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# ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL

## 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* **

**Summary**

The present study focuses on legal measures required for the ratification and effective implementation of the Convention on the Rights of Persons with Disabilities.

Chapter I clarifies the steps States need to take at both national and international level for the ratification of the Convention and highlights key issues for consideration relating to reservations and declarations lodged on the Convention. Chapter II identifies measures required by States to give effect to the Convention in the national legal order and highlights areas where adoption of or amendment to legislation might be required for compliance. Illustrative examples are provided in the areas of equality and non-discrimination, accessibility, legal capacity, liberty and security, independent living, education, and work and employment. Chapter III reviews the core features of the national monitoring and implementation system envisaged by the Convention and highlights aspects where adoption or amendment to legislation might be required. Chapter IV sets out conclusions and recommendations for ratification and effective implementation of the Convention on the Rights of Persons with Disabilities.

* The footnotes are circulated in the language of submission only.

** Late submission.

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## Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 7/9 entitled "Human rights of persons with disabilities". In this resolution, the Human Rights Council decided to hold on an annual basis an interactive debate on the rights of persons with disabilities. The Council further decided to hold its first such debate in the course of its tenth session, focusing on "key legal measures for ratification and effective implementation of the Convention, including with regard to equality and non-discrimination".

2. To support this debate, the Council requested the Office of the High Commissioner for Human Rights (OHCHR) "… to prepare a thematic study to enhance awareness and understanding of the Convention on the Rights of Persons with Disabilities, focusing on legal measures key for the ratification and effective implementation of the Convention, such as those relating to equality and non-discrimination, in consultation with States, civil society organizations, including organizations of persons with disabilities, and national human rights institutions …".

3. In conducting the thematic study, OHCHR has sought written submissions from various stakeholders, including States, intergovernmental organizations, national human rights institutions and non-governmental organizations, including organizations of persons with disabilities. OHCHR also organized a one-day open-ended consultation on the theme of the study on 24 October 2008 in Geneva and participated in relevant expert and other meetings. The findings and recommendations that emerged from the consultation process have informed the content of the study.[1]

## I. LEGAL MEASURES FOR RATIFICATION

4. As of the date of the submission of this report, 46 States are parties to the Convention on the Rights of Persons with Disabilities and 27 are parties to its Optional Protocol, while 138 and 81 countries respectively are signatories to the two instruments.[2] The Convention on the Rights of Persons with Disabilities is the first human rights treaty that contemplates the possibility of regional integration organizations, in addition to States, becoming parties to the Convention, and article 44 regulates such attribution. The European Community is a signatory to the Convention.

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[1] Information and contributions submitted for the study are available on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR) at: http://www2.ohchr.org/english/issues/disability/HRCResolution79.htm.

[2] Information on the status of the Convention and its Optional Protocol is available at: http://www2.ohchr.org/english/bodies/ratification/15.htm.

5. Not only was this Convention negotiated in a shorter time than any other human rights convention in the history of international law, it has also attracted swift ratification by States, second only to the Convention on the Rights of the Child.[3]

6. Ratification of the Convention on the Rights of Persons with Disabilities and of its Optional Protocol requires States to undertake steps both at the international and national level.

## A. International measures for ratification

7. At the international level, a State that intends to become a party to the Convention and its Optional Protocol must express its consent to be bound by the treaty in one of the forms prescribed by the Convention. Article 43 establishes that consent to be bound can be expressed through the methods of ratification, accession or confirmation.

8. Ratification consists of the deposit of the instrument of ratification[4] nationally executed by the State with the Secretary-General of the United Nations as the depositary of the Convention in accordance with article 41. Expression of consent to be bound through ratification is a two-step process, as it requires signature of the Convention by the State prior to the deposit of the instrument of ratification. While the act of signature does not make a State party to the treaty, it requires the signatory State to refrain from acts which would defeat the object and purpose of the treaty.[5] With the deposit of the act of ratification, on the other hand, the "State establishes on the international plane its consent to be bound by the Convention".[6]

9. Accession consists of the deposit of an instrument of accession with the depositary and has the same legal effect as ratification; unlike ratification, however, it does not require to be preceded by signature. "Confirmation" is used as an equivalent for the term "ratification" when an international organization expresses its consent to be bound to a treaty.[7]

10. A State can decide to ratify both the Convention and its Optional Protocol or the Convention only. Such intention needs to be reflected in the instrument executed and deposited by the State.

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[3] The Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990, after the deposit of its 20th ratification.

[4] "Instrument" means a document signed by the Head of State, Head of Government or Minister of Foreign Affairs which unambiguously conveys the intent of the Government on behalf of the State to consider itself bound by the Convention (and its Optional Protocol if it is the case).

[5] Vienna Convention on the Law of Treaties (VCLT), art. 18.

[6] VCLT, art. 2. para. 1 (b).

[7] *Treaty Reference Guide*, United Nations Office of Legal affairs, 1999, available at: http://untreaty.un.org/ola-internet/Assistance/guide.pdf.

11. Ratification at the international level should not be confused with ratification at the national level, which a State might be required to undertake in accordance with its own constitutional provisions and practice before it expresses consent to be bound internationally. Ratification at the national level is inadequate to establish the intention of a State to be legally bound at the international level and the required actions at the international level shall also be undertaken to this purpose.[8]

12. Once the State or other entity with treaty-making capacity has expressed its consent to be bound by the Convention by an act of ratification, accession or confirmation, and where that treaty has entered into force for that particular State (in the case of the Convention on the Rights of Persons with Disabilities, on the thirtieth day after the deposit of the instrument),[9] the State or entity becomes a party to the Convention.[10] At this stage the State or entity is bound by the provisions of the treaty under international law.

## B. National measures for ratification

13. Constitutional law and practice regulate the various aspects of the process that take place at national level prior to ratification or accession at the international level. Notwithstanding the specificities of individual countries, two approaches can be identified for national ratification, which are defined by the role played by the legislative branch of government.

14. In civil law countries, ratification takes place through the approval of the treaty by the legislative branch. After the vote of approval, the ratification act is sent to the executive for its promulgation, publication and deposit with the depositary of the treaty. Numerous States parties to the Convention that submitted contributions for this study such as Argentina, Chile, Croatia, Ecuador, Hungary, Mali, Niger, Panama and Spain, for example, ratified the Convention through a law of parliament; Mexico ratified it through approval by one of its legislative chambers. In most countries with a common law tradition, on the other hand, as well as in other legal systems, ratification of the Convention took place through an act of the executive and where parliament was involved in the process, it was in a consultative capacity. Executive decisions have been adopted in Bangladesh, New Zealand and Thailand, for example, to ratify the Convention.

15. Regardless of the differences between the two approaches, and of the specificities of national systems, domestic processes for ratification offer important opportunities for awareness-raising and promoting understanding of the treaty under consideration.

16. In the first instance, States considering ratification should review national legislation and policies for compliance with the Convention. Several of the submissions for this study make reference to such a process being undertaken prior to ratification, the scope and depth of which

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[8] Ibid.

[9] Convention on the Rights of Persons with Disabilities (CRPD), art. 45, para. 2.

[10] VCLT, art. 2, para. 1 (g).

appear significantly diverse.[11] Of interest is the practice in certain States of conducting national interest analyses,[12] which highlight issues such as the reasons for becoming a party to a given treaty, the implications of becoming a party in terms of obligations and costs arising from the ratification of the Convention and the related implementation issues, with reference to both identification of legislation in place and analysis of such legislation in terms of compliance. The national interest analysis accompanies the proposal for ratification in its internal process. As the next chapter indicates, any pre-ratification review should be part of a process that continues in the implementation phase to review existing and proposed legislation.

17. Secondly, the experience of States parties that have engaged in adequate consultation prior to ratification appears to result in a positive impact on the implementation of the Convention. Adequate consultation should take place at the level of government departments and agencies, and State and territory level where applicable. Such consultation should enhance understanding of the Convention, contribute to ascertaining compliance of laws, policies and programmes with the Convention and identify areas for improvement. Non-governmental stakeholders and in particular civil society and organizations of persons with disabilities should also be integrated in such national consultations. Full and effective participation and inclusion in society of persons with disabilities is a general principle of the Convention,[13] which also specifically establishes the duty on States to closely consult and actively involve persons with disabilities in the development and implementation of policies that affect them.[14] Submissions for this study have highlighted the beneficial impact of officially translating and widely disseminating the Convention in national languages, to publicly launch the process of ratification, to make publicly available a plan that includes timelines and opportunities for consultation, and to invite civil society and organizations of persons with disabilities to make submissions presenting their views on the opportunities, implications and challenges of ratification. The need to support the participation of organizations of persons with disabilities in consultations, including with financial support, should also be carefully considered. The findings of the national interest analysis carried out by the government should eventually be made public.

### C. Reservations and interpretative declarations

18. Some States that have ratified the Convention on the Rights of Persons with Disabilities have sought to adjust the application of the treaty by means of interpretative declarations or reservations. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties defines a "reservation" as "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or

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[11] Such as for example in the submissions of Nepal, New Zealand, Niger, Romania and Slovakia.

[12] Also referred to as *informes* or *dossiers*.

[13] CRPD, art. 3.

[14] CRPD, art. 4 (3).

to modify the legal effect of certain provisions of the treaty in their application to that State". Article 46 of the Convention on the Rights of Persons with Disabilities allows parties to lodge reservations provided that such reservations are not "incompatible with the object and purpose of the present Convention".

19. So far, El Salvador, Malta, Mauritius and Poland have entered reservations to the Convention and several States have lodged "declarations" to the Convention. It should be noted that the taxonomy chosen by States as to the qualification of their statements as "reservations" or "declarations" exerts no legal effect, and the nature of the exception is solely determined by its content in accordance with article 2 of the Vienna Convention. At the time of writing, only the reservation lodged by El Salvador had attracted a formal objection from the Government of Austria for its "general and vague wording".[15]

20. States considering lodging reservations or declarations to the Convention should consider that the treaty-monitoring bodies have consistently expressed the view that reservations diminish the scope of protection afforded by treaties.[16] Accordingly, treaty bodies have consistently sought, through their respective mechanisms, to restrict the scope of existing reservations and encouraged their removal by States parties.[17] It is expected that the Committee on the Rights of Persons with Disabilities will also address reservations and declarations lodged by States parties to the Convention during the periodic review of State party reports established by article 35 of the Convention.

## II. LEGAL MEASURES FOR IMPLEMENTATION

21. By ratifying the Convention on the Rights of Persons with Disabilities, States take an obligation under international law to implement it. Implementation is the process whereby States parties take action to ensure the realization of all rights contained in a given treaty within their jurisdiction.

### A. The incorporation of the Convention in the legal system of States parties

22. It should not be assumed that once the Convention has entered into force for a State, it has automatically become part of its national law. There exist two main approaches to the status of treaties within the domestic legal system, on the basis of which States are referred to as "monist" and "dualist" countries. These two approaches are defined by the prevalence of respectively monist or dualist theories on the relationship between international and national law.[18]

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[15] See footnote 2 above.

[16] HRI/MC/2005/5, para. 7.

[17] Ibid., para. 45.

[18] See A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2006), pp. 146 and 150.

23. In some States parties to the Convention such as Argentina, Chile, Costa Rica, Croatia, Hungary, Mali, Niger, Qatar, Slovenia and Spain, for example, the provisions of the Convention have direct legal effect on the national legal framework and are in principle directly applicable including in courts of law. In such States, international agreements to which the State is a party become part of domestic law by effect of the ratification of the international agreement (monist approach). In so-called dualist legal systems, on the other hand, the international and national legal systems form part of two separate legal spheres. In such countries, international human rights treaties to which the State is a party have no force, as such, within the domestic legal system and domestic legislation must be adopted to incorporate the treaty into the domestic legal order. While some States parties have made amendments to existing legislation for compliance with the Convention, it appears that the steps taken so far fall short of giving direct effect to the full Convention in the domestic system.[19]

24. Human rights treaty bodies have often recommended incorporation of the treaty in the domestic legal order as a measure for realizing the full potential of the treaty. The Human Rights Committee, for example, while noting that the International Covenant on Civil and Political Rights does not explicitly require States parties to incorporate the Covenant, also expressed the view "that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order" and invited States parties to proceed to incorporation.[20] Similar views were expressed by the Committee on Economic, Social and Cultural Rights: "legally binding international human rights standards should operate directly and immediately within the domestic legal system" and "while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable".[21] The views expressed in these general comments are often reiterated during the discussion of the periodic reports of States parties and contained in concluding observations as recommendations.[22]

### B. The hierarchy of the Convention in the legal system of States parties

25. According to information provided, in States where the Convention is directly applicable, it has been assigned different levels within the domestic hierarchy of laws. Costa Rica, for example, recognizes the Convention in the supra-constitutional rank, with the effect that it takes precedence over the national constitution in the aspects in which it recognizes broader rights or protection. In Argentina, a bill was presented to Parliament for recognition of the Convention at

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[19] Full incorporation or transformation takes place by the adoption of an act to which the Convention is attached as a schedule.

[20] Human Rights Committee, general comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 13.

[21] Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 9 (1998) on the domestic application of the Covenant, para. 8.

[22] See for example CCPR/C/IRL/CO/3, para. 6, or E/C.12/ALB/CO/1, paras. 15, 41 and 44.

constitutional level, similar to other human rights treaties. Moreover, in several States such as Croatia, Mali, Mexico and Niger, international human rights treaties to which the State is a party are regarded as standing above national laws.

26. Human rights treaty bodies have often addressed the issue of the place of international human rights treaties in the domestic legal hierarchy, demanding clarity as to the level of the treaty. Appreciation has been consistently expressed for States that have recognized human rights treaties as holding constitutional status. The Human Rights Committee explicitly noted that prevalence of international human rights treaties even above constitutional norms "flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'". The Committee noted that this principle "operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty".[23]

27. Reservations lodged by States that do not recognize the predominance of the Convention in case of a conflict between the Convention and constitutional or national laws might present challenges from the perspective of compatibility with article 27 of the Vienna Convention.

### C. General legal obligations

28. Article 4 of the Convention on the Rights of Persons with Disabilities defines the scope of the general legal obligations undertaken by States parties. It requires States "to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability" and provides the overarching framework within which the rights specified in the Convention are to be promoted and protected. States are required to "refrain from engaging in any act or practice that is inconsistent" with the Convention and to "adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the … Convention". Treaty bodies monitoring other human rights treaties have indicated that appropriate measures for implementation of human rights obligations may include legislative, judicial, administrative, educational, financial and social measures.[24]

29. By requiring States to give effect to their obligations "by all appropriate measures",[25] the Convention on the Rights of Persons with Disabilities adopts a broad and flexible approach to implementation that allows for the legal particularities of each State to be taken into account, including in particular the status of the treaty in the domestic legal order, as well as other

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[23] Human Rights Committee, general comment No. 31, para. 4.

[24] Ibid. or CESCR, general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1 of the Covenant).

[25] CRPD, art. 4, para. 1 (a).

relevant considerations. Notwithstanding such flexibility, the means through which the Convention is given effect must be appropriate in the sense of producing results that are consistent with the full discharge of the obligations of the State party. In all cases, in accordance with article 4, paragraph 3, States are required to closely consult and actively involve persons with disabilities through their organizations in the development and implementation of legislation and policies to implement the Convention.

## D. Measures for implementation

30. It is a basic principle of international law that a State party to an international treaty must ensure that its own domestic law is consistent with what is required by the treaty.[26] It follows that, except in the rare cases in which the rights and principles of the Convention are already protected by domestic law, States parties are required upon ratification to make appropriate changes to domestic law to ensure its conformity with the Convention.[27] This duty applies also to States where the Convention is part of national law as "incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention"[28] and also to States where the Convention enjoys constitutional status and above. Accordingly, article 4, paragraph 1 (b), of the Convention obliges States parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities". In order to adequately implement the Convention, one of the first steps that States need to undertake is a comprehensive review of the national legislation and policy framework. Treaty bodies have often explicitly recommended that States parties undertake such a review[29] and that it be rigorous and "consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights".[30]

31. According to information provided for this study, numerous States parties and signatories to the Convention have embarked on an internal review of legislation for compliance, the scope and depth of which appear to vary significantly. While in only a few States parties such a

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[26] See for example United Nations Department of Economic and Social Affairs, OHCHR and the Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (Geneva, 2007), available at: http://www.ohchr.org/Documents/Publications/training14en.pdf.

[27] Human Rights Committee, general comment No. 31, para. 13.

[28] See Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 20.

[29] See for example CEDAW/C/NIC/CO/6, para. 8 and CCPR/C/79/Add.21, para. 18.

[30] Committee on the Rights of the Child, general comment No. 5, para. 18.

review has so far resulted in the adoption or amendment of legislation, it is essential to underline that given the scope of the Convention, this review needs to be comprehensive and extend to areas of the law that go beyond the traditional scope of disability-related legislation.[31] The good practice of some countries that have reviewed both criminal and civil laws including laws regulating accessibility, elections, immigration and citizenship, administration of justice, detention and prisons, insurance, education, employment, health, mental health and compulsory assessment and treatment, guardianship and legal personality, welfare and pensions regulations, for example, is noted.[32] The participation of civil society organizations and in particular of organizations of persons with disabilities in such a review is required by the Convention. In some cases, civil society organizations have specifically highlighted their concern at the lack of initiative of the State party in the area of legal reform.

### E. The content of legislative measures

32. The mandate entrusted to OHCHR by the Human Rights Council in resolution 7/9 focuses the scope of this study on legal measures such as those related to equality and non-discrimination for the purpose of enhancing "awareness and understanding of the Convention on the Rights of Persons with Disabilities".

33. In all cases, it should be noted that the Convention sets out the obligations on States parties in relation to civil, cultural, economic, political and social rights. While the Convention does not recognize any new human right of persons with disabilities, it clarifies the application of existing rights to the specific situation of persons with disabilities.

34. The following sections treat selected provisions of the Convention in order to highlight legal measures that might be required in these areas for compliance with the Convention. As it is not possible to cover all articles comprehensively, they should be taken as illustrative examples of the reforms required by the Convention. The choice of provisions to address in the context of this study has been made on the basis of the contributions provided by States, national human rights institutions, civil society and organizations of persons with disabilities in the course of the consultations for this study. Where recommendations for legal reform are made, they should be read in the light of article 4, paragraph 4, of the Convention, which makes it clear that the Convention does not undermine or replace higher standards of protection that might be provided for in national legislation.

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[31] By referring to the traditional scope of disability-related legislation, reference is made to legislation based on a medical understanding of disability and primarily focusing on areas of health, prevention of disability, rehabilitation and social welfare.

[32] See for example the Treaty National Interest Analysis conducted by Australia, available at: www.austlii.edu.au/au/other/dfat/nia/2008/18.html; or the one conducted by New Zealand, available at: http://www.odi.govt.nz/documents/convention/2008-06-24-national-interest-analysis.doc.

### 1. Definition of disability

35. The Convention addresses the situation of those persons who experience barriers to participation in all areas of life, which are associated with an impairment, and who as a result cannot enjoy their fundamental human rights. By conceiving disability as a social phenomenon, the Convention encompasses persons with a diverse range of impairments (physical, sensory, mental and intellectual) and considers various types of barriers (legal, physical, attitudinal, and others) that persons with such impairments might face in the enjoyment of their human rights. At a minimum, the Convention clarifies that persons with disability shall include "persons 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".[33]

36. It is essential to the full and effective implementation of the Convention that definitions of disability in national legislation reflect an understanding of disability as a social phenomenon. This requires the repeal of medically-based definitions construed along types of impairments, or of definitions based on the notion of daily life activities, in which the incapacity to carry out such activities is linked to the impairment. Furthermore, national disability legislation must unequivocally protect all persons with disabilities, including persons with mental and intellectual disabilities.

### 2. Equality and non-discrimination

37. Equality and non-discrimination are the primary principles permeating the whole Convention. References to equality and non-discrimination are multiple and can be found in various parts of the Convention, including in the preamble,[34] purpose,[35] general principles[36] and general obligations[37] of States. Article 5 recognizes the right of all persons to equality before and under the law and the right to equal protection and benefit of the law without any discrimination. Article 5, paragraph 2, establishes the obligation on States parties to prohibit all discrimination on the basis of disability. In accordance with article 2 of the Convention, 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 ... including denial of reasonable accommodation". Reasonable accommodation is defined in article 2 of the Convention with reference to

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[33] CRPD, art. 1.

[34] CRPD, preambular paras. (a), (b), (c), (e), (f), (h), (p), (r) and (x).

[35] CRPD, art. 1.

[36] CRPD, art. 3.

[37] CRPD, art. 4.

"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden" and is to be considered a measure promoting equality.[38] The Convention also clarifies that specific measures that might be required to promote equality shall not be considered discriminatory.

38. The broad-spectrum clauses of article 5 must be read in conjunction with the specific non-discrimination and equality measures that are attached to the broad range of rights contained in the Convention, such as for example in matters of marriage, family, parenthood and relationships (art. 23), education (art. 24), health (art. 25), employment (art. 27), standard of living and social protection (art. 28) and participation in public and political life (art. 29).

39. For the effective implementation of the right to equality and non-discrimination, it is above all necessary that a general guarantee of equality and prohibition of discrimination on the basis of disability be included in legislation, which shall apply to all public and private actors operating in a given country. Such guarantee shall extend to all forms of discrimination based on disability and shall not be limited to discriminatory conduct against persons with disabilities, with the result that persons without disabilities are also entitled to protection under article 5:[39] this could be the case of a parent caring for a child with a disability who is discriminated against in employment because of the status of the child. Secondly, legislation must afford a person reasonable accommodation, the obligatory nature of which must be clearly established. By way of example, the duty to reasonably accommodate consists of the duty of a public or private entity to make the modifications or changes that are required by a person with a disability in the context of education, transport, employment or access to justice, to ensure the equal access of the person to the service or to the activity. It is recommended that the duty to accommodate be expressed in an open format so not to result in exclusion from protection; and that the factors upon which to assess the reasonableness of the accommodation request be provided.[40] Thirdly, equality legislation should foresee the adoption of positive measures required to promote de facto equality of persons with disabilities. Such measures might be either temporary or permanent, and shall not be considered discriminatory.

40. The Convention does not express a preference for the exact type of legislation that will give effect to the right to equality and non-discrimination on the basis of disability. States are free to choose the approach most suited to their specific legal systems and characteristics and might enact a comprehensive disability equality and non-discrimination law that also regulates

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[38] See for reference background conference document prepared by the Department for Economic and Social Affairs, "The concept of reasonable accommodation in selected national disability legislation" (A/AC.265/2006/CRP.1), available at: www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm.

[39] Sometimes referred to as "discrimination by association", as in the jurisprudence of the European Court of Justice.

[40] Factors might include, for example, the size and resources of the entity involved and the cost of the required accommodation versus the expected impact.

sectors such as health, education and so on; or they might decide to include disability amongst the otherwise prohibited grounds in general legislation and then proceed to integrate equality and non-discrimination guarantees in sectoral legislation.

### 3. Accessibility

41. The Convention recognizes accessibility both as a general principle of the Convention as well as a stand-alone provision. Article 9 recognizes an accessible environment as instrumental to the realization of the rights of persons with disabilities to independent living and full participation in all areas of life and requires States parties to take appropriate measures to ensure access to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities open to the public.

42. For accessibility legislation to be effective, it is necessary first and foremost that minimum standards and guidelines for the accessibility of services and facilities open to the public be adopted. Such standards and guidelines should be comprehensive and address the various types of barriers that persons with different impairments might face. Provisions should be made with reference both to new and existing buildings and regulate a time frame and the nature of interventions required for progressive conformity, in consultation with organizations of persons with disabilities.

### 4. Recognition before the law, legal capacity and decision-making

43. Article 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous other rights should be highlighted.

44. Article 16, paragraph 1, of the International Covenant on Civil and Political Rights already requires the recognition of legal personality of persons with disabilities. The implementation of the obligations contained in article 12, paragraphs 2, 3, 4 and 5, of the Convention on the Rights of Persons with Disabilities, on the other hand, requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.

45. In the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform. Legislation currently in force in numerous countries allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment and the attribution to a guardian of the legal capacity to act on their behalf. 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. Besides abolishing norms that violate the duty of States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfil this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5. 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.

46. Norms of laws disqualifying a person from office or performing a function on the basis of their disability also need to be abolished. These include norms disqualifying persons with disabilities from running for political positions, or from participating in juries or as witnesses to legal acts.

47. In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.[41] Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted.

### 5. Right to liberty and security of the person

48. A particular challenge in the context of promoting and protecting the right to liberty and security of persons with disabilities is the legislation and practice related to health care and more specifically to institutionalization without the free and informed consent of the person concerned (also often referred to as involuntary or compulsory institutionalization). Prior to the entrance into force of the Convention, the existence of a mental disability represented a lawful ground for deprivation of liberty and detention under international human rights law.[42] The Convention radically departs from this approach by forbidding deprivation of liberty based on the existence of any disability, including mental or intellectual, as discriminatory. Article 14, paragraph 1 (b), of the Convention unambiguously states that "the existence of a disability shall in no case justify a deprivation of liberty". Proposals made during the drafting of the Convention to limit the prohibition of detention to cases "solely" determined by disability were rejected.[43] As a result, unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person's

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[41] Often referred to as "insanity defence".

[42] See for reference the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, A/RES/46/119, available at: http://www.un.org/documents/ga/res/46/a46r119.htm.

[43] In the course of the third session of 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, proposals were made to add the word "solely" to then draft article 10, paragraph 1 (b), so it would read "any deprivation of liberty shall be in conformity with the law and in no case shall be based solely on disability".

disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14.

49. Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness. This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.

### 6. Right to live independently and be included in the community

50. The provisions of article 19 of the Convention carry far-reaching implications for all forms of institutionalized care of persons with disabilities. The recognition of the right of persons with disabilities to independent living and community inclusion requires the shift of government policies away from institutions towards in-home, residential and other community support services. The key element of any intervention aimed at giving effect to the right to independent living and community inclusion is the explicit legal recognition of the right of persons with disabilities to determine where and with whom to live. This recognition should also openly reflect the unlawfulness of arrangements for residential care made against the wishes of a person with disabilities.

51. De-institutionalization is necessary but not sufficient to achieve the goal of independent living. In most cases, a national strategy that integrates interventions in the area of social services, health, housing and employment, at a very minimum, will be required. For the effective implementation of such strategies it is necessary that the independent living principle be rooted in a legislative framework which clearly establishes it as a legal right and in turn places duties on authorities and service providers, while also allowing for recourse in case of violation. Such legislative frameworks shall include the recognition of the right to access the support services required to enable independent living and inclusion in community life, and the guarantee that independent living support should be provided and arranged on the basis of the individual's own choices and aspirations, in line with the principles of the Convention.[44]

### 7. Right to education

52. Compliance with article 24 of the Convention requires first and foremost the recognition of the right of persons with disabilities to education in an inclusive education system and the removal of legal barriers to the inclusion of persons with disabilities in the regular education

[44] CRPD, art. 3 (a).

system of the country. Both direct and indirect legal barriers must be removed in the phase of admission as well as during education. The duty to provide reasonable accommodation of the individual's requirements must be clearly established in national legislation. Such obligations shall be clearly established for all education providers, public or private. Overall institutional responsibility for the education of children with disabilities shall remain within the Ministry of Education and laws placing the education of persons with disabilities under the competence of the social welfare sector shall be repealed. Together with the obligations related to the right of children with disabilities to free and compulsory primary education, such duties are immediately applicable.

53. Secondly, States should formally identify standards of education to ensure that persons with disabilities can enjoy available, accessible, acceptable and adaptable education on an equal basis with others.[45] While such standards are to be progressively realized, States are under the obligation to take immediate steps towards the realization of the right to education by persons with disabilities to the maximum of available resources. These standards shall cover at a minimum: availability of inclusive, quality and free primary education and secondary education on an equal basis with others in communities of residence; physical and communication access (Braille, alternative script, augmentative and alternative methods, sign language); means and format of communication and peer support; provision of individualized student support where necessary; provision of adaptable curricula that aim at the full development of human potential, the sense of dignity and self-worth of the human being and contribute to the development by persons with disabilities of their talents, personality and creativity, and enable participation.[46]

### 8. Right to work and employment

54. Article 27 of the Convention emphasizes the right of persons with disabilities to work on an equal basis with others, including their right to equal pay for equal work, as well as trade union rights. The Convention prohibits discrimination on the basis of disability and guarantees reasonable accommodation in all phases of work and employment, including recruitment, hiring and employment, advancement and conditions of work. It requires positive measures to ensure that the open labour market is inclusive to persons with disabilities and to promote opportunities for employment or self-employment. Article 27 restates the prohibition of slavery and servitude and the protection from forced or compulsory labour on an equal basis with others.

55. In the spirit of the Convention, any legislation on employment of persons with disabilities needs to protect against any form of discrimination, direct and indirect, in all sectors, forms and levels of employment. The prohibition of discrimination shall apply to all phases of employment, including conditions for access to employment, to self-employment or occupation, including selection criteria and recruitment conditions, vocational guidance, vocational training, practical work experience, employment and working conditions, including dismissal and pay, membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such

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[45] See also A/HRC/4/29, para. 28.

[46] CRPD, art. 24, para. 1 (a), (b) and (c).

organizations. National legislation shall impose the duty to provide reasonable accommodation, clarify the elements of such conduct and the factors upon which to assess the reasonableness of the accommodation, and unequivocally link a denial of reasonable accommodation to an act of discrimination. It should be noted that article 27, paragraph 1 (a), prohibits discrimination on the basis of disability on all matters concerning all forms of employment and is not limited to prohibiting discrimination against persons with disabilities.

56. The scope of the protection granted by the Convention should be carefully mirrored in national legislation. A general provision on the admissibility of affirmative action measures should be included in legislation, clarifying that such measures shall not be taken as discriminatory against other members of society. Special measures established by law might include the determination of quotas in the recruitment of persons with disabilities. Other measures might include the provision of financial subsidies to employers, including tax reductions, vocational guidance and placement services.

### F. Judicial measures

57. For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the context of the other major human rights treaties. Administrative remedies might in certain cases be adequate to vindicate rights. In other cases, judicial protection of rights appears indispensable in order to satisfy the requirement of the Convention, and should extend to economic, social and cultural rights, besides civil and political rights.[47]

58. Even in States parties where the Convention is not directly applicable, ratification of or accession to the Convention creates a strong interpretative preference in favour of the Convention, which requires the judiciary to apply domestic law in a manner that is consistent with it. States parties are required to promote appropriate training on the Convention for the judiciary in accordance with article 13.

## III. LEGAL MEASURES FOR NATIONAL MONITORING

59. Article 33 of the Convention on national implementation and monitoring requires States parties to establish mechanisms for the implementation and monitoring of the Convention at national level. The Convention on the Rights of Persons with Disabilities is the first human rights treaty that contains detailed provisions on the establishment and functioning of national monitoring and implementation frameworks. The incorporation of such provisions has been celebrated as a measure to consolidate the institutional preconditions necessary to ensure the realization of the rights of the Convention.[48]

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[47] CESCR, general comment No. 9, para. 10.

[48] See G. Quinn, “Resisting the ‘temptation of elegance’: can the Convention on the Rights of Persons with Disabilities socialise States to right behaviour?” in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, O.M. Arnardóttir and G. Quinn, eds. (Leiden, Martinus Nijhoff Publishers, forthcoming in 2009).

### A. Focal points and coordination mechanisms at government level

60. Other non-binding United Nations instruments such as the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities recommended the establishment of entities at government level to serve "as national focal points on disability matters".[49] Numerous States that contributed to this study, therefore, reported on the existence of focal points and/or entities assigned responsibilities related to the development, implementation and monitoring of policies and programmes on disability.[50]

61. With a view to ensuring compliance with the Convention, it is recommended that States parties to the Convention or those considering ratification undertake an assessment of existing institutions with a view to adopting the necessary amendments for compliance with article 33 where required. The submission of Nepal, for example, makes specific reference to the need to critically revise the existing institutional framework for effectiveness and compliance with the Convention.[51] The mandate of government focal points should specifically include overseeing the implementation of the Convention, as acknowledged in the submission of Cyprus.[52]

62. Furthermore, while the Convention does not make specific recommendations as to the form and function of such entities, several considerations should be noted: ideally, the focal point (or focal points) should be located at the highest level of government, for example at the level of a minister or a commissioner within a given ministry. The establishment of a focal point or points and its/their mandate should take place through legal measures. The mandate should clearly address the need for coherent and coordinated government activity in the area of disability, and the focal point/s shall be allocated adequate human and financial resources. These entities should be adequately resourced in order to positively contribute to the implementation of national strategies and plans adopted to give effect to the Convention.

63. The establishment of a coordination mechanism at government level in addition to focal points is encouraged under the Convention, although optional.[53] A coordination mechanism might take the shape of an inter-ministerial group, tasked with coordinating implementation of the Convention across respective departments/sectors or levels of government and could prove particularly beneficial in systems of devolved administration, such as federal States.

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[49] General Assembly resolution 48/96, annex, Rule 17.

[50] This is the case for example of Argentina, Bangladesh, Bahrain, Chile, Colombia, Costa Rica, Croatia, Cuba, Ecuador, Egypt, Guatemala, Jordan, Lebanon, Mexico, New Zealand, Panama, Qatar, Spain, Thailand and Turkey.

[51] See the contributions of States available at: http://www2.ohchr.org/english/issues/disability/HRCResolution79.htm.

[52] Ibid.

[53] CRPD, art. 33, para. 1.

## B. National monitoring framework

64. In addition to designating institutions at government level tasked with implementation, the Convention requires States to maintain, strengthen, designate or establish a framework to "promote, protect and monitor" the implementation of the Convention.[54] Effectively, therefore, the Convention envisages two parallel structures at national level: the first, at government level, tasked with implementation. The second, at State level, tasked with promoting, protecting and monitoring implementation is required to include one or more independent mechanisms and to take into account the "principles relating to the status and functioning of national institutions for the protection and promotion of human rights".[55]

65. The Convention leaves to States parties the choice of instituting specific disability mechanisms or assigning the monitoring function to existing entities. Whatever the preferred choice, it must be noted that any institutions assuming the monitoring role must take into account the principles relating to the status and functioning of national institutions for the protection and promotion of human rights.

66. The elements of an appropriate framework are likely to vary according to the national and administrative systems of States, as explicitly provided for in article 33. The performance of functions related to the promotion, protection and monitoring might, however, include: awareness-raising and public education campaigns; the conduct of public inquiries; the preparation of studies and reports reviewing legislation and policies for compliance; and the promotion of harmonization of national law and practice with international standards. Furthermore, functions might also include reporting to government, parliament or any other competent body, in an advisory function, on human rights and disability matters, upon request or its own volition; contributing to reports which States are required to submit to United Nations bodies and committees; encouraging ratification or accession to human rights instruments and ensuring their implementation; and the hearing of complaints and petitions.

67. The importance of promptly initiating a consultation with national human rights institutions in relation to the role they can play in monitoring and promoting the implementation of the Convention should be highlighted. Such discussion is essential, including in cases in which States opt for assigning the monitoring mandate to a broader framework, of which national human rights institutions shall be part. In this regard, it is important to highlight the very specific prescription of the Convention that civil society and "in particular persons with disabilities and their representative organizations be involved and participate fully in the monitoring process".[56] In Sweden, consultations are taking place between the Office of the Ombudsperson and civil society to explore organizational alternatives for the participation of civil society.

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[54] CRPD, art. 33, para. 2.

[55] Also referred to as the Paris Principles, adopted by the General Assembly in resolution 48/134.

[56] CRPD, art. 33, para. 3

## IV. CONCLUSIONS AND RECOMMENDATIONS

68. **States considering ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol should engage in a domestic effort to clarify the implications of becoming a party to the Convention. Review of domestic legislation and policies for the identification of gaps or areas for reform should be a key element of such a process, which should also include meaningful and adequate consultation with stakeholders, including civil society and organizations of person with disabilities.**

69. **States becoming parties to the Convention should carefully evaluate the opportunity to lodge reservations or interpretative declarations to the Convention. Human rights treaty bodies have consistently expressed the view that reservations might have the effect of diminishing the scope of protection afforded by treaties.**

70. **Incorporation of the Convention in the domestic legal order of States parties realizes the full potential of the treaty and results in enhanced protection. States parties where the Convention is not automatically incorporated into the national legal system should consider the adoption of specific measures for this purpose.**

71. **International human rights treaties prevail over national legislation. Provisions of constitutional law as well as other aspects of domestic law cannot be invoked to justify a failure to perform or give effect to the obligations assumed by States upon ratification of the Convention.**

72. **The domestic review for compliance with the Convention that States are required to conduct should extend to all areas covered by the treaty, including equality and non-discrimination measures required for the full and equal enjoyment of all human rights by women, men and children with disabilities.**

73. **With a view to guaranteeing effective equality of persons with disabilities in all areas of life, legislative measures are not sufficient and should be accompanied by judicial, administrative, educational, financial and social measures, amongst others.**

74. **States parties to the Convention should ensure that all rights enshrined in the Convention are justiciable before national courts and access to justice for persons with disabilities should be ensured, in accordance with article 13.**

75. **States parties are required to establish or designate national implementation and monitoring structures in accordance with article 33. The effective establishment and functioning of such structures plays a key role in the effective implementation of the Convention.**

76. **States parties to the Convention should continuously assess the impact of policies and legislation adopted to give effect to the Convention, in cooperation with persons with disabilities and their representative organizations and other relevant stakeholders.**

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