

**ACCESSIBILITY AND HUMAN RIGHTS FUSION IN THE CRPD: ASSESSING THE SCOPE AND
CONTENT OF THE ACCESSIBILITY PRINCIPLE AND DUTY UNDER THE CRPD**

**Presentation for the General Day of Discussion on Accessibility
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INTRODUCTION

I would like to thank the Chairman of the Committee and distinguished members of the Committee for this opportunity to share some reflections on accessibility as it appears in the Convention on the Rights of Persons with Disabilities (CRPD).¹ I would also like to thank the Secretary of the Committee for her tireless work during this week's meeting.

It is axiomatic that no one can enjoy a human right to which they do not have access, and the barriers that currently prevent people with disabilities from fully enjoying their human rights are ubiquitous. Our Chairman Ron McCallum stated this morning that “we cannot think of anything more crucial for persons with disabilities than accessibility.”² More broadly, in a growing body of human rights law and practice concerning groups who have been historically marginalized or excluded, we find frequent invocations of the concept of accessibility, variously expressed.

The CRPD by the terms of its text, is not entirely clear in its characterization of accessibility – we know it is tagged as a general principle by virtue of its appearance in Article 3, but its reappearance in Article 9 requires some disentangling and the interrelationship between accessibility and other core concepts, principles and rules is not explained, although clearly its placement in the text suggest an overarching role. Accessibility as we have heard in today's General Discussion makes other appearances in the CRPD. So, as a structural matter, it appears

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¹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter CRPD].

² Opening Remarks of CRPD Chairman Ron McCallum, General Day of Discussion on Accessibility, Palais des Nations, Geneva, October 7, 2010.

in a preambular paragraph (v),³ two of the articles of general or transversal application,⁴ several of the specific substantive rights,⁵ two of the implementation measures⁶ and in Article 49 as a misplaced implementation measure that comprises one of the final provisions.⁷

In view of its embeddedness in the Convention, is it not surprising that accessibility has been variously described. And so, for Rosemary Kayess, “accessibility is core as it brings to life substantive equality.”⁸ For Charlotte McClain Nhlapo, accessibility it “is a continuum and a process.”⁹ For Gerard Quinn, Article 9 outlines extra steps needed to remove existing barriers, setting out a series of obligations all of which are directed at the removal of discriminatory barriers.¹⁰ For Rune Halvorsen, accessibility is a “key general principle” and a “main normative direction” of the Convention.¹¹ For Anna Lawson whose work renders most conceptual puzzles breathtakingly clear and coherent, uncharacteristically exclaims: “[Article 9] is an intriguing and

³ CRPD prmb. Para. (e) (“Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms). *Id.*

⁴ CRPD arts. 3 & 9.

⁵ CRPD art. 21.

⁶ CRPD art. 31 (“States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.”) *Id.* See also CRPD, art. 32. (“Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.... Facilitating cooperation in research and access to scientific and technical knowledge). *Id.*

⁷ CRPD art. 49 (“The text of the present Convention shall be made available in accessible formats.”) *Id.* The point regarding the misplacement of Article 49 is more than academic. States parties are explicitly required to report on measures of implementation, including for example Article 31 and 32 of the CRPD, pursuant to the reporting guidelines promulgated by the CRPD Committee. This is not the case in relation to the final provisions. By contrast, the Convention on the Rights of the Child places its equivalent provision on publicity of the CRC in the section on implementation measures and has corresponding reporting guidelines in relation to that provision. See CRC, art. 42. (“States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”) *Id.*

⁸ Rosemary Kayess, *CRPD and Disability Discrimination*, a paper given at the “Strengthening EU-UN Co-operation in the Struggle against all Forms of Discrimination” seminar organized by EU and OHCHR, October 14, 2009, Brussels.

⁹ Remarks of Charlotte McClain Nhlapo, General Day of Discussion on Accessibility, Palais des Nations, Geneva, October 7, 2010.

¹⁰ Gerard Quinn, *The Interaction of Non-Discrimination with Article 9: Added Reasonment*, Unpublished Paper, Sept. 2010 (on file with author).

¹¹ Rune Halvorsen, *The Accessibility Principle in the UN Convention on the Rights of Persons with Disabilities and Implication for EU Disability Law and Policy*, paper prepared for EFC CRPD Implementation Project, 2009 (on file with author).

somewhat bewildering provision, the exact scope and implications of which are not yet settled.”¹² This brings us here today to reflect on Article 9 and its meaning in the CRPD framework.

Accessibility as articulated in the CRPD is most certainly an affront - a challenge to - formal conceptions of equality.¹³ Accessibility then, howsoever denominated as a rule, principle, positive duty, general obligation or normative standard, is most certainly a constituent element of robust substantive equality and most surely a constituent element of each of the specific substantive rights in the CRPD.

In my presentation I will speak about the framing of access in international law generally, that is, relevant antecedents to the CRPD. Thereafter, I will address accessibility as a general principle in Article 3 and consider its constituent elements in Article 9. I will suggest some implications about the interrelationship between accessibility and other core concepts in the CRPD and point to some examples of its specific application, building on the numerous practical implications of Article 9 already made today. I will conclude by drawing attention to some specific national level consequences of the CRPD accessibility framework and then conclude.

I. CRPD ANTECEDENTS: THE FRAMING OF ACCESS IN HUMAN RIGHTS LAW

Although a wide variety of international instruments address the different dimensions of accessibility, the CRPD is the most comprehensive and clearly the most important. Still, accessibility as articulated in the CRPD springs from and should be informed by a long-standing international law pedigree, notwithstanding the CRPD’s added heft to previous articulations.

¹² Anna Lawson, *Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach*, unpublished paper, (on file with author).

¹³ See generally Michael A. Stein and Janet E. Lord, *Assessing Economic, Social and Cultural Rights: The Convention on the Rights of Persons with Disabilities* in *EQUALITY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS* ____ (Malcolm Langford & Eibe Reidel, eds. 2010) (with Michael Ashley Stein). In addition, as Rosemary Kayess has emphasized: “The development of substantive equality, drawing on principles of universal access, addresses the limitations of a formal equality paradigm and is premised on the recognition of difference as a core element of the human condition. An element that must be factored into how states protect, promote and fulfill human rights.” See Rosemary Kayess, *Protecting the Rights of Women with Disability*, Keynote Address, Diverse and Inclusive Practice: Redrawing the Boundaries, Domestic Violence, Disability and Cultural Safety Forum, Sydney, Australia, 8th - 9th November 2007 (on file with the author).

It should be recalled that international environmental law clearly reflects accessibility as a core general principle that guides State obligations.¹⁴ Thus, the Climate Change Convention requires States to promote and facilitate “public access to information on climate change and its effects,” support international and intergovernmental efforts to strengthen national scientific and technical research capacities and capabilities, specifically in developing countries, and to promote access to data and analyses from areas beyond national jurisdiction.¹⁵ The Convention on Access to Information, Public Decision-making and Access to Justice in Environmental Matters¹⁶ is clearly by its title and text, concerned with procedural rights of access to information, access to decision-making and access to justice. Other international agreements likewise reflect the principle of accessibility and specific rights to access information in various contexts.¹⁷

International human rights law likewise reflects various conceptions of accessibility. Thus, for example, the Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁸ recognizes “the right of access to any place or services intended for use by the general public such as transport, hotels, restaurants, cafes, theaters and parks.”¹⁹ The Convention on the Elimination of All Forms of Discrimination against Women²⁰ likewise speaks of accessibility in a variety of contexts, including in health care, education, economic opportunity, among others.

The Committee on Economic, Social and Cultural Rights has perhaps most helpfully animated the concept of accessibility and positive duties to provide access. In the context of

¹⁴ On principles of international environmental law, see Philippe Sands, *Principles of International Environmental Law* 150-153 (2d ed., 2003).

¹⁵ See United Nations Framework Convention on Climate Change, *adopted* 9 May 1992, *entered into force* 24 Mar. 1994, *reprinted in* 31 I.L.M. 849 (1992), art. 4(1)(i), *available at*: <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

¹⁶ Convention on Access to Information, Public Decision-making and Access to Justice in Environmental Matters, *adopted* 25 June 1998, *available at*: <http://www.unece.org/env/pp/documents/cep43e.pdf>

¹⁷ See, e.g., WHO Framework Convention on Tobacco Control, U.N. Doc. A56/8(2003), art 12, *available at* <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>. (requiring States parties to “adopt and implement effective legislative, executive, administrative or other measures to promote broad access to effective and comprehensive educational and public awareness programmes on the health risks including the addictive characteristics of tobacco consumption and exposure to tobacco smoke...”). *Id.* at art. 12.

¹⁸ See International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, U.N. Doc. A/6014 (1966) (*entered into force* 4 Jan. 1969) [hereinafter CERD].

¹⁹ CERD art. 5(f). See also CERD, art. 5(c) (guaranteeing “equal access to public service”).

²⁰ See Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981).

advancing conceptualization of the right to health under the International Covenant of Economic, Social and Cultural Rights (CESCR), the Committee adopted General Comment 14 and emphasized that health facilities, goods and services must be accessible to everyone without discrimination.²¹ The Committee went on to lay out four overlapping dimensions of accessibility including:

- Non-discrimination – expressing the notion that facilities, goods and services must be accessible to all people, in particular persons belonging to especially marginalized groups without discrimination. Here it bears mentioning that the CRPD is relevant not only to the protection of the rights of persons with disabilities, but more broadly as a core human rights convention it is relevant in terms of the strengthening of rights of all persons. The approach to be taken by the CRPD Committee then in articulating accessibility obligations, perhaps by way of General Comment, will be relevant to the interpretation of accessibility provisions for all persons.
- Physical accessibility – expressing the idea that facilities, goods and services should be physically accessible, within safe physical reach for all sections of the population, and especially vulnerable or marginalized groups. Physical access is broadly conceptualized in the CRPD and can thus add considerable content to accessibility in this context, building on and contributing to previous articulations by treaty bodies.
- Economic accessibility (affordability) – expressing the idea that facilities, goods and services must be affordable for all persons. Fees for essential services must be based on the principle of equity such that they are affordable for all, including socially disadvantaged groups and that poorer households are not disproportionately burdened. The CRPD Committee has the opportunity to underscore the mutually constitutive relationship between poverty and disability in explicating the economic dimension of accessibility that is reflected in the CRPD.
- Information accessibility – expressing the idea that accessibility includes the right to seek, receive and impart information and ideas. In this regard the CRPD makes a substantial contribution to information accessibility, building not only on existing human

²¹ Committee on Economic, Social and Cultural Rights, General Comment 14, 22nd Sess., U.N. Doc. E/C.12/2000/4 (August 11, 2000), *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/40d009901358b0e2c1256915005090be?Opendocument>

rights law, but likewise on accessibility in other realms such as international environmental law and intellectual property law.

The ESCR Committee has made other contributions to animating the duty to provide access that should be of value to the CRPD Committee in its work. Indeed General Comment 5 of the ESCR Committee was of considerable value to the drafters of the CRPD, not only in animating the link between non-discrimination and reasonable accommodation which made its way into the CRPD text, but likewise in clarifying duties of access. For example, in General Comment 5 the ESCR Committee observed that “the right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services - including orthopedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration.”²² Insofar as the CRPD adds considerable content to accessibility and the work of this Committee will therefore of major relevance to other treaty bodies just as the work of other treaty bodies will inform this Committee’s work.

II. ACCESSIBILITY AS A PRINCIPLE

As a general principle in Article 3 of the CRPD, accessibility has a wide scope. There are at least two ways to understand accessibility under Article 3. First, general principles should serve as a filter through which discrete pieces of existing law should be run to assess conformity with the object and purpose of the CRPD. Second, as an interpretive tool, Article 3 serves to guide the meaning of the CRPD, in particular its specific substantive rights. It is to be applied across the entirety of the text as an interpretive tool. In keeping with the sense of a general principle as understood by the International Court of Justice in the *Gulf of Maine case*, it should serve as a rule of fundamental and general character which gives specific, particularized application.

It could perhaps be useful for the Committee to consider the implications of accessibility as a general principle, for example its role in national plans and policies on disability and into the workings of legislatures and government and in relation to budgeting and allocation of resources at all levels. The assessment of accessibility impact and integrating the results of disability

²² Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, 09/12/94, para. 34.

access audits into the development of law, policy and practice as a component of accessibility duties under the Convention and participation of disabled persons themselves and their representative organizations are all elements of Article 9 implementation and certainly this aligns with other treaty body commentaries regarding implementation duties. Charlotte McClain this morning spoke to the issue of national accessibility audits, underscoring its importance for consideration by the Committee. I will return to national implementation measures at the end of presentation.

III. THE CORE CONTENT OF ARTICLE 9 AND ITS CONSTITUENT ELEMENTS

Turning now to the text of Article 9 - State Parties commit to the identification and removal of obstacles and barriers to access in Article 9(1). Article 9 thus imparts a duty on States Parties to ensure access through the removal of barriers. In that sense, one can identify a clear duty to accord access. Article 9 goes on to lay out specific measures - positive duties, obligations - to achieve access, measures of varying degrees of normative suasion, with weaker language used in relation to some measures, stronger language in others. For Gerard Quinn, this signifies that:

there is some elusive line beyond which the non-discrimination principle will not generate the more robust obligations contained in Article 9. Put another way, failure to have an inaccessible environment is clearly a form of discrimination. Using the non-discrimination tool it is possible to craft some limited positive obligations on States to undo this discrimination. But failure to achieve all the positive obligations outlined in Article 9 is probably not in itself a form of discrimination. By definition, many of these obligations will require resources and extensive systemic change – all subject to the overall obligation of progressive achievement contained in Article 4.2 with respect to socio-economic rights. Where this line falls is very hard to say – but it does exist.²³

I will return to that in a minute -

Article 9 addresses a broad spectrum of accessibility concerns, including physical, technological, information, communication, economic and social accessibility. Article 9

²³ Quinn, *supra* note 10.

expressly acknowledges the need to consider and address accessibility measures at the earliest stage in planning and preparedness programming in terms of accessible information and communications technologies. But, to be sure, advance planning and indeed the anticipatory duty reflected in UK reasonable adjustment law could be usefully explained in relation to other measures in Article 9.²⁴ A General Comment could provide this opportunity.

Article 9 applies as well to both public and private actors who are obliged to make their product or services “open or provided to the public.” Less clear, is whether the references in Article 9, for example, impose specific duties on States to promote accessibility in the private housing sector: What is the scope of the duty under Article 9 regarding measures such as building and planning permission regulations, licensing laws, procurement policies and the like?²⁵ It certainly should in my view but it is not expressly articulated in the text. These and related questions could be usefully addressed by the Committee in a General Comment.

The forms that barriers to accessibility take can be many and varied, as Article 9 makes clear, and the Committee may wish to consider laying out illustrative examples of how various forms of barriers impinge upon specific disability rights and consider the cross-disability implications of those. Certainly other treaty bodies have utilized this approach within the framework of a clear but still succinct General Comment.

- Physical: For example, many people are unaware of the barriers faced by little people, who frequently have to interact with a built-environment primarily designed for “average-sized” people. In addition, people may not be sufficiently aware of the need for tactile or high colour-contrast surfaces to assist people with visual impairments as they navigate streets and buildings.

Informational -

- Institutional: These include legislation, practices, or processes that actively prohibit or fail to facilitate access by people with disabilities. Working with blind advocates in Morocco I learned of wide ranging practices that deny the right of a blind person to open

²⁴ See generally Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustments* (2008).

²⁵ Anna Lawson, *supra* note 12 at 4.

a bank account on his or her own. In my work on election access, I know that people with psycho-social disabilities are very often expressly prohibited from participating in voting by electoral codes and in practice, while other people with disabilities may be unable to vote because of the absence of legislation or practice that ensures that they can both gain physical access to polling venues or voting booths and have access to the ballot and other voting information once they are there. Part of the accessibility duty in Article 9 is to put a process in place that will identify barriers to access in a cross-disability manner.

- Attitudinal: Perhaps the most pervasive barrier concerns attitudes in relation to persons with disabilities. The relationship between Article 9 and Article 8 in this regard becomes a salient issue for the Committee to address and a core component of realizing Article 9 obligations.

The provisions that elaborate the specific measures to be undertaken in Article 9 are quite detailed and attempt to capture the wide range of access needs of different people with disabilities in different contexts.

They include:

- Developing (and monitoring implementation of) minimum accessibility standards and guidelines
- Providing training on accessibility for stakeholders
- Promoting design, development, production, and distribution of information and communications technologies that address accessibility early in their development, and that are provided at minimum cost
- Promoting access to new information and communications technologies and systems, “including the internet”
- Providing signage for the public in Braille and other easy to read and understand forms
- Providing live assistance (such as guides, readers, and sign language interpreters)
- Promoting other “appropriate forms of assistance and support” to ensure access to information.

Crucially, Article 9 requires states to ensure that the “environment” is accessible to all persons with disabilities in order to facilitate living independently and participating fully in all aspects of

life. The conceptualization of “environment” in Article 9 is expansive insofar as it not only includes built structures, but likewise transportation, information and communications (including the Internet). As underscored by Kayess and French, Article 9 embraces a principle of geographic equity insofar as it requires equivalent levels of environmental accessibility in both urban and rural areas.²⁶

IV. INTERRELATIONSHIP OF ACCESSIBILITY WITH OTHER CRPD CONCEPTS

In any comprehensive consideration of the nature and scope of accessibility in the CRPD, its interrelationship with other core concepts should be addressed. This may be one of the most useful roles that a General Comment could play in relation to the illumination of the accessibility obligations in the CRPD.

The first core issue is the interrelationship of the accessibility obligation to non-discrimination in the CRPD. The terms of the text make a linkage clear, even if the nature of that linkage is not spelled out. In Article 9(1), States Parties are required to take “appropriate measures” to ensure that persons with disabilities have “access” to certain types of structures, information and services and, trenchantly, this must happen “on an equal basis with others.”²⁷ As noted by Professor Anna Lawson in her analysis of the relationship between accessibility and non-discrimination: “A failure to fulfill this obligation would thus result in inequality of access which might, at least in some situations, be expected to constitute discrimination on the basis of disability which States are required by Article 5 to prohibit.”²⁸ As she and others such as Gerard Quinn have pointed out, the CRPD does not go farther in enumerating the circumstances according to which a failure to meet the accessibility duty will constitute discrimination. This, then, is to be contrasted with the explicit linkage between reasonable accommodation and discrimination in the Article 2 definition of disability discrimination which plainly states that a failure to provide reasonable accommodation equals discrimination. Clarification, then, of this nexus would no doubt provide assistance to States Parties in meeting their accessibility obligations. While the role of progressive realization and reasonable accommodation through

²⁶ See Rosemary Kayess and Philip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 *Human Rights Law Review*, 1-27 (2008).

²⁷ CRPD art. 9(1).

²⁸ Lawson, *supra* note 12 at 4.

the undue burden provision are no doubt relevant as brakes to be used in appropriate circumstances, they were certainly not intended by the drafters to pave the way for States to run roughshod over their obligations to provide access. In the same way that the ESCR Committee and the European Committee on Social Rights²⁹ has clarified the permissible scope of concepts such as progressive realization, so too can the Committee do so in a General Comment on accessibility. It could likewise draw on and develop within the context of the CRPD the reasoning set forth by the African Commission on Human and Peoples' Rights in *Purohit and Moore v The Gambia*,³⁰ which decided that The Gambia failed to comply with its obligations under the Charter in relation to its treatment of persons with mental disabilities and that States Parties are required to take concrete and targeted steps to ensure access to the right to health, even allowing for the fact that resources were limited in that case.

Beyond considering the interrelationship of Article 9 and non-discrimination, Rune Halvorsen has emphasized four other concepts that are related to accessibility. He distinguishes these concepts from accessibility and understands them as comprising different strategies for rendering operational the general principle of accessibility:

Universal design: exposing whether environments, facilities, products and services are designed to make them usable by all persons, to the greatest extent possible, thereby minimizing the need for particular adaptations or special designs.³¹ The term “universal design” is not referenced in Article 9 but is clearly a component of the accessibility duty because of its appearance in Article 4 which sets forth general and cross-cutting obligations. Charlotte McClain spoke in some detail today about the intersection between Article 9 and universal design and so I need only incorporate her remarks by reference here.

Reasonable accommodation: defined in the CRPD as necessary and appropriate modifications or adjustments of social environments to meet the needs of individuals with disabilities.³² The link to accessibility runs in several directions. First, persons who are unable to access certain goods and services via universal design should nonetheless be provided accessibility in other ways, for

²⁹ See generally *Autisme-Europe v France* - European Committee of Social Rights Complaint No. 13/2002 (7 November 2003).

³⁰ See *Purohit and Moore v The Gambia*, Communication No. 241/2001 (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>

³¹ CRPD arts. 2; 4(f).

³² CRPD art.

example through personal assistance. The obligation to provide reasonable is bounded by the principle of “disproportionate or undue burden.”³³ This latter principle may ensure that a sensible interventions in the market is undertaken and with the consent of stakeholders. It would be incredibly useful for the Committee to clarify the relationship between accessibility and reasonable accommodation in generating some Article 9 positive duties that are clearly and unequivocally linked to non-discrimination and are of *immediate* as opposed to progressive achievement. More important perhaps is the reemphasis, drawn from the Committee on ESCR rights, of the duty to move expeditiously to realize even those obligations that are subject to progressive realization.

Usability: discerning whether the facilities, products or services persons with disabilities have access to in fact fully serve the purposes or functions to which they are directed.

Availability: whether products, facilities or services actually exist and are relevant for the lives of people with disabilities and facilitating their access and participation in society or “whether such products, facilities and services are unavailable to economic or other reasons.”³⁴ A third issue is whether the products, equipment, facilities or services meant to be accessible, are actually available. This distinction between accessibility in a more technical design sense and availability as more a question of the distribution of economic and other resources is made several places in the Convention. Such issues may arise, for example, in relation to the availability of assistive technology or in relation to universally designed and usable products that are mainstream and commonly used by large sections of the populations, such as personal computers and mobile phones. The availability of assistive technology will depend on factors such as whether people with disabilities can afford them, whether a responsive market exists and whether an efficient distribution system exists. The availability of accessible products will be strongly embedded in different economic, political and social landscapes.

These foregoing concepts could be usefully explicated by the Committee should it proceed with the drafting of a General Comment.

³³ CRPD art. 2, 5. 23, 24. 27.

³⁴ See Rune Halvorsen, *Digital freedom for persons with disabilities: are policies to enhance eAccessibility and eInclusion becoming more similar in the Nordic countries and the US?* European Yearbook of Disability Law (forthcoming 2011) (on file with author).

V. ACCESSIBILITY APPLIED TO SPECIFIC CRPD SUBSTANTIVE RIGHTS

As with Articles 1-8, Article 9 is intended to inform and assist in the interpretation and implementation of all the human rights elaborated in the CRPD. For example, if someone were seeking to implement Article 13, concerning access to justice, an important starting place would be Article 9 when considering how to improve the accessibility of, for example, courthouses or the criminal justice system. This links to Article 32, as usefully emphasized by Diane Mulligan and the International Disability and Development Consortium.³⁵ Thus for example, in Haiti, the US government is currently undertaking extensive justice sector assessment prior to rebuilding.³⁶ The danger of course is that no disability assessment will make its way into those mainstream assessments.

Turning to practical measures for implementation in specific areas – other contributors have provided salient examples throughout this General Day of Discussion. Thus, Human Rights Watch has referenced the interrelationship between accessibility and making an educational system fully accessible – Shantha Barriga spoke about practical measures in this context and in the health context.³⁷ She also referenced the importance of gender considerations in relation to practical measures for implementation of accessibility obligations. The World Federation of the Deaf has talked in detail about access in relation to communications. Many other issues have likewise been addressed. I will provide a few examples drawing on my own experience in the area of inclusive development.

Political Participation

Article 29 of the Convention lays out rights to participate in political and public life for person with disabilities. In Jordan, disabled peoples organization are working hard to ensure equal access to polling stations in forthcoming elections. A variety of measures are being undertaken. In addition, disability advocates are challenging the manner in which assistance is

³⁵ See Diane Mulligan and Marianne Schultz, *Accessibility and Article 32*, Paper Submission for the General Day of Discussion on Accessibility, Palais des Nations, Geneva, Oct. 7, 2010.

³⁶ For more on inclusive (re)development in the Haitian context, see Janet E. Lord, *Disability Inclusive Disaster Preparedness and Response: Challenges and Opportunities for Reconstruction in Haiti*, __ Am. Soc’y Int’l L. __ (2010).

³⁷ Human Rights Watch, Statement by Shantha Rau Barriga, General Day of Discussion on Accessibility, Palais des Nations, Geneva, Oct. 7, 2010.

provided at the polling center. A voter who requires assistance, for example because he/she is blind, has only one option at present: he/she must make a declaration of illiteracy and then may whisper the candidate of his choosing to the election committee member. As the Jordanian DPOs have pointed out, this is not voting in secret and it is not voting independently and it is not an equal measure of accessibility. Accessibility calls for equal access, not second rate access. A holistic reading of Article 9, the general principles in Article 3 and the specific substantive rights of political participation in Article 29 clearly point to a different means. Crucially, they point not only to a more dignified solution for persons with disabilities, they likewise should inform voting rights for all persons, such as illiterate voters. An assisted voting method has been planned an accessibility guide addressing a wide range of accessibility issues is being issued, the first in the region, that is cross disability in its coverage. In other countries tactile ballot guides have been utilized by blind voters to ensure equal access. Just as the rich treaty body jurisprudence informs our understanding of the CRPD, so too will the work of this Committee inform human rights generally.

Access to Justice

States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in Article 13, are enjoyed by persons with disabilities and whether measures to ensure accessibility are in fact put in place.

Here comes to mind the case of a deaf boy in Zambia who was accused of murder and thrown into detention when in fact evince pointed clearly to his step father. The boy could not talk and was provide with no interpreter or access to legal representation. Only after months in detention were the efforts a Zambia coalition of disabled peoples organizations successful in getting him the assistance he needed to defend himself against what was a wholly false accusation. It is not enough for State Parties to report that persons with disabilities have access to justice. Rather, they must show how and through what measures access is being provided, whether as witness, defendant etc. There is a crucial role of international development donors and implementers to play in this context, for example in the area of justice sector assessments that all too often do not include strategies of inclusion for persons with disabilities. It is critical that access to justice programming be inclusive of persons with disabilities and seek to advance,

through proactive measures, implementation of Article 13 and related provisions such as Article 12 of the CRPD.

VI. NATIONAL IMPLEMENTATION OF ACCESSIBILITY DUTIES

The general obligations set forth in Article 4 make clear the need to ground CRPD obligations in national law, policy and programming, in consultation with persons with disabilities. The Committee may wish to consider the implications of Article 4 for the Article 9 duties and their reinforcement in domestic legislative framework and through a variety of other methods. As such, a legislative base is required to instantiate these duties. The Committee may wish to highlight, as in other General Comments, set out in terms of the need for a legislative base to instantiate accessibility duties, accessibility policies, plans, strategies and also mechanisms for remedies and accountability, monitoring, indicators and benchmarks to make real the accessibility duties. Crucially, Article 4 requires States Parties to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes, including in formulation of accessibility standards concerning CRPD rights. This is a point underscored by IDA which has usefully called on discussions around any General Comment to be inclusive of persons with disabilities and their representative organizations.³⁸ Helpfully, the European Committee for Social Rights, in its dialogue with States, has affirmed the idea that undertaking specific measures in the pursuit of economic, social and cultural rights is not enough to satisfy its obligations. Rather, measures must be coherent and coordinated as part of a complementary system of achieving equality. The Committee has stated that “[w]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress, and to an extent consistent with the maximum use of available resources.”³⁹

States parties should regularly assess whether the measures chosen are effective in practice:

³⁸ See International Disability Alliance, *IDA Submission to the Committee on the Rights of Persons with Disabilities*, Day of General Discussion on Accessibility - Article 9 CRPD, 7 October 2010.

³⁹ European Committee of Social Rights, Decision on the Merits of Collective Complaint No. 13, at ¶ 53).

Legislation. Adoption of legislation to address access to and effective enjoyment of rights is indispensable in complying with Article 9. States Parties should therefore adopt specific legislation that prohibits discrimination in all spheres. Such laws should aim at eliminating barriers to access that constitute both *formal* and *substantive* discrimination, attribute obligations to public and private actors and introduce a variety of measures to bring about equitable access to all rights.

Policies, plans and strategies. States Parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address barriers to access. Such policies, plans and strategies should address all groups of persons with disabilities and should include not only reasonable accommodation but also positive measures, including those in Article 9, in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of all CRPD rights. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of accessibility, along with other Article 3 principles, should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling myths and stereotypes about disability that stand in the way of achieving accessibility.

Elimination of barriers. States Parties must adopt an active approach to eliminating systemic disability discrimination and segregation in practice that inhibits the realization of equitable access to all rights for persons with disabilities. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including positive measures enumerated in Article 9. States Parties should consider using incentives to encourage public and private actors to change their attitudes and behavior in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. The identification and elimination of barriers will frequently require devoting greater resources to some issues of access. Particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of

the harm caused by disability discrimination and inequality of access to rights in all fields covered by the CRPD. Institutions dealing with allegations of disability discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to all persons with disabilities without discrimination and consistent with principles of accessibility. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to the CRPD and Article 9, including actions or omissions by private actors. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, public apologies, and State Parties should ensure that these measures are effectively implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote accessibility through measures in Article 9 and towards the full protection of civil, political, economic, social and cultural rights.⁴⁰

Monitoring, indicators and benchmarks. States Parties are obliged to monitor effectively the implementation of measures to comply with Article 9 of the CRPD. Monitoring should assess both the steps taken and the results achieved in the elimination of barriers to effective access. National strategies, policies and plans should use appropriate indicators and benchmarks in operationalizing the accessibility obligations in the CRPD.⁴¹

CONCLUSION

In conclusion, accessibility as general principle in Article 3 and as positive duties set forth in Article 9 is a tool for the realization of State Party obligations. Taken together, these articles call upon States, as well as disabled peoples organizations and national human rights institutions among others, to engage in a wide variety of human rights actions in order to realize the implementation of the Convention – from scoping exercises that examine accessibility obligations in law and policy, to law reform and law development, to human rights education that raises awareness amongst a wide array of stakeholders about the implementation of accessibility obligations.

⁴⁰ General Comments No. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

⁴¹ See the Human Rights Committee's General Comments on education (No.13), health (No.14), water (No.15), author's rights (No.17), social security (No.19), and its reporting guidelines (E/C.12/2008/2).

Accessibility is clearly inextricably linked to all the rights in the Convention, howsoever we may wish to characterize it as a free standing right, duty, set of obligations or a general principle or implementation measure or rights facilitator. Putting conceptual and academic issues aside, accessibility serves different functions in the CRPD and can serve the work of the Committee and the implementation of the Convention in different ways. Accessibility can help us identify barriers that bar access to rights for persons with disabilities on an equal basis with other and thus constitute discrimination. Locating accessibility as a duty in much the same way that Anna Lawson speaks of the reasonable accommodation duty likewise serves a fundamentally important purpose in helping to fulfill the promise of the social model.⁴² As an implementation filter or tool, it can generate meaning when applied to each and every specific obligation in much the same way that the idea of accessibility is an analytical tool in CDESCR implementation as reflected in the General Comment on health for example.⁴³

I thank the Committee for this opportunity to reflect on Article 9 and look forward to further discussion among colleagues as the Committee it advances its work on this and other important issues.

⁴² See generally Lawson, *supra* note 24.

⁴³ See General Comment 14, *supra* note 21.