## Day of General Discussion on equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities

**Presentation by Facundo Chavez Penillas, Human Rights & Disability Advisor**

**Office of the High Commissioner for Human Rights**

**25 August 2017**

**Palais des Nations, Geneva, room XVII**

Committee Members,

Colleagues and Friends,

 It is a pleasure for me to represent OHCHR and the human rights and disability team at this Day of General Discussion on equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities. I thank you for the invitation.

 I would first like to thank my colleague Victoria Lee for her inputs to this presentation.

 OHCHR prepared its first study on equality and non-discrimination under article 5 of the CRPD, A/HRC/34/26, which was submitted to inform the annual debate on the rights of persons with disabilities during the 34th session of the Human Rights Council.[[1]](#footnote-2) I encourage the Committee to consider this report during the development of the General Comment on article 5.

 Our report discusses the principles of equality and non-discrimination approaching them from general obligations to individual accommodations, including the broader approach to equality. Beyond the traditional understanding of non-discrimination, the report recognises that the realization of development and the enjoyment of economic, social and cultural rights are a fundamental aspect of the equal enjoyment of human rights by persons with disabilities.

In this sense, and following previously adopted positions of this Committee, OHCHR considers that the Convention adopts the principle of substantive equality, which includes equality of opportunities and equality of outcomes, and calls for systemic reform to achieve it. The approach is transformational. OHCHR considers that there is an undeveloped area of the CRPD connected to article 8 and the potentiality of its transformational effect which could be reflected in the General Comment concerning combating stereotypes.

In addition, OHCHR briefly explored the issue of intersectionality. The Committee has reflected on this issue in its General Comment No. 3 and this new General Comment offers a good opportunity to expand on this concept, particularly to provide guidance on how to address intersecting discrimination impacting narrowly targeted populations.

OHCHR would like to put to the consideration of the Committee some suggestions following the findings of our report, hoping that our contribution can be of use in the development of the General Comment. I will present some of the challenges identified that require more explicit and concrete guidance, based on both the level of development at national level, as well as the most commonly formed requests for technical cooperation coming from countries.

 I would like to highlight the importance of ensuring measures to reduce inequalities within countries and between persons with disabilities and the broader population, as well as among persons with disabilities with different impairments. I encourage the Committee to include specific links between equality and non-discrimination and the rights to work and employment, inclusive education and the right to live independently and to be included in the community, identifying immediate obligations such as: the provision of reasonable accommodation, a no-rejection clause from general education, and the respect for the right to choose where and with whom to live, under these rights.

 States and courts experience challenges when evaluating the nature of the obligations considered under “specific measures” due to the multiple and varied array of measures entailed therein. I suggest that the Committee evaluates the differentiation between “affirmative actions” and “specific measures” to better guide States in the implementation of such antidiscrimination provisions.

 Yet the most challenging provision in the Convention for States parties under equality and non-discrimination, is reasonable accommodation. States tend to evaluate “reasonableness” in a very open and even, in cases, arbitrary manner; confusing objective and subjective evaluations. Considering the lack of understanding of States and other stakeholders, we identified challenges with regard to: (i) the process to provide reasonable accommodation; (ii) the process to deny reasonable accommodation without incurring discrimination, and (iii) the nature of this obligation compared to others. The General Comment provides the appropriate platform to develop these extremely demanded elements.

The Committee has provided substantive guidance on the process to deny reasonable accommodation without incurring discrimination, nevertheless, this objective proportionality test needs to be better clarified in the General Comment. In the individual communication *Jungelin v. Sweden*, the Committee started to define the criteria of the objective proportionality test in order to evaluate if a requested accommodation is “undue or disproportionate.” I encourage the Committee to give expanded guidance in this sense, establishing the criteria as presented in the mentioned decision and developing on why it must be clear, objectively measurable and neither vague nor ambiguous in order to avoid arbitrariness and prevent discrimination.

Particularly, I would like to draw the attention of the Committee to the dissenting opinion in *Jungelin*. The dissenting opinion considered that, in addition to the criteria identified by the State which the Committee considered to be objective and sufficient to evaluate the proportionality of the accommodation requested, another criterion should also be considered; that is the enhanced obligation of the provision of reasonable accommodation when it contributes to other general duties under the treaty that may be of progressive realization. In this case, the accommodations for the individual contributed to rendering the workplace more accessible which could benefit future employees and thus promote the employment of persons with disabilities. It could also apply, for example, with measures for an individual student which simultaneously contributes to transforming education systems into inclusive education systems.

In implementing reasonable accommodation, States are not only fulfilling their non-discrimination mandate, but they are also learning from their experiences. Systematising these experiences under a good knowledge management structure provides for a resource that facilitates the realization of other rights improving efficiency. OHCHR agrees with the dissenting opinion in *Jungelin* as it provides clear guidance on how to bridge the gap between immediate and progressive obligations under the treaty.

We are aware that States tend to challenge their obligations under the treaty by adopting arguments under the umbrella of immediate and progressive obligations. It would be important to lay emphasis on upholding international law with regards to these obligations, including article 4(2) of the CRPD.

OHCHR’s report develops extensively on the issue of reasonable accommodation, the objective proportionality test, and factors of that test which have been considered by a number of countries which act to deter its full implementation and effectiveness. The report also develops on the common confusion between reasonable accommodation and other measures such as accessibility, specific measures, support, and procedural accommodation, among others. I encourage the Committee to consider the discussions and differentiations made in the report to better guide States on the nature and practical effects of such measures.

With respect to redress for violations, effective remedies need to be tailor-made. When considering discrimination cases, international and national courts have tended to undervalue the impact on persons with disabilities of such discrimination. The cumulative experience of discrimination lived by persons with disabilities is not usually appropriately redressed and the remedies applied often overlook the specificity of the situation, needs and most importantly the impact of violations experienced by the person concerned, particularly when concerning multiple and intersecting forms of discrimination. I suggest the Committee to include a connection with the right to access to justice in this aspect.

Also in connection with the right to access to justice, the Committee has considered the issue of procedural accommodation with three different approaches: in most concluding observations procedural accommodation has been linked to accessibility, in some it has been equated to reasonable accommodation, and in a few it has been linked to non-discrimination. OHCHR considers that procedural accommodation differs from the general obligation to make the judicial system accessible, and that it differs from reasonable accommodation because member States discussed and discarded such terminology during the negotiation of the treaty. OHCHR considers that procedural accommodation is not subject to a proportionality test. I invite the Committee to explore further this aspect and to strengthen the linkages with non-discrimination in their country reviews.

 As one of the latest adopted human rights treaties, the Convention benefitted from lessons learned from preceding treaties and is equipped with provisions which serve to strengthen and facilitate its effective implementation. It also introduced many innovations which pose new interpretations and questions under international human rights law. The General Comment offers the opportunity to clarify these innovations for strengthened implementation as well as to contribute to enriching the wider human rights discourse, not only for persons with disabilities, but for the benefit of all individuals .

 I wish you a fruitful day of general discussion, and I remain at your disposal for any clarification.

 Thank you.

1. http://ap.ohchr.org/documents/dpage\_e.aspx?si=A/HRC/34/26 [↑](#footnote-ref-2)