.

**Disproportionate Burden/Undue Burden**

It is advisable to include a sub-heading on the disproportionate/undue burden defence.

There is some uncertainty on the part of States Parties and private actors regarding the application of the terms ‘disproportionate burden’/‘undue burden’ at the national level. These terms are relatively unknown to some domestic systems. It would be useful, in the first instance, to clarify explicitly whether these two terms can be used interchangeably/have the same meaning. It appears that both terms can be condensed into the application of the

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3 The Committee may find the following literature useful in that regard: European Network of Legal Experts in the Non-discrimination field, *Reasonable Accommodation beyond Disability in Europe?*, report written by Emmanuelle Bribosia and Isabelle Rorive and supervised by Lisa Waddington (2013).

4 Sandra Fredman provides a useful summary of the ways in which such discrimination can manifest itself. See, for instance, S. Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination (European Commission, May 2016).
proportionality test that the Committee has referred to in its decisions. Nonetheless, clarification on this point would be helpful. Bearing in mind that the concept of ‘disproportionate burden/undue burden’ is a contextual test, and that its application depends on the circumstances of the case in question, it would still be useful, particularly for duty-bearers and national judges, if the CRPD Committee could elaborate on the types of factors that will be relevant in applying this test.

It is also important not to cause confusion by referring to the concept of reasonableness and proportionality together. According to the drafting history of the Convention, the term ‘reasonable’ was not meant to be a qualifier in and of itself, such as ‘to modify or weaken the provision of accommodations.’ The drafting history also reveals that the term ‘reasonable accommodation’ is a single concept that is being defined.

**At what point does the reasonable accommodation duty arise?**

The CRPD Committee has previously stated that the reasonable accommodation duty ‘is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis with others in a particular context.’ Some authors have pointed to the fact that it should be clarified whether the reasonable accommodation duty arises upon request, or once a duty-bearer becomes aware of the necessity of a reasonable accommodation in a given situation. Moreover, the request may relate to a request for a specific accommodation or to a request for some form of unspecified change, which is not placed in the context of the reasonable accommodation duty. The Committee may find it appropriate to elaborate on these points.

**Procedural requirements linked to the reasonable accommodation duty**

It is important to point out that the manner in which a request for reasonable accommodation is handled may, in itself, amount to a denial of such accommodation, and that the procedure established by States Parties to decide on requests for individualised assistance should take into account the individual needs of the person with a disability. The need for dialogue between the person with a disability and the duty bearer should be stressed in this respect.

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5 See, for instance, para. 10.5 of *Marie-Louise Jungelin (represented by the Swedish Association of Visually Impaired Youth (US) and the Swedish Association of the Visually Impaired (SRF) v Sweden, Communication No. 5/2011, views adopted by the Committee at its twelfth session (15 September–3 October 2014), adopted 2 October 2014.*

6 Ibid.


8 Fourth Session of the Ad Hoc Committee, Volume 5(10), September 03, 2004.

9 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 on Article 9 (Accessibility), UN Doc. CRPD/C/GC/2 (2014), para. 26.


11 See on this point: Netherlands, Equal Treatment Commission (*Commissie Gelijke Behandeling (CGB))* ETC, 9 February 2005; See also, Belgium, Court of First Instance of Ghent (*tribunal de première instance – Rechtbank van eerste aanleg*), (emergency proceedings), *Marie Gerday (representing her son Dylan Moens) v. Sint-Bavohumaniora and the Flemish Community; Romny Van Landuyt and Carine Van De Ginste (representing their daughter Sylvie Van Landuyt) v. Maria Assumpta and the Flemish Community; Yalçın Batur*
Article 5 (4)
- ‘Specific measures’: Paragraph 9 of the outline of the draft General Comment on Article 5

As well as distinguishing clearly between ‘specific measures’ and reasonable accommodations, it is important to draw attention to the distinct nature of ‘specific measures’ under Article 5(4), as well as the fact that some measures may need to be permanent or ongoing in character, due to the nature of certain types of impairment. It is also important to point out, as the OHCHR has done, that any measures adopted by States Parties under Article 5(4) CRPD ‘must be consistent with all the principles and provisions of the Convention’ and must ‘not lead to segregated practices.’

III. Interrelation with specific other articles

It is important that the Committee explains the meaning of the phrase ‘on an equal basis with others,’ which permeates the substantive articles of the Convention, and its link with non-discrimination.

The Committee should also explain the fact that the Convention seeks to achieve equality through a ‘twin-track’ approach (both mainstreaming disability rights, as well as the provision of disability specific measures). It is suggested that the Committee would elaborate on that point in relation to the substantive CRPD rights.

- Article 6: Paragraph 10 of the outline of the draft General Comment on Article 5

It may be useful to distinguish here, as Kimberley Crenshaw does, between structural intersectionality (structures of power and exclusion, leading to the unequal position of women with disabilities in the labour market etc.) and political intersectionality (related to the fact that the experiences of disabled women are often left out of the feminist political agenda).

Reference could be made to General Recommendation 24 (1999) of the CEDAW Committee, which also refers specifically to women with disabilities, as well as to General Comment 5 ICESCR, which recognises that double discrimination suffered by women with disabilities is often neglected. Furthermore, reference can be made to the Preamble of the CRPD, which emphasises the need for gender mainstreaming in all efforts by States Parties to implement the Convention and recognises that women and girls with disabilities are often at greater risk of violence, abuse, neglect, or exploitation.


- **Article 7: Paragraph 11 of the outline of the draft General Comment on Article 5**

It would be helpful if the Committee could clarify the types of ‘age-appropriate assistance’ envisaged under Article 7(3) CRPD.

- **Article 9: Paragraph 12 of the outline of the draft General Comment on Article 5**

Although the Committee’s General Comment No. 2 touches on the interaction between the equality norm and accessibility, there is still some confusion on these issues both in scholarly writings and in practice. It is important to clarify the difference between accessibility and reasonable accommodation, in the first place. It is also important to define the concepts of ‘access to,’ ‘lack of access,’ ‘denial of access,’ and how the equality norm, including the legal tools of reasonable accommodation and ‘specific measures,’ are means by which to ensure accessibility. It would be illustrative to give concrete examples of reasonable accommodations versus accessibility measures.\(^{15}\) It is also suggested to draw attention to the ‘close and mutually reinforcing relationship’\(^{16}\) between reasonable accommodation and accessibility measures. It may also be helpful to refer to the CRPD duty to universally design, and to clarify the connection between that and the duty to reasonably accommodate, namely that universal design should reduce, but not exclude, the need for individualised adaptations.

- **Article 12: Paragraph 13 of the outline of the draft General Comment on Article 5**

It would be helpful if the Committee could clarify the fact that certain supports to ensure equal recognition before the law will not have the immediate character of reasonable accommodations. Rather, they will be provided on a progressive basis by States Parties. Providing examples of reasonable accommodations would be helpful in the context of the right to equal recognition before the law. It should also be stressed that the removal of legal capacity can be a form of discrimination.

- **Article 24: Paragraph 17 of the outline of the draft General Comment on Article 5**

It is important to distinguish between the reasonable accommodation obligation in Article 24(2)(c), which is an immediate obligation, and the provision of other individualised supports in various sub-paragraphs of Article 24, which are progressive in nature.

- **Article 27: Paragraph 18 of the outline of the draft General Comment on Article 5**

It would be advisable for the Committee to take the opportunity to elaborate on the multifaceted dimension of the equality norm (ranging from non-discriminatory access, reasonable accommodation and specific measures, through to ensuring the right to work on an equal basis with others) and the immediate/progressive character of States Parties’ obligations in that context.

\(^{15}\) See, among others, the examples of reasonable accommodation provided by the Office of the United Nations High Commissioner for Human Rights (December 2010), “Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities”, UN Doc. A/HRC/34/26, para. 28.

IV. State Party obligations

- Legislative obligations: anti-discrimination laws: Paragraph 19 of the outline of the draft General Comment on Article 5

It is important to elaborate on the broad material scope of the Convention (‘all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’). It is also important to refer to Article 1 of the CRPD. Moreover, it should be emphasised by the Committee that any definition of disability contained in domestic non-discrimination laws and policies should follow the social-contextual and human rights-based model of disability, rather than the outdated individual or medical model.

- Enforcement obligations: legal remedies: Paragraph 21 of the outline of the draft General Comment on Article 5

It is important to highlight the fact that enforcement mechanisms created in conjunction with Article 5 should be inclusive and accessible, including access to legal aid. All barriers to enforcement of Article 5 duties must be eliminated, and this includes the provision of effective disability-sensitive training of the judiciary, lawyers and all staff associated with the judicial services.17

It is important to point out that the classification of the breach of the duty to accommodate will have consequences for the remedies available to potential victims and therefore the sanctions imposed on the duty-bearer(s). In other words, the failure to accommodate must be defined explicitly as a form of discrimination if specific remedies available in cases of discrimination are to be applicable.18 The CRPD Committee’s concluding observations clarify that States Parties should not restrict remedies for disability discrimination to monetary damages and this should be reiterated.

- Statistics and Research: Paragraph 22 of the outline of the draft General Comment on Article 5

It is important to highlight the fact that, in many States Parties to the CRPD, there is not only a lack of up-to-date data on disability, but also a lack of disaggregated data according to type of disability – the Committee could link this to Article 31(2) of the Convention.

The Committee could briefly outline the importance of statistics and other empirical evidence in revealing the existence, and patterns, of discrimination, and the other purposes that statistics (and indicators) serve in the equality context.19 Attention should also be drawn to the fact that statistics should be gender disaggregated, in line with Article 6 CRPD.

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18 L. Waddington and A. Broderick, Promoting Equality and Non-Discrimination for Persons with Disabilities (Council of Europe, 2017).

19 Ibid.
- **Other positive obligations: Affirmative action measures:** Paragraph 22 of the outline of the draft General Comment on Article 5

Under the heading of ‘other positive obligations’, attention should be drawn to the fact that financial supports or subsidies should be put in place in order to offset the cost of reasonable accommodations, as well as other disability-related measures.

**V. National Monitoring**

- **Focal point and coordination:** Paragraph 23 of the outline of the draft General Comment on Article 5

It would be helpful if the Committee could clearly differentiate between the function of the (obligatory) focal point and the (optional) coordination mechanism with respect to implementation of Article 5. It would also be helpful if the Committee could explain the importance and role of a coordination mechanism with regard to federal or decentralised States Parties to the CRPD. The Committee may choose to link the equality principle and the social-contextual model of disability to States Parties’ decisions regarding the ministerial department in which the focal point is placed.\(^{20}\)

- **Independent monitoring frameworks:** Paragraph 24 of the outline of the draft General Comment on Article 5

Reference should be made under this heading to the Paris Principles and their relevance to implementation of the right to equality under the CRPD. It would be useful if the Committee could give examples of the ways in which the independent mechanisms envisaged under the Convention can facilitate implementation of the Convention (such as contributing to States Parties’ reports, shadow reports etc).\(^{21}\) The complexity of ensuring adequate monitoring in federal or decentralised States Parties should be referred to, and advice should be given in that regard.

- **Meaningful participation:** Paragraph 25 of the outline of the draft General Comment on Article 5

It would be useful if the Committee could provide concrete examples of ways in which DPOs can be involved by States Parties in the focal points, coordination and independent mechanisms.\(^{22}\)

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\(^{22}\) Ibid, see page 46.