

**IMPLEMENTING THE UN CONVENTION ON DISABILITY IN THE  
EUROPEAN UNION AND MEMBER STATES: A REVIEW OF SUBSTANTIVE  
OBLIGATIONS AND EXAMPLES OF GOOD PRACTICES**

*Francisco J Bariffi<sup>1</sup>*

## **1. Introduction**

Among vulnerable groups, persons with disabilities are probably the largest minority worldwide and yet, until recently, their rights have not been addressed from a human rights perspective. The adoption (13<sup>th</sup> December 2006) and entry into force (3<sup>rd</sup> May 2008) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) has clearly signal a paradigm shift on the way to understand and to address disability towards the so-called “social model” of disability. In both policy and legal terms, this change of paradigm is summarised by considering disability as a matter of human rights.

The key element of the CRPD’s paradigm shift relies on the social model of disability which has inspired all the negotiation process. Understanding disability focusing in the social construction instead of the individual situations has enormous consequences in both the implementation of legal responses and in the design of public policies. The CRPD recognizes in the preamble that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. Additionally article 1 asserts that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

The EU also sees disability as a social construct. The EU social model of disability stresses the environmental barriers in society which prevent the full participation of people with disabilities in society (Action Plan 2003). Therefore EU’s action in promoting and protecting the rights of persons with disabilities shall acknowledge:

- That disability results from the interaction between persons with impairments and attitudinal and environmental barriers;

---

<sup>1</sup> [bariffi@mdp.edu.ar](mailto:bariffi@mdp.edu.ar). Deputy Director of the Human Rights Center, National University of Mar del Plata, Argentina. Academic coordinator of the Iber-American Network of Experts on the UN Convention on Disability. Member of the Institute on Human Rights “Bartolomé de las Casas” University Carlos III of Madrid, Spain. Former legal advisor of the Spanish delegation during the Ad-Hoc Committee on the UN Convention on Disability.

- That persons with disabilities shall not be considered as object” of charity, medical treatment and social protection, but "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society;
- The importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development;
- That discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person;
- The need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support;
- That, despite the various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

The CRPD entered into force on May 3, 2008. Currently (16/05/11) 100 States have ratified the Convention among which 17 are EU Member States, together with the additional ratification on behalf of the EU as an independent international entity. While the EU has negotiated and signed several international treaties, this is the first time that the Union is part of an international multilateral treaty on human rights.

## **2. An approach into the substantive provisions of the CRPD: new rights for persons with disabilities?**

The right to equality plays a key role in the application of human rights standards to persons with disabilities. Indeed, the Universal Charter of Human Rights and most thematic treaties cover persons with disabilities, yet despite these various instruments, “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”. Therefore legal response to disability is not about creating or recognizing new specific rights whether about ensuring the “full and equal enjoyment of all human rights and fundamental freedoms”.

According to article 1 the purpose of the CRPD is to recognize the equal entitlement of persons with disabilities to all human rights and fundamental freedoms, while identifying measures and specific guarantees to ensure that persons with disabilities enjoy and exercise all human rights on an equal basis with others. Therefore The CRPD does not aim to establish new rights, but aims to apply the principle of non-discrimination to every human right. For this reason, the drafters and those involved in the negotiations of the Convention had to include in each right the principle of equality and non discrimination and identified in respect to each single right the additional measures required to make the right a reality for persons with disabilities. While the CRPD clearly falls within a non-discrimination model approach there are some provisions throughout the text which may resemble to the recognition of specific

disability-oriented human rights such as the right to accessibility (art.9), the right to independent living (art.19), or the right to habilitation and rehabilitation (art. 26).

The CRPD does not only embody the right to equality and non-discrimination but also defines discrimination on the basis of disability as “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. It includes all forms of discrimination, including denial of reasonable accommodation”. It is clear that measures to improve the rights enjoyment of persons with disabilities must be addressed from the use of anti-discrimination mechanisms.

Therefore, as a constituent part of the Convention, the general principle of equality and non-discrimination is present throughout the text. It is included in the preamble (interpretative value), as the purpose (art. 1 CRPD) and as a general principle (art. 3 CRPD) of the Convention. The full realization of all human rights of persons with disabilities without discrimination on the basis of disability (art. 4.1 CRPD) is also recognized amongst the general obligations of States as well as the adoption of all appropriate measures to eliminate discrimination against persons with disabilities (art. 4 (1) (b)) and on the basis of disability by any person, organization or private enterprise (art. 4 /1) (e)). Equally important, equality and non-discrimination is recognized in the Convention as a right to be recognized as a person before and under the law and to equal protection by the law (art. 5.1 CRPD), as a State obligation to prohibit all discrimination on the basis of disability, to ensure equal and effective legal protection against discrimination on all grounds and to take all appropriate steps to ensure that reasonable accommodation is provided. The Convention also clarifies that specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination

Acknowledging that “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person” the CRPD displays a series of international obligations towards States Parties such as:

- States shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

- States shall recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law;

- States shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds;

- In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided;

- Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention;

- States shall combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.

Likewise the CRPD calls for the application of specific rights-based measures from the perspective of non-discrimination. Consequently States Parties shall adopt measures and ensure that;

- Persons with disabilities enjoy the inherent right to life on an equal basis with others;

- Necessary measures are to be taken to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters;

- Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

- Effective access to justice is granted to persons with disabilities on an equal basis with others;

- Persons with disabilities, on an equal basis with others, i) enjoy the right to liberty and security of person; and ii) are not deprived of their liberty unlawfully or arbitrarily;

- No persons with disability are to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

- Persons with disabilities, both within and outside the home, are protected from all forms of exploitation, violence and abuse;

- Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others;

- Persons with disabilities enjoy the rights to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others;

- All persons with disabilities enjoy the equal right of to live in the community, with choices equal to others;

- Personal mobility with the greatest possible independence for persons with disabilities;

- That persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others,

- No person with disabilities, regardless of place of residence or living arrangements, is subjected to arbitrary or unlawful interference with his or her privacy;

- Measures are taken to prevent discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others;

- The recognition of the right of persons with disabilities to education, without discrimination and on the basis of equal opportunity, ensuring an inclusive education system at all levels and lifelong learning;

- Persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability;

- Effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life;

- The recognition of the right of persons with disabilities to work, on an equal basis with others; including the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities,

- The recognition of the right of persons with disabilities to an adequate standard of living for themselves and their families, without discrimination on the basis of disability;

- That persons with disabilities can exercise of their political rights and the opportunity to enjoy them on an equal basis with others;

- The recognition of the right of persons with disabilities to take part on an equal basis with others in cultural life.

### **3. An overview of the substantive obligations**

#### *The right to life:*

Article 10 of the CRPD reaffirms that “every human being has the inherent right to life” and that States Parties “shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others”. At first sight this provision does not seem to add anything new to the existing law within the general international human rights framework. However when we observe this provision from the prismatic of the disability-based non-discrimination clause, its impact and application becomes visible and fundamental. E.g. does domestic law authorizes any kind of euthanasia? Does domestic law authorizes the interruption of pregnancy? In these cases do those law make any distinction or reference to disability in any form or definition (malformation, deficiencies, anomalies...)? Likewise does domestic law or practices make any distinction or reference to disability in procedures for life-sustaining situations or in organ donation?

*Situations of risk and humanitarian emergencies:*

Article 11 of the CRPD calls upon States Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. This provision has potential impact at both the national and the international State's jurisdiction. At national level the CRPD requires States to ensure the protection and safety of persons with disabilities in matters such as, protocols for action of security forces, firefighters, national guards, as well as in handling state of national emergency, natural disasters etc. At international level the CRPD requires States Parties to ensure the protection and safety of persons with disabilities through their military forces when acting in armed conflicts, humanitarian emergencies or military occupation.

*Legal capacity and equal recognition before the law:*

Article 12 on equal recognition before the law is perhaps the most innovative and, at the same time, the most controversial provision of the CRPD, introducing a significant change in the legal framework regulating the legal capacity of persons with disabilities, shifting from a traditional system based on a "substituted-decision making model", to a "supported-decision making model".

Two fundamental obligations can be clearly identified towards State Parties. On the one hand the CRPD requires States Parties to ensure the recognition and enjoyment of both equality before the law (legal personality) and legal capacity (including capacity to act) of all persons with disabilities on an equal basis with others in all aspects of life. On the other hand the CRPD requires States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. However, article 12, as read independently from the rest of the CRPD, has a relative normative force. In other words, article 12 really becomes imperative and progressive when is connected with other provisions of the CRPD such as Article 5 (non discrimination), Article 14 (liberty and security), Article 15 (protection against torture), Article 16 (freedom from exploitation, violence and abuse), Article 17 (integrity of the person) and Article 19 (living independently and inclusion in the community), but foremost, when is connected to both, the definition of disability (article 1) and the definition of disability based discrimination (article 2).

From this perspective, the impact of article 12 at national level seems colossal. States Parties will need to review existing laws and practices in order to ensure the equality and non-discrimination of persons with disabilities, especially those with intellectual and psychosocial disabilities, in matters such as: incapacitation and guardianship process, adult protection laws, mental health laws, tort law, family law, advance directives, enduring powers of attorney, etc. The fundamental question for analysis is this respect would be: who gets to decide? The traditional substitutive-decision-making protection model is challenged. Instead the CRPD proposes a model of protection through supports.

*Access to justice:*

Article 13 of the CRPD demand State Parties to ensure “effective” access to justice for persons with disabilities on an equal basis with others. The notion of “access to justice” included in the CRPD is broad and comprehensive and can be analyzed, at least, in three different dimensions i.e. legal, physical, and communicational. At the legal dimension, States Parties should ensure that all persons with disabilities have standing to effectively access to legal proceedings on their own behalf both as direct or indirect participants. At the physical dimension, States Parties should ensure that court buildings and any judicial public office are accessible for persons with disabilities. Lastly at the communicational dimension, States Parties should ensure that all relevant information provided to the person with disability whether is written or oral is available in alternative communicational format such as sign language, Braille, or in a format easy to read and understand. Therefore States Parties should review existing laws and practices in matters such as: civil and criminal procedural codes, accessibility to public buildings and to the public administration, reasonable accommodations, alternative communicational formats, legal representation, jury participation etc.

*Liberty and security of the person:*

Article 14 focusing on the right to liberty and security of persons with disabilities can be addressed from a double perspective. The first paragraph tries to ensure that persons with disabilities, on an equal basis with others are “not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty”. This provision is clearly targeting those situations of involuntary institutionalization i.e. forced admission to psychiatric hospitals, care residences, etc. In connection with article 12 this provision requires States Parties to review and rethink the rationale for forced institutionalization. Disability can no longer be the reason for institutionalizing and individual, as it is the case in nearly all existing domestic laws. The second paragraph of article 14 tries to ensure that persons with disabilities which are deprived of their liberty lawfully can receive an equal treatment with other. This implies that persons with disabilities should be reasonably accommodated to their special needs. Prisons or any other detention facility should be accessible for persons with disabilities. Therefore States Parties must review existing laws and practices in matters such as: admission to hospitals and other care or medical treatment institutions, regulations and protocols in prisons, jails, detention centers, police stations, immigration centers, etc.

*Freedom from torture or cruel, inhuman or degrading treatment or punishment:*

Freedom from torture or cruel, inhuman or degrading treatment or punishment is clearly a *jus cogens* norm of international law already embodied in all civil and political human rights treaties and especially in the UN Convention against torture of 1984. Thus, why the need of such a provision in the CRPD? The disability-specificity of this provision points towards conditions of institutionalization in general, and more specifically, to medical or scientific experimentation without informed consent, which

pursuant article 12 can only be the person's consent. The former UN Special Rapporteur on Torture in report A/63/175, has brought to light the preoccupant condition of persons with psychosocial disabilities living in institutions which, most too often, amount to torture or inhuman or degrading treatment. Hence, State Parties shall take special measures to protect and prevent these situations and to ensure real access to persons with disabilities to legal remedies and State control. Likewise States Parties shall ensure that no person with disability is subjected to a medical or scientific experimentation without his/her personal consent. Therefore States Parties must review existing laws and practices in matters such as: regulations on medical or scientific experimentation, regulations on conditions of institutionalization, patient rights laws, informed consent laws, etc.

*Freedom from exploitation, violence and abuse*

While article 16 (violence) is closely linked to article 15 (torture), the specificity of this provision aims to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse. Most persons with disabilities due to the lack of supports or personal assistance are necessarily confined to live under the care from either their families or in a public institutions. Therefore in most of the daily basic activities they interact with and depend on third persons without any regulation or control. The CRPD requires States Parties to take all appropriate measures to prevent all forms of exploitation, violence and abuse in at least four areas: 1) providing assistance and support for persons with disabilities and their families and caregivers including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse; 2) ensuring that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities; 3) promoting the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse; and 4) ensuring that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted. Therefore States Parties must review existing laws and practices in matters such as: frameworks for protection of women, children, elder people, sexual exploitation, or any other group, medical and assistive care frameworks etc.

*Protecting the integrity of the person:*

Article 17 on the protection of the integrity shall be read in connection with article 15, 16 and 12. Altogether these provisions reaffirm the inalienable right of any person with disability to the respect of his or her physical and mental integrity on an equal basis with others. Accordingly States Parties shall ensure that no person with disability is subjected with informed and personal consent to any practice, treatment or intervention which may affect both his/her physical and mental integrity. Therefore States Parties must review existing laws and practices in matters such as: patient rights, medical and scientific experimentation, sterilization, psychiatric treatment etc.

*Liberty of movement and nationality:*



Two basic aspects are involved in article 18. The first one is the recognition of the right of all persons with disabilities to be registered at birth and all the rights directly derived from it such as to right to a nationality, the right to an identity, the right to a residence and the right to a filiation. The second one is the recognition of the right of all persons with disabilities to liberty of movement, including the freedom to choose their residence, to enter and leave any country including their own on an equal basis with others. Therefore States Parties must review existing laws and practices in matters such as: nationality and immigration laws and regulations, asylum and refugee laws and regulations, regulations for visas and working permits, etc.

*Living independently and being included in the community:*

Article 19 recognizes the equal right of all persons with disabilities to live in the community, with choices equal to others. Most scholars believe this is a specific right for persons with disabilities and imposes upon the State Parties a double obligation. On the one hand it requires States Parties to remove all barriers and refrain to support any measure directed to create or maintain residential institutions for the protection and care of persons with disabilities. On the other hand States Parties shall take appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community including access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community. Therefore States Parties must review existing laws and practices in matters such as: psychiatric hospitals, residential homes or centers, frameworks for the promotion of autonomy, personal assistance, etc.

*Personal mobility:*

While article 18 deals in general with the right to liberty of movement, article 20 focuses on the more personal and specific situation of each person with disability. This provision tries to acknowledge the need to ensure accessibility and reasonable accommodations for persons with disability in relation to the daily and ordinary dynamic of each person (e.g. get out of bed, take a shower, get dressed, take children to school, go to work, go to a restaurant, visit friends etc). Thus the CRPD requires State Parties to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, as well as it provides some guidelines on how this obligation should be achieved. Firstly, ensuring that personal mobility is provided to persons with disabilities “in the manner and at the time of their choice, and at affordable cost”; secondly facilitating access “to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries”; thirdly providing training in mobility skills to both persons with disabilities and staff working with them, and lastly, to encourage entities producing mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities. Therefore States Parties must review existing laws and practices in matters such as: public transportation, guide dogs, adapted cars, wheel chairs and other mobility devices, personal assistance, etc.

### *Freedom of expression and opinion, and access to information*

Article 21 requires States Parties to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. This provision is a clear example why in order to fulfill civil and political rights it is also necessary an active role of the State and not only a passive non-interventionist approach. The Convention not only focuses on the right to freedom of expression but also on the right of persons with disabilities to access information on equal basis with other.

But far from a vague and rhetoric provision, article 21 provides clear indications on how to ensure access to information. Firstly it makes clear that communication “includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”. Secondly, it requires States Parties to ensure that information intended for the general public is available to persons with disabilities in accessible formats and technologies. This obligation also applies to private entities that provide services to the general public. Thirdly, article 21 targets mass media, requiring States Parties to encourage them to make their services accessible to persons with disabilities. Lastly, article 21 calls for the recognition, acceptance and promotion on the use by persons with disabilities of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions

Therefore States Parties must review existing laws and practices in matters such as: audiovisual communication media, Sign Language, Braille, alternative communications, close captioning and subtitling, regulations on access to the public administration, regulations on access to basic information such as instructions for medicines, medical treatment, informed consent, real estate transactions, etc

### *Respect for privacy:*

Article 22 reaffirms that “no person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation”. This provision focuses basically in two aspects. On the one hand, article 22 tries to ensure protection of each person’s private live irrespective of the living arrangement. On the other hand, this provision tries to safeguard each person’s private information, especially that information related to the persons disability. Like religion, or political affinity, all disability related information shall be considered as personal data and therefore as protected information. Therefore States Parties must review existing laws

and practices in matters such as: legislation on personal data, regulations on medical records, regulation of disability certificates, etc.

*Respect for home and the family:*

Article 23 asserts that “States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others”. Reality shows that family rights are systematically breached in most countries. Persons with disabilities are generally not considered as persons eligible to become parents or even in many cases, as children with the right to a home and a family.

Accordingly, article 23 addresses both the active and the passive dimensions of family rights i.e. to become a parent and to live in a home and a family. As for the former, article 23 makes clear that all persons with disability shall keep and enjoy their fertility and reproductive rights, including the right to marriage, the right to keep their fertility and the right to decide freely and responsibly on the number and spacing of their children. AS for the latter, the CRPD affirms that “States Parties shall ensure that children with disabilities have equal rights with respect to family life” and the “In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents”.

Therefore States Parties must review existing laws and practices in matters such as: family law, reproductive rights, sterilization procedures, adoption, guardianships, parental authority or custody, etc.

*Education:*

Education is certainly the gate towards inclusion. Without real access to quality and inclusive education none of the other rights can be fully fulfilled. Article 24 reaffirms the right of persons with disabilities to education but it also states that “with a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning”. The CRPD without a doubt reaffirms the paradigm of “inclusive education”. Most Sates have already, even before the CRPD, engaged in some kind of inclusive education process. In addition Children’s right to inclusive education is widely recognized in international human rights law. So the question here would be: what does the CRPD add to this consolidated right? Like in most of the substantive rights the CRPD provides details on how to achieve this goal. In very simplistic approach it could be asserted that the CRPD tries to ensure that right to inclusive education does not only amount to access but to inclusion to education. Inclusiveness is not achieved simply by letting persons with disability to access to regular education. It clearly requires a much more supported approach where States provide effective measures and resources to ensure equality of opportunities. Accordingly article 24 requires States Parties to ensure that “persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live”, that “reasonable accommodation of the individual's requirements is

provided”; that “persons with disabilities receive the support required, within the general education system, to facilitate their effective education”, and that “effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion”.

But the CRPD goes even further when it requires also States to “enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community”. Consistent with the notion of inclusiveness the CRPD acknowledges that diversity shall be brought into the equation and therefore persons with disability shall also have the right to be educated in “social development skills” such as, “learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring”, “learning of sign language and the promotion of the linguistic identity of the deaf community”, and “that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development”.

Finally and in order to ensure educational inclusiveness the CRPD also command States Parties to “take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education”.

Therefore States Parties must review existing laws and practices in matters such as: primary, secondary and higher education laws and regulations, Braille and sign language laws and regulations, audiovisual accessibility, etc.

#### *Health:*

When dealing with health issues it is important to take into account the underlying ideology in which the CRPD was negotiated. The inspiring social model of disability emerged as a natural rejection to the medical model which considered disability as an individual condition of medical deficiency. Therefore it is easy to understand why this was a very sensitive issue. Health is an important aspect of any individual’s life but it could never be the basis, or the condition for social inclusion and for the enjoyment of all human rights. Thus article 25 tries to ensure that “the persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability”.

Therefore for the realization of this right the CRPD focuses in two general aspects of non-discrimination. On the one hand article 25 tries to ensure that persons with disabilities have access to “the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes”, and also, access to “those health services needed by persons with disabilities specifically because of their disabilities”. On the other hand, article 25

together with article 9 requires State Parties to ensure that accessibility and reasonable accommodations are provided in the access and enjoyment of health services.

Therefore States Parties must review existing laws and practices in matters such as: health and mental health laws and regulations, medical insurances, social security schemes, patients rights laws, etc.

*Habilitation and rehabilitation:*

As a way to ensure that the right to health was not interpreted from the medical model the negotiators of the Convention decided to address rehabilitation in a separate provision. Article 26 declares that “States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life”. It is easy to see that article 26 is much more linked to article 9 and article 19 than with article 25. Rehabilitation is not a health issue but a measure for equalization of opportunities. Accordingly article 26 requires States Parties to “organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services”.

Two very important ideas need to be considered when addressing the right enshrined in article 26. Firstly that habilitation and rehabilitation can refer to the area of health but it also must address the other essential areas of any individual’s life such as employment, education and social services. Secondly and foremost, that habilitation and rehabilitation must be an option and not an imposition to achieve inclusion.

Therefore States Parties must review existing laws and practices in matters such as: rehabilitation programs, personal assistance, social services, autonomy promotion schemes, labour rehabilitation programs, etc.

*Work and employment:*

Another of key issues of the CRPD work and employment was intensively discussed throughout the negotiation process. Article 27 not only recognizes “the right of persons with disabilities to work, on an equal basis with others”, but it also makes clear that this right “includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”. Article 27 tries to cover both stages of employment i.e. the conditions for recruitment (hiring) and the conditions for permanence and promotion. Thus the CRPD demand States Parties to “prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions”.

In addition States Parties must take measures to “protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and

healthy working conditions, including protection from harassment, and the redress of grievances”. Likewise States Parties must ensure that: persons with disabilities can “exercise their labour and trade union rights”, and that they “are not held in slavery or in servitude”.

Article 27 reaffirms the duty of States Parties to employ persons with disabilities in the public sector, to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures” and to “ensure that reasonable accommodation is provided to persons with disabilities in the workplace”.

Therefore States Parties must review existing laws and practices in matters such as: work and employment laws, reasonable accommodations for employment, non-discrimination legislation, trade unions laws, etc.

*Adequate standard of living and social protection:*

When reading article 28 interpreters might easily falls in the temptation to consider it within the category of social and economic rights, and therefore, subject it to the criterion of progressiveness and resources availability. Having said this article 28 tries to ensure that persons with disabilities have the right “to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, and to this end, States Parties “shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability”. Clearly article 28 does not pretend to settle an especial level of social and economic realization for persons with disabilities but to ensure that the existing policies and measures do not discriminate on the basis of disability. As a result article 28 has an immediate effect in States Parties.

Despite of its comprehensive reach article 28 makes express references to basic areas of social and economic promotion such as, access to water and food, social protection and poverty reduction, housing programs, and retirement benefits.

Therefore States Parties must review existing laws and practices in matters such as: poverty reduction programs, access to water, food and shelter programs, housing programs, pensions and retirement benefits, etc.

*Participation in political and public life:*

Article 29 asserts that “States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”. This is another aspect of life in which persons with disabilities have been systematically excluded. Therefore the CRPD in this point tries to ensure persons with disabilities the recognition and enjoyment of this right in both dimensions, as active participants i.e. to become a political or advocate representative, as well as passive participants, i.e. to fully participate in electoral procedures. As for the former, article 29 provides detailed guidelines on how to ensure that persons with disabilities can exercise their right to vote, including accessibility, access to information, and reasonable accommodations or assistance. As for the later, article 29 requires States Parties to take measure to ensure that persons with disabilities can participate in “non-governmental organizations and

associations concerned with the public and political life of the country, and in the activities and administration of political parties”, and that they can form and join “organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels”.

Therefore States Parties must review existing laws and practices in matters such as: electoral laws and regulation, Political Parties regulations, NGOs regulations, regulations for eligibility for public office positions, etc.

#### *Participation in cultural life, recreation, leisure and sport*

Article 30 tries to shade a light to an invisible aspect of the life of persons with disabilities. Accordingly States Parties shall recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, both by accessing to cultural material, television programmes, films, cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, in accessible formats, and also by enabling persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

Likewise article 30 also contains provisions to enable persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities. To this end States Parties shall take appropriate measures to “encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels” as well as to “ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities.

Finally article 30 makes a very important statement when it requires States Parties to “take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials”.

Therefore States Parties must review existing laws and practices in matters such as: intellectual property law, linguistic recognition, laws and regulation on accessibility to cultural environments such as cinemas, theatres, libraries, mass media laws and regulations, etc.

#### **4. The implementation of the CRPD at EU level**

The commitment of the EU with disability issues dates back far before the adoption of the CRPD. In the last decade, the EU has enacted several documents and instruments which reflect the EU’s commitment towards the human rights of persons with disabilities. Article 13 of the consolidated EC Treaty authorizes EU’s bodies to take action to combat discrimination, including *inter alia*, disability as one of the grounds on which discrimination must be prohibited. Another important binding legal

body is the Framework Employment Directive (2000/78/EC) which requires Member States to take steps to prohibit discrimination on a number of grounds including disability in the context of employment. Likewise the proposals for EU reform now contained in the Treaty of Lisbon will expand considerably the EU's binding obligations on human rights both by the making the provisions of the Charter of Fundamental Rights of the European Union binding to both EU's institutions and Member States, and also by the accession of the EU to the European Convention on Human Rights. Both legal pieces contain provisions directly or indirectly applicable to the human rights of persons with disabilities.

Aside from legal obligations the EU has launched a Disability Action Plan 2003-2010 which is currently the main policy document. The Action Plan is based on the three key 'operational objectives' of anti-discrimination, mainstreaming and accessibility. Accordingly EU's recent disability strategy for 2010-2020 focuses on empowering people with disabilities to enjoy their rights on an equal basis with others and on removing obstacles in everyday life. It also aims to help implement the provisions of the Convention in practice, both at EU and national level. The strategy complements and supports action by the Member States which have the main responsibility in disability policies.

Council Resolution (2008/C 75/01) on the situation of persons with disabilities in the EU, recalls that at the first informal ministerial meeting on disability issues of 11 June 2007, the UN Convention was endorsed as a fundamental step for the promotion, protection and full realization of the human rights and fundamental freedoms of all persons with disabilities. Ministers undertook to further develop policies so as to ensure the full implementation of the Convention and called on the European Commission to ensure that the new priorities of the European Disability Action Plan contribute to the effective implementation of the UN Convention.

From the very beginning the EU was involved in the negotiation of the CRPD. While most Member States had national representation sitting at the UN Ad-Hoc Committee, the voice of the Unión was always a single one. The Member State sitting at the EU's presidency would lead the negotiation process. This provided to EU and its Member States a powerful negotiation influence which played a leading role in all the sessions.

On February 27<sup>th</sup> of 2007 the Commission submitted a proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol (COM(2007)0077). On March 27<sup>th</sup> of 2007 (ST07404/07) the Council authorised the Community to sign the Convention and issued a declaration on the Optional Protocol. The Commission signed the Convention on 30 March 2007. On November 26<sup>th</sup> of 2009 the Council issued a decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC). On December 23<sup>rd</sup> of 2010 the EU deposited in the UN the ratification instrument to the CRPD. This step binds the EU institutions (the Commission,



Parliament, Council and Court of Justice) to uphold the rights of persons with disabilities.

The power to conclude international treaties is one of the attributes that characterize the legal personality of the European Community, and at the same time it is an essential instrument for the exercise of Community's competencies in external relations (Article 300 TEC). Likewise the European Court of Justice (ECJ) in several cases, has asserted that once an international treaty is concluded by the Council and enters into force, its provisions form an "integral part" of EU.

Consequently, the Commission has stated in its proposal for a Council decision, COM (2008) 530 final, that "the principle of subsidiarity applies, owing to the mixed nature of the powers assigned by the UN Convention and its Optional Protocol. As both Community and Member States' powers are concerned, joint conclusion/ratification of the Convention by the Community and the Member States is required.

It is appropriate to note that the EU, as regional integration organization, and in accordance with the provisions of Articles 44.1 and 43 of the CRPD, must express its consent by "confirmation", and declare, in the instruments of formal confirmation or accession, the extent of the competence with respect to matters governed by the Convention. Also, the CRPD requires regional integration organizations that have expressed their consent to inform the depositary any substantial modification in the extent of their competence.

The Council Decision 2010/48/EC on the conclusion of the UN CRPD referred to the EU competence in respect to matters governed by the UN CRPD, and listed EU instruments that demonstrate such competence.

The Decision states that, at present, the Union has exclusive competence as regards the compatibility of state aid with the common market, the common custom tariffs, and matters related to its own public administration (e.g. recruitment, remuneration, training etc). In the fields of discrimination, free movement of goods, persons, services and capital agriculture, transport, taxation, internal market, equal pay for male and female workers, and Trans-European policy and statistics, the Union shares competence with its Member States. The Decision further clarifies that in the aforementioned areas of shared competence, the Union has exclusive competence to enter into the UN CRPD in respect of those matters only to the extent that provisions of the UN CRPD or legal instruments adopted in its implementation thereof affect common rules previously established by the Union. In addition, the Decision lists, in the Appendix of Annex II, specific Community acts that illustrate the extent of the area of competence of the EU in accordance with the EC Treaty. Yet the Decision makes clear that "the extent of the Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention"

## 5. Examples of goods practices

In terms of international human rights treaties, we can identify three moments or critical stages: firstly, the negotiation and approval of the treaty; secondly the incorporation of the treaty at domestic level; and thirdly the implementation of the treaty by States Parties. Each and every of these stages is highly complex and requires tremendous efforts. Reality shows that the stages that follow the adoption of an international treaty on human rights are not prompted by its own gravity, but on the contrary, require joint action by several actors among which civil society plays an essential role.

While States have complete freedom to establish internal procedures to transform international law into domestic law, there is a general principle by which States cannot invoke a rule of domestic law for failing to meet an international obligation binding on them. Thus, once the State has indicated its willingness to honor its international obligations in respect of an international treaty, then it begins a process in which the state must analyze its domestic law and, in case of conflict with international standards, should reform or adapt domestic legislation to avoid the breach of international obligations.

The incorporation of the CRPD in domestic law is not simply enacting the treaty by an act of parliament but rather a mainstreamed and organized review of all legislation. Consequently, ratification of the CRPD mean for each State review, and in case of conflict, the reform legislation that could be affected by the provisions of international text. It is important not only to restrict the impact on disability legislation but to the whole legal system, including regional and local laws.

### *Good Practices for the Initial Implementation Phase*

1) The CRPD is a human rights treaty and, as sated above, it can be regarded as the highest standard for human rights protection of persons with disabilities. Likewise the CRPD is basically a non-discrimination approach towards persons with disabilities, and the principle of non-discrimination is considered a *jus cogens* norm of international law. Therefore States Parties should avoid, where at all possible, the use of reservations, interpretative declarations or “explanatory memorandums”.

2) As part of the CRPD implementation process, and as a matter of first priority, States Parties should undertake a screening of national legislation and policy, in order to identify any areas in which legislation or policy fails to meet the obligations under the Convention.

3) A good lesson to be learned from the CRPD’s negotiations process was the active participation of persons with disabilities both as parts of official State delegations as well as part of the civil society. The Chairman of the Ad-Hoc Committee allowed

accredited NGOs to express their point of view at the end of each round of article discussion. This active participation resulted in the incorporation on the final text of the real demands and needs of persons with disabilities by means of their own voice and will. This methodology has not only proven to be of substantial important to reflect real needs of persons with disabilities but it has been recognized as a “right” with several references throughout the CRPD.

4) Accessibility has become the most important tool to achieve equality in the field of disability. A universally accessible environment enables persons with disabilities to live independently and participate fully in all aspects of life. In this respect, it could be argued that accessibility is an “end”, and design for all and reasonable accommodations are the ‘specific measures to achieve the facto equality’.

5) International cooperation is seen as an important element of the process towards achieve the aims and objectives to the CRPD. In this respect the CRPD stresses the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizes the critical need to address the negative impact of poverty on persons with disabilities. Therefore the CRPD recognizes the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries.

6) The CRPD contains an innovative tool for national monitoring of the obligation set forth in the text. It is of great importance that this tool –enshrined in article 33- is interpreted and implemented in a coordinated globalized strategy. Article 33 makes clear that it is important to distinguish between “implementation” and “monitoring”. As regard the former article 33(1) requires States to designate one or more focal points within their governments for matters relating to the implementation of the CRPD. In relation to the latter article 33(2) requires States to maintain, strengthen, designate or establish a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the CRPD.