The Convention on the Rights of Persons with Disabilities 2006: Its Value in Litigation Before the European Court of Human Rights

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Abstract: The central exploration in this thesis is of the relationship between the rights in the Convention on the Rights of Persons with Disabilities 2006 (CRPD) and the rights in the European Convention on Human Rights 1950 (ECHR). They are distinct treaties, promulgated by different bodies, with different bodies in charge of their implementation and interpretation, respectively the Committee on the Rights of Persons with Disabilities (CRPD Committee) and the European Court of Human Rights (ECtHR). However, they have a common ancestry and most parties to the ECHR are also parties to the CRPD. As the rights in the ECHR are replicated in the CRPD, a link may seem sensible: but if the content of the right differs, what then? This is a classic interpretation problem: what the law means invariably turns on text, the purpose of the text, and the context in which the text exists. The existence of the CRPD and its acceptance by most parties to the ECHR is an obviously important context. A legal doctrinal research methodology of collating and analysing documents – primarily Concluding Observations, General Comments and other documents issued by the CRPD Committee, and the case law of the ECtHR – is used to explore how the CRPD can influence the interpretation of the ECHR.

After an introduction that sets the scene, chapter 2 explores ECtHR jurisprudence explaining its acceptance as to why the CRPD is relevant to its interpretation of the ECHR. Chapters 3 to 5 explore three areas of interplay:

(i) education and non-discrimination, where the ECHR has been interpreted consistently with the CRPD;

(ii) protection from human trafficking, where limited use has been made of CRPD standards, but it is suggested that there is no tension and the CRPD could be used by litigators; and

(iii) protection from psychiatric compulsion, where at present there is an apparent tension as the ECHR is interpreted to allow such compulsion in some circumstances but the CRPD Committee holds that the CRPD precludes it; the chapter explores the interaction between different rights in the CRPD to explain fully its conclusion, to allow the apparent tension to be explored with a fuller understanding of the framing of the CRPD.

These three chapters reflect a sliding scale (assimilation, no tension but no assimilation, tension and no assimilation). They also have a commonality, reflecting a secondary

feature of this thesis, namely the use of strategic litigation to develop interpretations of human rights. In the education chapter, strategic litigation played a role; arguments are developed in the other two chapters that could be used in strategic litigation, which is legitimated by the material set out in chapter 2. It is a secondary feature because the arguments could also be used by any litigator before the ECtHR, including one who does not act consciously to develop rights. The final chapter, chapter 6, outlines a research agenda for further matters that could be explored using the same methodology as has been adopted in the rest of the thesis.

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Chapters 2 and 3 had been submitted at the time of the submission of the thesis for examination (pursuant to a requirement for a PhD by articles to have two articles submitted); they were sent to one journal; the journal advised that it would only review one article (as it had a policy of not considering two articles from an author at any one time) and declined to publish the one selected; they will be submitted to another journal.

Chapter 4 has been published as:

> Kris Gledhill, The Committee on the Rights of Persons with Disabilities and the Fight Against Human Trafficking, (2021) 8 Journal of International and Comparative Law 249-282.

Chapter 5 has been prepared for submission.

Required attestation of authorship:

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor used artificial intelligence tools or generative artificial intelligence tools (unless it is clearly stated, and referenced, along with the purpose of use), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning."

This thesis has been supervised by Professor Kate Diesfeld at AUT and Professor John Dawson at the University of Otago; this means that they have provided significant commentary on this thesis as it has developed, for which I am thankful. I would like to thank also the examiners, Emeritus Professor Bernadette McSherry and Professor Bill Atkin, who picked up various points they kindly described as minor, but also provided various thoughtful pointers. Naturally, any errors remain mine.

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Chapter 1 – Introduction

This is a PhD by Articles, also known as a Format Two Thesis at AUT. As such, its structure should contain the following elements (summarised from the AUT Postgraduate Handbook 2023[1]):

> (i) The manuscripts collated may be "In preparation for submission to a peer-reviewed journal", "Submitted to a peer-reviewed journal", "Published in a peer-reviewed journal". It is necessary that at least two of them have been submitted.
> (ii) They "must be resultant from work completed during the student's enrolment and supervision in their research degree".
> (iii) "The student is required to be the principal author of the manuscript, with a stated contribution which constitutes the leadership and writing up of the work reported in the manuscript(s)" (with signed declarations as to the contributions).
> (iv) There is a need for "a comprehensive overall discussion and conclusion chapter, and explicit links of at least half a page as a prelude between distinct chapters each of which form a sequential and cohesive thesis".
> (v) "The introductory thesis chapter should state how the thesis is structured …".
> (vi) The articles will include "some discussion and conclusion material", such that "some repetition may occur between the chapters as manuscripts, and the final discussion and conclusion chapter"; however, the "discussion and conclusion chapter is essential, and should synthesize all findings in the thesis as a whole, including practical implications, and future research directions".
> (vii) The thesis must stand on its own merits as a thesis and will be assessed on its totality"; the word count should be 40-60,000 words, with a limit of 100,000 (excluding references and appendices).

This introductory chapter seeks to provide an overview of the thesis and to explain its rationale and validity, and to cover the other matters that should feature in an introductory chapter. The thesis contains four articles plus this introduction and a concluding chapter which sets an agenda for further research: the four articles all explore aspects of the Convention on the Rights of Persons with Disabilities 2006 (CRPD)[2] and its

[1] Pages 93-95, 98; available at https://www.aut.ac.nz/research/postgraduate-student-support/pg-forms-policies-and-processes/handbook (last accessed 13 December 2023).
[2] Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 December 2006, entered into force 3 May 2008) (CRPD).

relationship with European Convention on Human Rights 1950 (ECHR).[3] The first article outlines how, in the case law of the custodians of the ECHR, it is permissible to make use of the CRPD in seeking to interpret the ECHR. The second, third and fourth articles then look at specific rights: they are arranged in a way that involves a sliding scale.

The second article discusses how the right to education combined with non-discrimination standards under the ECHR is now interpreted in a way that is consistent with the CRPD, such that there is de jure integration of standards; it explores how strategic litigation has played a role in this. The article goes on to set out how material originating with the expert body that supervises the implementation of the CRPD, the Committee on the Rights of Persons with Disabilities (CRPD Committee),[4] suggests that there is not yet full de facto recognition of the right, such that further litigation before the ECtHR is possible.

The third article relates to the right to be protected from human trafficking, which is often viewed as a breach of the right not to be subject to slavery, servitude or forced labour. Here, the ECtHR has not cited material arising under the CRPD: such material is collated in the article and it is argued that it illuminates other rights under the ECHR that will often be breached by human trafficking. As such, future ECHR case law could move towards that de jure integration if the CRPD is cited. The fourth article relates to the situation of mental health law and in particular to the use of compulsion (detention and treatment): here, there ECtHR has indicated that the ECHR cannot be interpreted in the way that the CRPD Committee interprets the CRPD, such that there is a bar to de jure integration between the two instruments (in that the law they state is different). The article seeks to present a fuller understanding of what the CRPD Committee suggests a compliant mental health law would contain, which may assist future arguments for de jure integration.

A. Setting the Scene for the Thesis

A core aspect of legal research is the question of what *is* the law in a particular context. The particular area of law involved in this thesis is international human rights law. If one were to visualise something looking almost like a genealogical chart with the

[3] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953), more commonly referred to as the European Convention on Human Rights ("ECHR").

[4] Article 34 of the CRPD sets out that it shall consist of "twelve experts" when the Convention enters into force and an addition six once there are sixty ratifications: they have to be "of high moral standing and recognized competence and experience" in the area.

Universal Declaration of Human Rights 1948 (UDHR)[5] as the starting focal point for modern human rights law,[6] its progeny can be set out into two strands. One strand involves the human rights treaties promulgated by the United Nations, level one of which are the two overarching covenants, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)[7] and the International Covenant on Civil and Political Rights 1966 (ICCPR),[8] which are designed to implement the UDHR. On another strand would be the various overarching human rights treaties promulgated by regional bodies such as the Council of Europe, Organisation of American States, the Arab League and the African Union which also set out high level rights, often referencing the UDHR. For the Council of Europe, the first level would include the ECHR and the European Social Charter.[9]

At level two of the UN strand would be various other core human rights treaties,[10] including the International Convention on the Elimination of Racial Discrimination 1965 (ICERD),[11] the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW),[12] the Convention against Torture and Other Cruel, Inhuman or

[5] Resolution 217(III) of 10 December 1948; the text is available at http://www.un.org/en/universal-declaration-human-rights/index.html. The UN Charter of 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945, available at http://www.un.org/en/charter-united-nations/index.html, is also to be noted: its preamble refers to the desire "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women …" – this need to reaffirm is also a textual indication of the purpose in place.

[6] In short, a founding assumption for this thesis is that there is normative framework to secure the first principle enunciated in Article 1 of the UDHR, namely that all persons are equal in dignity and rights, replacing the thought patterns that had justified colonisation and slavery and more recent atrocities, most notably the Holocaust, which rested on systemic inequality in dignity and rights.

[7] International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

[8] International Covenant on Civil and Political Rights 1966 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

[9] European Social Charter, ETS No 035 (opened for signature 18 October 1961, entered into force 26 February 1965) and European Social Charter (revised), ETS No163 (opened for signature 3 May 1996, entered into force 1 July 1999).

[10] The genealogical chart analogy does break down slightly as one of these second tier treaties pre-dates the level one covenants, and some of them contain both civil and political and economic, social and cultural rights, and so the linking lines are different.

[11] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) (ICERD).

[12] Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) (CEDAW).

Degrading Treatment or Punishment (CAT)[13] and the Convention on the Rights of the Child 1989 (CRC).[14] Joining this list[15] most recently is the CRPD.

These supplemental treaties[16] add value in a number of ways. Each has an expert committee that supervises its implementation. States report on progress made and the relevant committee recommends supplemental steps; this also leads to comments addressed more generally to states. In addition, the various committees may receive communications from individuals claiming breaches of their rights (if their state permits it), and some have inquiry procedures.[17] As such, they provide additional ways of developing principles, providing outlets for complaint and securing remedies. In addition, the process of drafting the specialist treaties allows the international community to provide additional guidance on standards that might be implicit in the overarching covenants. For example, the ICCPR precludes discrimination in relation to rights (its Article 2) and in relation to other standards in law (its Article 26): but ICERD, CEDAW and the CRPD provide definitions of what amounts to discrimination and illustrate how non-discrimination principles apply in their context. This is discussed in Part C below.

This process of supervising implementation includes resolving disputes about the meaning of treaty language. The Vienna Convention on the Law of Treaties 1969[18] contains some interpretive rules: terms should be given their "ordinary meaning", but that involves looking at the context and taking into account the "object and purpose" of the treaty, but also "relevant rules of international law" and any practice showing how

[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) (CAT).
[14] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (CRC).
[15] There is also the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3, opened for signature 18 December 1990, entered into force 1 July 2003, and the International Convention for the Protection of All Persons from Enforced Disappearance 2716 UNTS 3 (opened for signature 20 December 2006, entered into force 23 December 2010)
[16] There are various level two conventions in the Council of Europe: for example, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ETS 164 (opened for signature 4 April 1997, effective from 1 December 1997) (usually referred to as the Oviedo Convention on Human Rights and Biomedicine).
[17] See Natalie Baird, The International Human Rights Framework in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds), *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017), ch 4, particularly at pp197-208; see also Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015), pp60-82.
[18] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

parties agree the treaty should be interpreted; and supplementary material can be used to resolve ambiguous or obscure meanings or correct an outcome which is "manifestly absurd or unreasonable".[19]

Accordingly, whilst the text of the treaty emanates from the same body – the General Assembly of the United Nations – the interpretation of each of the core human rights treaties is in the hands of a different body, one of which is the CRPD Committee. Similarly, over on the second strand, the ECHR is interpreted by the European Court of Human Rights (ECtHR).

The rationale for the CRPD was that whilst non-discrimination principles were core to the human rights treaties already in existence, they were not being respected in the case of persons with various disabilities because of a charity and/or medical model of disability (ie portraying people with disabilities as objects of welfare or focusing on the disability rather than the person).[20] The CRPD is based on the need to replace this approach with a focus on society's acknowledgement of the equal personhood of everyone and the granting of accommodation to people who need more because of disability-based requirements in order to secure the same realisation of rights as others.[21] The latter is termed the social and human rights model of disability.[22]

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[19] Vienna Convention on the Law of Treaties 1969, Articles 31 and 32; if a treaty is in more than one language, Article 33 indicates that they are presumed to mean the same, but the best reconciliation of different meanings is required.

[20] See, for example, A Handbook for Parliamentarians on the Convention, *From Exclusion to Equality, Realizing the rights of persons with disabilities*, issued by the High Commissioner for Human Rights, the Department of Economic and Social Affairs of the UN, and the Inter-Parliamentary Union (available at https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities.html, last accessed 8 September 2018), which comments that "Persons with disabilities remain amongst the most marginalized in every society. While the international human rights framework has changed lives everywhere, persons with disabilities have not reaped the same benefits" (Foreword, piii).

[21] There are two general texts on the CRPD: Della Fina, Valentina, Cera, Rachele, Palmisano, Giuseppe (Eds.), The United Nations Convention on the Rights of Persons with Disabilities: A Commentary (Springer International, Cham, Switzerland, 2017); and Bantekas, Ilias, Stein, Michael Ashley, Anastasiou, Dimitris (Eds) The Convention on the Rights of Persons with Disabilities: A Commentary (OUP, Oxford, 2018). Naturally, these is a significant body of academic material on which to draw.

[22] Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 Columbia Human Rights Law Review 93 notes that the view of people with limited capacity being treated as objects of charity and placed under guardianship in their best interests was, being replaced by a supported decision-making approach, an "emerging paradigm" which "challenges our perceptions and our understanding of when, how, and even *if* the state may intervene in a person's life". In various of its Concluding Observations to states, the Committee on the Rights of Persons with Disabilities has commented on the need for training on the human rights model of disability: for example, in relation to Jordan, it calls on the state to "Integrate the human rights-based model of disability into the training curriculum of all health professionals": Committee on the Rights of Persons with Disabilities, Concluding Observations to Jordan, UN Doc CRPD/C/JOR/CO/1, 15 May 2017, para 48(b). The World Health Organization has been

Importantly, the CRPD does not claim to provide new rights, but at the same time has been described as producing a paradigm shift, in the sense understood in science of a new way of thinking about a field, because of its reinterpretation of existing rights.[23] This is expanded in Section C below but can be illustrated briefly:

> (i) Article 14 of the CRPD includes language that prohibits detention based on disability, which the CRPD Committee interprets to mean that mental health laws authorising detention and treatment in a psychiatric hospital must be abolished: but no other human rights body has expressed this view and indeed Article 5(1)(e) of the ECHR expressly refers to detention of persons of "unsound mind" (and just about every country in the world has a mental health law that provides for involuntary detention and treatment). So, does human rights law preclude detention or not?
>
> (ii) Similarly, Article 12 of the CRPD makes clear that taking decisions on behalf of persons with disabilities in their "best interests" – a common approach - is problematic because it undermines their agency and should be replaced by the idea of supported decision-making, essentially finding the decision that is true to the standards of the individual. This may allow decisions that are not in the best interests of the person. Should this be permitted? Of course, no-one who makes their own decisions is required to do what is objectively best for themselves: so should people with compromised decision-making abilities be allowed on equal terms to give priority to foibles over rationality?

In short, there are parallel treaties that all aim to give effect to rights that can be traced back to the same source, namely the UDHR, but which have different texts and have different authoritative bodies to interpret them. This thesis examines the interaction between the CRPD and the CRPD Committee, which operate at level two on the UN strand, and the ECtHR, which interprets a level one overarching treaty on the other strand. There are 46 member states to the Council of Europe and the ECHR:[24] the CRPD has 188 parties, and the only Council of Europe member not to have ratified it is

active in preparing training materials through its QualityRights initiative: see https://www.who.int/publications/i/item/who-qualityrights-guidance-and-training-tools.

[23] Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 Columbia Human Rights Law Review 93. In its Concluding Observations to Slovakia, it was said that "The Committee welcomes the recognition of the paradigm shift required to realize the rights of persons with disabilities in the State party as well as the efforts to adopt a human rights-based approach to disability." Committee on the Rights of Persons with Disabilities, Concluding Observations to Slovakia, UN Doc CRPD/C/SVK/CO/1, 17 May 2016, para 4.

[24] This is at the time of writing: see https://www.coe.int/en/web/portal/46-members-states. The Russian Federation has been a member, but was expelled for invading Ukraine: see https://www.coe.int/en/web/portal/the-council-of-europe-key-facts.

Liechtenstein (which has signed it).[25] That provides a context for the interaction: both treaties are binding on those 46 states as a matter of international law.[26]

This interaction is examined in the context of strategic litigation in that a theme running through is how lawyers seeking to raise arguments before the ECtHR can and should make use of the text of the CRPD and of the principles developed by the CRPD Committee, particularly when those lawyers are representing persons with disabilities. As such, the central aims of the thesis are to explain how that is legitimate and to illustrate where it has been done with success and where it could be done but has not been tried to any great extent: but there is also discussion of where that might prove controversial because of limitations in possible interpretations.

In the rest of this Introduction, Part B briefly explains strategic litigation and Part C examines the text of the UDHR, how it was developed when put into the tier one ICCPR and ECHR, and how the text of the CRPD fits with these documents. Part C thereby seeks to provide an overview of the potential for arguments, though simply based on the text. Part D then explains how the articles collated together as chapters in this thesis illustrate what has happened so far. Part E sets out some other matters that need to be explained in a PhD thesis, including research methodology and how this thesis as a whole meets the structure required for a PhD by articles at Auckland University of Technology.

B. Explaining (and Providing a Working Definition of) Strategic Litigation

A secondary aspect of this thesis is the role of strategic litigation: the development of the case law in chapter 3, relating to the right to education, shows an intertwining with strategic litigation and the suggestions made as to ongoing litigation could be used by strategic litigators; similarly, the points developed in chapters 4 and 5 include arguments that could be used by strategic litigators.

[25] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (as at 6 December 2023).

[26] The common distinction between monist and dualist legal systems, namely that international law becomes part of domestic law in a dualist system only when further steps are taken to incorporate them, is less important in relation to these treaties since they are not self-executing: rather, they include an undertaking to take appropriate steps (ECHR Art 1, CRPD Art 4).

As this is only a secondary aspect of the thesis (and the suggestions made could be used by lawyers who do not consider themselves to be strategic litigators), a brief account only is given of "strategic litigation". An important aspect is its aim to secure recognition of a principle that can be used by others. However, there is more to it. An analysis of its use in academic and policy papers, and also websites, suggested several features.[27] The first point is its legacy component: ie, seeking long-term legal impacts that will benefit others: importantly, however, this might come not from winning a case but from raising the profile of an issue to promote an outcome in another way (such as changes in policy). Secondly, it is a method of advocacy, meaning that it can be adapted to various purposes, including raising the profile of other rights, not just those directly in issue in a case. For example, as discussed in chapter 3, part of the success was persuaded the ECtHR to adopt a new approach to where the burden of proof lay in light of social science evidence; this can be used outside the context of education. Thirdly, it seeks effects beyond the court system, ie practical effects. Fourthly, it makes use of various methods of litigating, including litigation before international bodies: indeed, they might be ideal, given the potential of their decisions to impact transnationally.

So understood, strategic litigation can often be interchanged with other descriptors,[28] such as "cause lawyering",[29] "public interest litigation",[30] or "impact litigation".[31]

C. Outlining the Relevant Treaty Texts and Potential for Argument

This section provides an overview of the texts considered in more detail in the thesis, introducing them and outlining some of the arguments available for using the CRPD as

[27] See Michael Ramsden and Kris Gledhill "Defining Strategic Litigation" (2019) 38 (4) Civil Justice Quarterly 407-426.

[28] But see Michael Ramsden and Kris Gledhill "Defining Strategic Litigation" (2019) 38 (4) Civil Justice Quarterly 407-426, at 417-424, where we suggest differences between the various terms. See also Kris van der Pas, 'Conceptualising strategic litigation' (2021) 11(6(S)) Oñati Socio-Legal Series 116-145 at 127-130, where similar conclusions are reached.

[29] Defined by Sheingold and Sharat as "using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or, indeed, legal": see Stuart Scheingold and Austin Sharat *Something to Believe In: Politics, Professionalism and Cause Lawyering* (Stanford University Press, Stanford, 2004), p3.

[30] Defined by Chen and Cummings as "a broad and contested range of activities that includes legal advocacy focused on the representation of individuals shut out of the private market for legal services as well as lawyering to advance the collective interests of defined groups or constituencies (both liberal and conservative)": see Alan Chen and Scott Cummings *Public Interest Lawyering: A Contemporary Perspective* (Walters Kluwer, New York, 2014) p7.

[31] Defined by White as "litigation oriented toward the change of institutional norms or practices, rather than the resolution of individual problems": see Lucie White "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1987) 16 NYU Review of Law & Social Change 535, fn 1.

an interpretive tool for the ECHR, illustrating the point that those interested in the meaning of the latter should become familiar with the CRPD.

1. Preambles and Purposes: and Taking Rights Seriously[32]

The preamble to the UDHR, the starting point for current human rights standards, references the purpose of having such standards. This should be read together with various provisions of the UN Charter in order to get a full picture, since the preamble to the UDHR includes reference to the UN Charter and its reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women" and the determination to secure progress and "the promotion of universal respect for and observance of human rights and fundamental freedoms" (in the context of referencing recent "barbarous acts").[33]

The UN Charter is a treaty,[34] the preamble to which notes that the states aim to prevent future war, secure respect for international law, and also "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women" and "promote social progress and better standards of life in larger freedom". The purposes of the UN are set out in Article 1 of the Charter: as with the preamble, they refer to securing peace, but also (with emphasis added):

> 3. *To achieve international cooperation* in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*.[35]

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[32] This thesis does not engage particularly with jurisprudential theories: however, Dworkin's "Taking Rights Seriously" (Ronald Dworkin *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977) – setting out his "political philosophy, which is an anti-utilitarian restatement of liberalism, in which he gives pride of place to every person's right to equal concern and respect with every other" (Neil MacCormick *Legal Right and Social Democracy* (Oxford, OUP, 1984) at 146, in chapter 7, "Taking the 'Rights Thesis' Seriously", a critique of Dworkin's Taking Rights Seriously) – does chime well with the arguments presented, including the centrality of equality.

[33] For a full account, including reference to suggestions that there be a bill of rights in the UN Charter, see Johannes Morsink *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia, 1999); see also Mary Ann Glendon *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Right* (Random House, New York, 2001), which charts the drafting of the Declaration.

[34] United Nations, Charter of the United Nations, 1 UNTS XVI (signed 26 June 1945, entered into force 24 October 1945); available at https://www.un.org/en/about-us/un-charter/full-text (last accessed 5 December 2023).

[35] See also Article 55, which requires, inter alia, that the UN promote non-discriminatory realisation of human rights. See also Article 13, which sets that one of the functions of the General Assembly is to take action in securing rights, and Article 62, which requires the Economic and Social Council to operate also in

Similarly, the Statute of the Council of Europe[36] is a treaty, Article 1 of which also sets the aim of acting in common to maintain and realise human rights.

Consistently with these, the UDHR preamble references the importance of recognising "the inherent dignity and of the equal and inalienable rights of all members of the human family", that being "the foundation of freedom, justice and peace in the world" and the protection of human rights by law being necessary to avoid "rebellion against tyranny and oppression". Both the ECHR and the ICCPR reference the UDHR.[37]

The indications of purpose in the CRPD emphasise these non-discriminatory obligations. Its Article 1 notes its purpose to "promote, protect and ensure" that all persons with disabilities can enjoy "the full and equal enjoyment of all human rights and fundamental freedoms" and promote "respect for their inherent dignity".[38] The context is notice in its preamble that, notwithstanding various standards – including the ICCPR – that should ensure non-discrimination, "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" (preamble para (k)).[39] Accordingly, "a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil,

the area. States are obliged to cooperate with the UN by reason of Article 2(2) (which applies to all obligations, with sovereignty over domestic affairs retained by Article 2(7)) and Article 56.

[36] Statute of the Council of Europe, ETS No 001 (opened for signature 5 May 1949, entered into force 3 August 1949).

[37] The preamble to the ECHR is express on this: it references that the UDHR "aims at securing the universal and effective recognition and observance of the rights therein declared" and indicates that the members of the Council of Europe involved in the ECHR are "resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". The ICCPR sets out the obligation under the UN Charter to secure rights and references the need to create the conditions for rights to be secured "in accordance with the" UDHR.

[38] The reference to "dignity" is noted: in Chapter 6, where I set out the ongoing research agenda for after this PhD thesis, one area is to understand what is meant by dignity and how the CRPD assists that, being a human rights treaty which contains various references to dignity. These were noted by the Grand Chamber of the ECtHR in *Bouyid v Belgium* (App no 23380/09, 28 September 2015) at para [45]. It was held that the action of police officer in slapping juveniles in detention was a breach of Article 3 of the ECHR (as degrading treatment) because it was not necessary and so diminished their dignity. However, there was no effort to define dignity or even conceptualise it. The parameters of the debate on the meaning of dignity are set out in Kay Wilson *Mental Health Law: Abolish or Reform?* (Oxford, OUP, 2021), particularly chapter 4, "The 'Interpretive Compass' of the CRPD: The Theory of Dignity".

[39] It is also noted (preamble para (t)) that most persons with disabilities live in poverty.

political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries" (preamble (para (y)).

This purposive language in the various human rights documents is supported by obligations as to implementation, which conveys the idea that rights should be taken seriously. Whilst the UDHR is a declaration of rights and so does not have language as to its implementation, it does set out in its Article 8 that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". In short, there is a right to have these rights implemented in law so as to provide remedies for their breach. Article 1 of the ECHR is the "Obligation to respect human rights", and it references the obligation to "secure" rights. The Article 13 "[r]ight to an effective remedy" sets out that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The ICCPR sets out a duty "to respect and to ensure" rights in its Article 2(1), supplemented by the obligation in Article 2(2) "to take the necessary steps … to adopt such legislative or other measures as may be necessary" in relation to rights not already in place. The right to a remedy is in Article 2(3), the elements of which are (a) to provide "an effective remedy" for any violation of rights, including when by officials, (b) the encouragement to develop judicial remedies, but the requirement to have claims for remedies determined by a competent authority, and (c) the need to enforce remedies.

Article 4 of the CRPD, headed "General obligations", includes the general undertaking in Article 4(1) to ensure that rights are enjoyed. In addition:

> (i) Article 4(2) repeats the obligation in the ICESCR to use the maximum of available resources relating to achieve progressively economic, social and cultural rights, including international cooperation;[40]

[40] When the UDHR was translated into treaties, a distinction was drawn between civil and political rights (into the ICCPR) and economic, social and cultural rights (the ICESCR): the central distinction was that rights in the latter category had to be achieved progressively, though each state had to act both "individually and through international assistance and co-operation" and use "the maximum of its available resources"; reference was also made to using "all appropriate means, including particularly the adoption of legislative measures". This approach, set out in Art 2(1) of the ICESCR is expanded upon in the third General Comment from the Committee on Economic, Social and Cultural Rights: progressive realisation is "a necessary flexibility device" because immediate realisation is not necessarily realistic, but "imposes an obligation to move as expeditiously and effectively as possible towards that goal": Committee on Economic, Social and

(ii) Article 4(4) allows states to go further than required, and

(iii) Article 4(5) makes the point that all parts of federal states are covered.

The CRPD makes a significant contribution to understanding what implementation involves.[41] The reference in Article 2(2) of the ICCPR to "legislative or other measures as may be necessary" leaves open for development what may be required. Instances are given in the CRPD, including in its Article 31-33: these can be seen as instances of a specialist treaty giving examples of what is required to put rights into effect.

Article 31, headed "Statistics and data collection", is clear about its purpose. Article 31(1) sets out an undertaking by states "to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention"; Article 31(2) notes that the information obtained "shall be … used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights"; and Article 31(3) requires that material be disseminated, including in accessible ways, which in turn means that they can be used by civil sector bodies seeking to influence policy so that rights are implemented.[42]

Likewise, Article 32, about "International cooperation", is built on recognising, in the words of Article 32(1), "the importance of international cooperation and its promotion, in support of national efforts" to implement the CRPD; examples given are "capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices", "cooperation in research and access to scientific and technical knowledge" and "technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies", with an overarching need to ensure that international cooperation and development is "inclusive of and accessible to persons with disabilities". This more extensive treatment of cooperation builds significantly upon the undertaking in Article 2(1) of the ICESCR to act both as a state and "through international assistance and co-operation, especially economic and technical", though it is to be noted that the obligation

Cultural Rights, General Comment No 3: The nature of States parties' obligations, 1990, E/1991/23, para 9.

[41] There is no specific reference to right to a remedy (save that Article 16(5) refers to the investigation and prosecution of abusers): but the rights set out in the ICCPR, including to a remedy, apply in any event and in conjunction with the right to non-discrimination.

[42] There are also obligations to make sure that the process of data collection is rights-compliant.

set out in the CRPD is not limited to ESC rights as the examples given would clearly extend to many civil and political rights.

Article 33, relating to "National implementation and monitoring", is also something that is designed to secure the better implementation of rights. It requires coordination and monitoring processes. Article 33(1) has a requirement and a suggestion. The requirement is "one or more focal points within government for matters relating to the implementation of" the CRPD; the suggestion – via an obligation to give it "due consideration" – is for "a coordination mechanism within government to facilitate related action in different sectors and at different levels". Separately, 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, which under Article 33(3) should involve civil society, especially organisations representing persons with disabilities.[43]

In addition, there are several references to the importance of training (or, as Article 32(2) has it, capacity-building), which can be seen to support implementation through education. This is set out in three more general obligations and then in several more particular settings. Accordingly, as part of the general obligation in Article 4(1) to "ensure and promote" rights being enjoyed without any disability-based discrimination, one of the specific undertakings is:

> … (i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.

Similarly, as part of the obligation to raise awareness of the rights and contributions of persons with disabilities and to combat prejudice and stereotypes, Article 8(2) sets out the one example is:

> … (d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

[43] It is also noted in Article 33(2) that states should "take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights", which seems to be a reference to what are also known as the Paris Principles and require, inter alia, guarantees as to their independence and also the pluralism of their members: available at https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris.

Likewise, one of the examples given in Article 9(2) in relation to the need to ensure accessibility in society is "… (c) To provide training for stakeholders on accessibility issues facing persons with disabilities".

As to more specific requirements, references to training – both of those who work with persons with disabilities, but also of persons with disabilities and their families - are found in various other Articles:

(i) Article 13 - Access to justice: "(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff".

(ii) Article 20 - Personal mobility: "effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities" include "(c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities".

(iii) Article 24 – Education: Article 24's obligation to ensure inclusive education includes, under Article 24(4) the requirement to "train professionals and staff who work at all levels of education" about "disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities".

(iv) Article 25 – Health: A requirement, in the context of recognising the equal "enjoyment of the highest attainable standard of health", to "take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation" includes requiring the same quality of care, resting on "free and informed consent". One identified method for this is "raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care".

(v) Article 26 - Habilitation and rehabilitation: Under Article 26(2) is the promotion of "initial and continuing training for professionals and staff working in habilitation and rehabilitation services".

(vi) Article 27 - Work and employment: The equal right to work requires the state, under Article 27(1), to take "appropriate steps, including through legislation, to, inter alia" … "(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training".

(vii) Article 28 - Adequate standard of living and social protection: States are required under Article 28(2) to "safeguard and promote" the equal right to social protection, with steps to take including providing "assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care".

(viii) Article 30 - Participation in cultural life, recreation, leisure and sport: Article 30(5) requires, as part of securing equal participation, "appropriate measures" for various steps, including having "disability-specific sporting and recreational activities", part of which is the equal provision of "appropriate instruction, training and resources".

(ix) Article 32 - International cooperation: One of the examples of international cooperation mentioned in Article 32(1) is "… (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices".

What is the relevance of this to someone exploring taking a case to the ECtHR under the ECHR or the Human Rights Committee of the UN under the ICCPR? In simple terms, the more detailed provisions in the CRPD illustrate features that might ground a claim for a breach of the more general treaties. For example, suppose that a lawyer is seeking to formulate a claim that rights have been breached by a private body in the context of an inadequate protective regime. Various rights under the ECHR and the ICCPR involve a duty to protect, expressly so in relation to the right to life (Articles 2(1) of the ECHR and 6(1) of the ICCPR). If, say, there is a death in a health and safety setting where the state could have imposed regulations designed to save life but did not do so because it was not aware of the extent of the problem, and that lack of awareness arose from a lack of statistics, reference to Article 31 of the CRPD is helpful because it illustrates that the international community accepts that data collection is necessary to help formulate policies that secure rights.

Another illustration might be a death caused when a state official uses lethal force when de-escalation tactics should have been used, and might well have been had they been trained in their use. The ECHR and the ICCPR do not make reference to training, but the CRPD make numerous references to it, providing the building blocks for an argument that officials who interact with the public need to be trained appropriately, in turn allowing evidence of a lack of training to support an argument that there has been a breach.[44]

2. Illustrations of Other Rights

Those familiar with the International Bill of Rights or the ECHR will note that the references above to training in the CRPD are in the context of some rights that feature in those overarching statements of rights (eg, education, health) but also some that do not feature elsewhere (eg, personal mobility). Similarly, the provisions of Articles 31-33 of the CRPD noted above set out expressly obligations on states as part of the duty to implement

[44] See as an example *V v Czech Republic* App no 26074/18, ECtHR (5th Section), 7 December 2023, [2024] MHLR 113, in which part of the reasoning for finding a breach of the right to life when a patient in a psychiatric hospital died whilst being restrained by police who had used taser on him was that the legal fravmework was inadequate because of the lack of instruction to police on de-escalation techniques.

that do not feature in the wider treaties. This illustrates an important feature of the CRPD: given the context of its aim, referenced in its preamble, to secure existing rights for persons with disabilities rather than to create new rights, the rights set out in the CRPD that do not feature expressly elsewhere should be understood as illustrations of existing rights, including rights that are implicit in what is explicitly stated.

Expanding upon this in a more systematic way, the following table collates how the civil and political rights set out in the UDHR were transferred into the ICCPR and the ECHR[45] and how they have been reproduced or reformulated or expanded in the CRPD.

UDHR 1948	**ICCPR 1966**	**ECHR 1950**	**CRPD 2006**
Art 1 - Freedom and equality in dignity and rights.			Art 1 – Purpose - to promote full and equal enjoyment of rights and respect for dignity; partial definition of persons with disabilities.

[45] Note that the right to education is included in the ECHR but not the ICCPR, instead being found in the ICESCR. The CRPD includes ESC rights as well, but only civil and political rights are used for this illustration, given the centrality of the ECHR in this thesis.

Art 2 - Entitlement to rights without discrimination. (See also Article 7)	Art 2 – Undertakings to (1) ensure rights without discrimination, (2) to adopt necessary legislative and other measures to secure rights, (3) to ensure effective remedy for breach. Art 3 - Equality between men and women. Art 24 - Protection for children Art 26 - Right to non-discrimination	Art 1 Obligation to respect human rights - Obligation to secure rights. Art 13 – right to effective remedy Art 14 - non-discrimination in rights Protocol 12, Art 1 - More general right to non-discrimination	Art 2 – Definitions - Includes definition of discrimination (and reasonable accommodation) Art 4 - General obligations - Obligation to secure rights. Art 3 - General principles Art 5 - Equality and non-discrimination Art 6 - Women with disabilities - Recognition of intersectionality and need to take action. Art 7 - Children with disabilities Art 8 - Awareness-raising Art 9 – Accessibility Art 31 - Statistics and data collection Art 32 - International cooperation Art 33 - National implementation and monitoring
Art 3 (pt 1) - Right to life, liberty and the security of person.	Art 6 - Right to life	Art 2 Right to life	Art 10 - Right to life Art 11 - Situations of risk and humanitarian emergencies – right to equal protection and assistance
Art 3 (pt 2) - Right to life, liberty and the security of person.	Art 9 - Right to liberty and security of person Art 10 - Provisions as to separation of prisoners and need for rehabilitation	Art 5 Right to liberty and security	Art 14 - Liberty and security of the person – Equal right and prohibition of disability-based detention
Art 4 - No slavery or slave trade.	Art 8 - No slavery, servitude, forced labour.	Art 4 Prohibition of slavery and forced labour	Art 27 - Work and employment - Art 27(2) requires protection from slavery, servitude and forced labour.

Art 5 - No torture or cruel, inhuman or degrading treatment	Art 7 - No torture or cruel, inhuman or degrading treatment (including non-consensual medical or scientific experimentation) Art 10 - Those in detention to be treated with humanity and respect for inherent dignity.	Art 3 Prohibition of torture – No torture or inhuman or degrading treatment	Art 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment Art 16 - Freedom from exploitation, violence and abuse Art 17 - Protecting the integrity of the person Note also Art 25, requiring consent to medical treatment.
Art 6 - Right to recognition as a person.	Art 16 - Right to recognition as a person.		Art 12 - Equal recognition before the law - including need for supported decision-making
Art 7 - Equality and equal protection, and no incitement to discrimination.	Art 26 - Equality and equal protection. Art 20 - No incitement to discrimination (or violence)	Protocol 12, Art 1 – Equality and equal protection	Art 4 - General obligations - Obligation to secure rights (and see also Art 8 awareness-raising) Art 3 - General principles Art 5 - Equality and non-discrimination Art 6 - Women with disabilities - Recognition of intersectionality and need to take action. Art 7 - Children with disabilities
Art 8 - Right to an effective remedy for breaches of rights.	Art 2(3) - Right to an effective remedy (and encouragement to have it as a judicial remedy)	Art 13 Right to an effective remedy	
Art 9 - No arbitrary arrest, detention or exile. (supplementing Art 3)	Art 9 - Protection against arbitrary detention (and various supplemental rights)	Art 5 Right to liberty and security - (Also various supplemental rights)	Art 14 - Liberty and security of the person - Equal protection of liberty, including that disability not basis for detention; and equal access to other protections. Art 19 - Living independently and being included in the community

Art 10 - Fair and public trial.	Art 14- (1) Fair and public trial (with limitations on public); (3) Various minimum standards for criminal trials; (4) Special approach to juveniles; (5) Right of appeal in criminal matters; (6) Compensation for miscarriage of justice; (7) No double jeopardy	Art 6 Right to a fair trial - (1) Fair and public trial (with limitations on public); (3) Various minimum standards for criminal trials. Protocol 7, Art 2 - Right of appeal in criminal matters Protocol 7, Art 3 - Compensation for miscarriage of justice. Protocol 7, Art 4 - No double jeopardy.	Art 13 - Access to justice - Equal access to justice, with procedural accommodations and training of relevant staff.
Art 11(1) - Presumption of innocence in criminal matters	Art 14(2) - Presumption of Innocence in criminal matters	Art 6(2) Presumption of innocence in criminal matters	
Art 15(2) - Non-retrospectivity in criminal matters.	Art 15 - Non-retrospectivity in criminal matters.	Art 7 No punishment without law - Non-retrospectivity in criminal matters.	
Art 12 - No arbitrary interference with privacy, family, home or correspondence; no attacks on honour and reputation; law to protect.	Art 17 - No arbitrary interference with privacy, family, home or correspondence; no attacks on honour and reputation; law to protect.	Art 8 Right to respect for family and private life - Right to respect for privacy, family, home or correspondence; no unlawful or disproportionate interference.	Art 22 - Respect for privacy - No arbitrary interference with privacy, family, home or correspondence; no attacks on honour and reputation; law to protect; equal protection for personal, health and rehabilitation information. (See also Art 19.)
Art 13(1) - Right to freedom of movement and choice of residence in state	Art 12(1) and (3) - Right to freedom of movement and choice of residence in state, subject to proportionate limitations	Protocol 4 Art 2 Freedom of movement - (1) Right to freedom of movement and choice of residence in state, subject to proportionate limitations.	Art 18(1) - Liberty of movement and nationality - Right to freedom of movement and choice of residence in state Art 19 - Living independently and being included in the community Art 20 - Personal mobility - Right to personal mobility and independence
Art 13(2) - Right to leave any country and return to own.	Art 12(2) - Right to leave any country, subject to proportionate limitations; no arbitrary restriction on entering own country.	Protocol 4, Art 2(2) - Right to leave any country, subject to proportionate limitations. Protocol 4, Art 3(2) - Right to enter own country	Art 18(1) - Right to leave any country and no arbitrary deprivation of right to enter own country.

	Art 13 - Due process before expulsion of foreigner	Protocol 4 Art 3 Prohibition of expulsion of nationals - (1) No expulsion of nationals. Protocol 4 Art 4 Prohibition of collective expulsion of aliens - Collective expulsion of aliens is prohibited. Protocol 7 Art 1 Procedural safeguards relating to expulsion of aliens	
Art 14 - Right to seek asylum			
Art 15 - Right to nationality and to change it	Art 24(2) - Child to be registered and have name. Art 24(3) - Right to nationality		Art 18 - Includes right to a nationality, and for children to have nationality (and to know and be cared for by parents), and not be deprived of nationality arbitrarily or on basis of disability.
Art 16 - Right of men and women to marry and found family, so long as consensual; and protection of family.	Art 23 - Right of men and women to marry and found family, so long as consensual; and protection of family; and equality within and after marriage, and protection of children on dissolution.	Art 12 Right to marry - Right of men and women to marry and found family	Art 23 - Respect for home and the family - Removal of discrimination relating to marriage, family, parenthood and relationships, including right to marry and found family if consensual, right to decide on number and spacing of children, access to family planning information, right to retain fertility; equal rights re guardianship, wardship, trusteeship, adoption of children; right to appropriate assistance in child rearing; children with disabilities have equal rights to family life, requiring information and support, and no separation except on basis of best interests and process with judicial review, and with no separation based on disability of child or parent; and placement with family on any removal.

Art 17 - Right to property, with no arbitrary deprivation.		Protocol 1, Art 1 Protection of property - Right to possessions, with any deprivation in public interest, though states can also control use of property in public interest and secure taxes and penalties.	Art 12(5) - Equal rights to inherit and control property and access financial services
Art 18 - Right to freedom of thought, conscience and religion and to manifestation of beliefs.	Art 18 - Right to freedom of thought, conscience and religion; manifestation of beliefs may be subject to proportionate restriction to protect other interests.	Art 9 Freedom of thought, conscience and religion - Right to freedom of thought, conscience and religion; manifestation of beliefs may be subject to proportionate restriction to protect other interests.	
Art 19 - Right to freedom of opinion and expression, including to seek, receive and impart	Art 19 - Right to freedom of opinion and expression, including to seek, receive and impart, though latter (but not holding view) may be subject to proportionate restrictions for other interests. Art 20 - Propaganda for war to be prohibited, as shall advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.	Art 10 Freedom of expression - Right to freedom of opinion and expression, including to seek, receive and impart, though latter (but not holding view) may be subject to proportionate restrictions for other interests.	Art 21 - Freedom of expression and opinion, and access to information - Right to equal freedom of opinion and expression, including to seek, receive and impart information, and using accessible forms of communication (and so linking with the Article 9 right to accessibility, which includes information and communications).
Art 20 - Right to peaceful assembly and association (though no compulsion to belong to an association).	Art 21 - Right to peaceful assembly with proportionate restrictions to protect other interests. Art 22 - Right to association, subject to proportionate restrictions to protect other interests	Art 11 Freedom of assembly and association - Right to peaceful assembly and association, subject to proportionate restrictions to protect other interests.	

Art 21 - Right to take part in government, to access public service, and support for democracy based on universal suffrage and secret vote.	Art 25 - Right to take part in government, to access public service, and support for democracy based on universal suffrage and secret vote.	Protocol 1 Art 3 Right to free elections - Elections by secret vote and to ensure free expression of opinion of people.	Art 29 - Participation in political and public life - Equal right to participate in political and public life, including through accessible voting, support and allowing assistance if requested; and encouraging participation in public affairs, including through NGOs and political parties.
Art 26 – Right to Education	[Not in the ICCPR: but Article 13 of the ICESCR provides a right to education]	Protocol 1 Art 2 Right to Education	Art 24 – Education – right to inclusive education

In Chapter 6, setting the research agenda, there is more detailed commentary on the potential implications of some of these CRPD standards for litigation before the bodies responsible for implementing the ECHR and ICCPR. Here, and building upon the account given before the Table of the steps to be taken to secure rights, the focus is on the rights that feature in Chapters 3-5. These are outlined in Part D below and involve the rights to education, to bodily integrity and to liberty, all in the context of non-discrimination. These can be seen to illustrate the general point made in this thesis as to the value of those involved in strategic litigation using the ECHR and ICCPR to consider the CRPD as an aid to interpretation.

As noted, the value of specialist treaties such as the CRPD includes the opportunity for states to agree on language that explains further what might be implicit in other treaties or arises from those other treaties by way of interpretation. This can include definitions; it can also include examples of more detailed provisions. Indeed, this process can be seen by comparing the UDHR with the ECHR or ICCPR, both of which state they seek to put the UDHR into operation. The UDHR is written at a high level, setting out principles, and also including a general limitation clause in its Article 29 that explains that rights can be limited for various good reasons. In both the ECHR and the ICCPR, the implications of the general limiting clause are set out in more detail in relation to rights that can be limited; but there are also instances of more rules being set out. For example, the components of a fair trial in a criminal setting, namely the minimum standards to be met, are set out in Article 6(3) of the ECHR and Article 14(3) of the ICCPR; and various procedural rights required to support the right to liberty are set out in Articles 5(2)-(5) of the ECHR and 9(2)-(5) of the ICCPR.

Following that approach, the CRPD builds further, as can be illustrated, first with education.

(a) Education

Article 26 is a fairly detailed provision of the UDHR. Article 26(1) sets out that "Everyone has the right to education"; reference is made to elementary, secondary, tertiary and technical and professional education; and there is reference to it being free at the elementary stage. Article 26(3) refers to the right of parents to choose the kind of education for their children. In addition, Article 26(2) sets out that education's purposes are "the full development of the human personality", "the strengthening of respect for human rights and fundamental freedoms", the promotion of "understanding, tolerance and friendship among all nations, racial or religious groups", and supporting the UN's peace work.

A stripped-down version of the right is found in Protocol 1 to the ECHR, Article 2 of which has two sentences, the first setting out that "No person shall be denied the right to education". The second sentence requires the state to "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

There is no right to education in the ICCPR: rather, it is to be found in the ICESCR (and hence subject to the requirement for gradual realisation, albeit using the maximum of available resources[46]). It is much more detailed than the ECHR language. Article 13(1) of the ICESCR restates elements of Article 26 of the UDHR, namely that education is a "right of everyone", and that its purposes are "the full development of the human personality and the sense of its dignity", strengthening "respect for human rights and fundamental freedoms", allowing "all persons to participate effectively in a free society", promoting "understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups", and assisting the UN to maintain peace. There is also recognition in Article 13(3) of the right of parents and guardians to establish schools based on their religious or moral views, though with state regulation of "minimum educational

[46] See fn 40 above, summarising Article 2(1) of the ICESCR.

standards"; and Article 13(4) expressly provides for private schools, provided they comply with the principles of Article 13(1) and minimum standards.

Article 13(2) sets out in more detail the approach that should be adopted to the different stages of education:

> (i) primary – compulsory and free, and more to be done for those who had not completed the whole period to have "[f]undamental education";
> (ii) secondary ("including technical and vocational") – "generally available and accessible to all by every appropriate means", particularly by progressively making it free;
> (iii) higher – "equally accessible to all, on the basis of capacity, by every appropriate means", particularly by progressively making it free;

Another point made in Article 13(2)(e) is that there is also a need to develop schools, "an adequate fellowship system" and the ongoing improvement of "the material conditions of teaching staff".

Naturally, these provisions are to be read with the non-discrimination provisions set out in the International Bill of Rights and Article 14 of the ECHR. In this context, Article 24(1) of the CRPD opens with the indication that states "recognize the right of persons with disabilities to education", which makes express that the right of "everyone" (in the UDHR and ICESCR) and the converse in the ECHR that "no-one" shall be denied it covers those with disabilities. There is also an indication of the purposes of education in that context, with reference to the "full development of human potential and sense of dignity and self-worth", "strengthening of respect for human rights, fundamental freedoms and human diversity", developing "personality, talents and creativity, as well as … mental and physical abilities, to their fullest potential" and enabling effective participation in society. These points are no doubt implicit in the existing right to education, as set out in the ICESCR, combined with non-discrimination: but Article 24(3) of the CRPD builds on this need to build "life and social development skills" by referencing such things as the need to facilitate learning of alternative modes of communication, skills in orientation and mobility, peer support, and mentoring. As such, the CRPD provides solid examples of more detailed approaches that support the more generally-stated approach in the ICESCR.

Much more significantly, however, is that Article 24(1) expands upon the indication that persons with disabilities have the right to education by setting out that the non-

discriminatory and equal right to education requires "an inclusive education system at all levels", so making clear that any system of education for those with disabilities that involves special schools or other forms of segregated learning are not suitable means of ensuring equality in education. Article 24(2) builds on this, setting out expressly that there can be no exclusion from "the general education system" or "free and compulsory education, or from secondary education" on disability grounds, but rather there should be "an inclusive, quality and free primary education and secondary education" system in local communities, and that "[r]easonable accommodation", "the support required" and "individualized support measures" exist, and do so in the context of "environments that maximize academic and social development, consistent with the goal of full inclusion".

Clearly, this is a valuable statement for anyone who seeks to argue before the European Court of Human Rights that failing to secure inclusive education is discriminatory against persons with disabilities who are excluded from mainstream schools. At the very least, it raises the issue of whether the language of the ECHR should be interpreted in the same way as the states parties to the CRPD – which, as noted above, is all but one Council of Europe state – have accepted is the way to secure equality of education.

Two other parts of the CRPD are worth noting. First, it makes reference to tertiary and life-long learning: neither are mentioned in the ECHR and "higher" but not "life-long" education feature in the ICESCR, and so this may help to clarify what is covered by "education". Article 24(5) requires equal access to "general tertiary education, vocational training, adult education and lifelong learning" (and Article 24(1) also references the need for life long learning); the need to provide "reasonable accommodation" is again referenced.

Secondly, Article 24(4) sets out that securing the right to inclusive education requires "appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille", and more generally to "train professionals and staff who work at all levels of education" on "disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities". This is another instance of the CRPD providing guidance on steps to be taken to secure the implementation of rights, which can be used in litigation as evidence of deficiencies that might support a claimed breach. Combined with the Article 31 obligation as to data

collection, gaps in the recruitment or training of staff may provide a solid argument for failures to implement a right. In ECHR terms, this would amount also to a breach its Article 1 obligation to secure rights.

Another more general point arises from this outline of the contents of Article 24, namely the references made to "reasonable accommodation". This is relevant to the understanding of discrimination, which is mentioned but not defined in the UDHR or the first-tier treaties to which it gave rise.

(b) Equality and Non-Discrimination

The powerful opening words of the UDHR, in its Article 1, are that "All human beings are born free and equal in dignity and rights". Its Article 2 sets out the entitlement of all to the rights set out "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[47] Moreover, Article 7 provides for equality before the law, the equal protection of the law "without any discrimination" and the entitlement to "equal protection against any discrimination … and against any incitement to such discrimination".[48]

The ECHR initially incorporated only Article 2 of the UDHR. Its Article 1 – "Obligation to respect human rights" – requires states to "secure to everyone within their jurisdiction the rights and freedoms" set out in the ECHR; and its Article 14 – "Prohibition of discrimination" requires that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The ICCPR went further, fully implementing the UDHR:

> (i) Article 2(1) set out the undertaking by parties "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without

[47] There is also express reference to the need to avoid distinction based on the status of the country or territory: this references the de-colonising role of the UN (on which see Chapter XI of the UN Charter).
[48] Fair trial rights, set out below, also require equality before judicial bodies; and there are references to equality in relation to electoral and public service matters, also noted below.

distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

(ii) Article 3 requires states "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant".

(iii) Article 26 provides for equality before the law and the equal protection of the law, requiring that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

(iv) Article 20(2) provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"; war propaganda must also be prohibited (Article 20(1)). The context is that Article 20 comes after the qualified right to freedom of expression in Article 19, and so presents an example of a limit on that.

(v) Article 16(1) indicates that the right to marry and found a family shall be "without any limitation due to race, nationality or religion", and also that men and women have "equal rights as to marriage, during marriage and at its dissolution".

(vi) Article 24(1) provides that children have the right to such protective measures as are relevant to being a minor "without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth".

The Twelfth Protocol to the ECHR[49] has now added further protection from discrimination. Its Article 1(1) requires that "[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", and Article 1(2) precludes discrimination by any public authority on any of these grounds.

Although not mentioned expressly in the ICCPR or ECHR, "disability" is a status or ground on which discrimination is not possible.[50] The CRPD, given its aim of ensuring that there is equal enjoyment of rights by those with impairments, has an understandable focus on non-discrimination. It also provides a definition of what this means: adding definitions is another role, along with providing illustrations, that specialist treaties such as the CRPD can achieve.

[49] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 177, Opened for signature 4 November 2000, Entered into force 1 April 2005.

[50] In *McIntyre v UK* Appn no 29046/95, Commission decision of 21 October 1998, which concerned whether a mobility impaired student had been discriminated against in relation to the lack of access to the school library and science rooms, the UK did not accept that "disability" was within "other status" for the purposes of Article 14 of the ECHR. The Commission, rather than setting out the obvious, declined to rule on this because it found the application inadmissible on other grounds. However, in *Glor v Switzerland* Appn 13444/04, ECtHR (1st Section), 30 April 2009, which related to a difference in treatment based on diabetes, the Court noted at para 80 that "As the list of grounds of distinction given in Article 14 is not exhaustive …, there is no doubt that the scope of this provision includes discrimination based on disability".

The following elements are present:

(i) The first paragraph of "Article 1 – Purpose" states that "[t]he purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". The preamble also highlights various other matters relevant to this purpose, including the problems of intersectionality: hence, para (q) refers to the additional risks to women and girls with disabilities and para (s) to the need for a gender perspective in relevant policies; para (r) refers to the need to reflect the rights of children and the Convention on the Rights of the Child;[51] and para (p) refers to the problems of all other forms of intersectionality, namely persons with disabilities who are also discriminated against "on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status", and para (t) refers to the high rate of poverty amongst people with disabilities, which could be seen as a form of socio-economic status (essentially meaning that most people with disabilities may well face intersectional discrimination because of one of the impacts of the failure to secure the rights of persons with disabilities).[52]

(ii) There is also assistance with defining who is covered. The second paragraph of Article 1 indicates that "[p]ersons 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". This language clearly does not exclude other situations, and is supplemented at a conceptual level by the indication in paragraph (e) of 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". This is language that encapsulates what is termed the social model of disability, namely the idea that it is not something inherent in the person (which is referred to as the medical model, which identifies the person with the impairment), but rather places the focus on the way that society responds.[53]

[51] Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); its Article 23 requires steps to support children with disabilities.

[52] See also Article 3 of the CRPD – "General principles" – which lists "[r]espect for inherent dignity, individual autonomy … and independence", "[n]on-discrimination", "[f]ull and effective participation and inclusion", "[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity", "[e]quality of opportunity", "[a]ccessibility", "[e]quality between men and women" and respect for children, including their "evolving capacities" and "right … to preserve their identities".

[53] Retief and Letšosa describe several models, including the religious model (ie disability as an act of God), the medical model (disability as a form of disease), the charity model, the social model and the human rights model: Marno Retief and Rantoa Letšosa "Models of disability: A brief overview", (2018) 74(1) HTS Teologiese Studies/Theological Studies 74, a4738; https://doi.org/10.4102/hts.v74i1.4738. In its General Comment No 6, the CRPD Committee expresses concern at the ongoing use of the "charity and/or medical models despite the incompatibility of those models with the Convention"; it requires use of the human rights model: CRPD Committee, General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, paras [2]-[3]; see also paras [8]-[11].

(iii) The general duty as to the implementation of the CRPD includes in Article 4(1) includes ensuring that rights are enjoyed "without discrimination of any kind on the basis of disability".[54] Various specifics are listed, including taking "all appropriate legislative, administrative and other measures" to secure rights, abolish any "laws, regulations, customs and practices that constitute discrimination against persons with disabilities", covering both public and private sector; including a disability-rights perspective in relevant policies and programmes; promoting universal design (ie the design of goods, services, facilities etc so that they can be used by all);[55] encouraging the development of assistive devices and processes and providing accessible information about them; and training professionals and staff on rights. Article 4(3) requires the active involvement of people with disabilities as relevant legislation and policies are developed and implemented.

(iv) The Article 4 obligation on the state to secure non-discrimination creates an implicit corresponding right not to be discriminated against. Article 5 – "Equality and non-discrimination" - sets out that right expressly, though together with several obligations on states, such that Articles 4 and 5 really run together. Article 5(1) requires that states "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", leading to obligations in Articles 5(2) and (3) respectively to "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds" and "take all appropriate steps to ensure that reasonable accommodation is provided". In addition, it is made clear that no discrimination arises from "[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities".

(v) Awareness raising is also required, by virtue of Article 8. Given that the definition of disability noted above is the social model and hence rests on attitudes and interactions, awareness-raising can be seen as an important aspect of countering negative attitudes. Article 8(1) requires steps to "raise awareness", "foster respect for the rights and dignity of persons with disabilities", "combat stereotypes, prejudices and harmful practices" and "promote awareness of the capabilities and contributions of persons with disabilities". Article 8(2) gives examples of what should be done, including suitable "public awareness campaigns" and encouraging suitable portrayals in the media, securing respect within the education system and "[p]romoting awareness-training programmes".

(vi) There is also recognition of specific intersectional problems for women and girls and also children. Article 6 indicates that states recognise the "multiple discrimination" faced by women and girls and take "all appropriate measures" to secure their rights. Article 7 requires "all necessary

[54] Article 4(2) repeats the obligation in the ICESCR to use the maximum of available resources relating to achieve progressively economic, social and cultural rights, including international cooperation; and Article 4(4) allows states to go further than required, and Article 4(5) makes the point that all parts of federal states are covered.

[55] Article 2 of the CRPD includes the following definition:'"'Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."

measures" to secure equal rights for children with disabilities, with their "best interests" as "a primary consideration".[56]

(vii) In addition, the CRPD provides a definition of discrimination, which does not appear in the overarching ICCPR or the ECHR. Part of Article 2, the definitions article of the CRPD, is the indication that ""Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation". This makes clear that discrimination includes that which is direct (ie provisions with a discriminatory purpose), indirect (ie apparently neutral provisions which have a discriminatory effect) and failing to make reasonable adjustments.[57] References to direct and indirect discrimination being covered have featured in previous non-discrimination treaties, namely ICERD and CEDAW;[58] but the inclusion of denial of reasonable accommodation is new. It is also defined in Article 2: ""Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

The obvious point to make is that, from the perspective of someone arguing any case before the ECtHR or the Human Rights Committee of the UN that involves discrimination, or before any domestic body where there is an interpretive role for these instances of international law, there is a raft of hard law obligations in the CRPD that illustrate what is implicit in the more general provisions. This applies obviously if the discrimination has

[56] See also the provisions in Article 23, the right to family, as to the protection of children: Article 23(1) refers to the retention of fertility by persons with disabilities, including children; Article 23(2) requires equal rights and responsibilities in relation to such matters as "guardianship, wardship, trusteeship, adoption of children or similar institutions", with the "best interests of the child" being "paramount", and provision being made for "appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities"; Article 23(3) requires "equal rights … to family life" for children with disabilities, which has to include "early and comprehensive information, services and support" to those children and their families so as to secure the right and "prevent concealment, abandonment, neglect and segregation of children with disabilities". Articles 23(4) and (5) make further provision in this regard: separation requires a finding that it is in the best interests of the child, which must be open to judicial review, and must not be "on the basis of a disability of either the child or one or both of the parents"; and there must be "every effort to provide alternative care within the wider family, and failing that, within the community in a family setting". Clearly, this is to be read in the context of other provisions against institutionalisation, including Articles 14 and 19.

[57] In its General Comment No 6, the CRPD Committee identifies four main forms of discrimination that must be prohibited, namely direct discrimination (ie different treatment arising from disability, even if that is not the motive), indirect discrimination (where a neutral law, policy or practice has a disproportionate impact on those with a disability), denial of reasonable accommodation, and harassment: CRPD Committee, General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 28 April 2018, para [18].

[58] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) and Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981). They refer, respectively, to "purpose and effect" and "effect and purpose".

been on the basis of disability: but it might also be applicable to other forms of discrimination. For example, genetic predispositions to health conditions might be more prominent in a particular ethnicity: a failure to take that into account in health policy could be seen as failure to offer reasonable accommodation for people of that ethnicity, which should inform the understanding of that being discrimination under ICERD (perhaps as an extension of indirect discrimination, namely a failure to make certain provision not having a neutral impact).

(c) Bodily Integrity

In addition to life and liberty, bodily integrity is secured by rights not to be subject to ill-treatment. Accordingly, the requirement of Article 5 of the UDHR that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is replicated as the first sentence of Article 7 of the ICCPR: the second sentence of Article 7 gives as an example that "no one shall be subjected without his free consent to medical or scientific experimentation". Article 3 of the ECHR also replicates Article 5 of the UDHR but without the word "cruel".[59]

The CRPD has several relevant provisions that build on this language:

> (i) Article 15(1) repeats the substance of Article 7 of the ICCPR, including the reference to non-consensual medical or scientific experiments. Article 15(2) requires "all effective legislative, administrative, judicial or other measures" to secure equal protection against such problematic treatment.
>
> (ii) Article 16 is headed "Freedom from exploitation, violence and abuse". Its various provisions have several aims: preventing breaches of the right, but also, accepting that breaches will recur, remedial provisions aimed at rehabilitating victims and securing accountability from perpetrators. Accordingly:
>
> > (a) Article 16(1) requires protection from "all forms of exploitation, violence and abuse, including their gender-based aspects", including inside and outside the home, involving "all appropriate legislative, administrative, social, educational and other measures". Article 16(2) supplements this, requiring for persons with disabilities themselves but also families and caregivers "appropriate forms of gender- and age-sensitive assistance and support",

[59] There is the specialist treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987). Note also Article 10 of the ICCPR, which requires that detainees be treated with respect for human dignity.

"including … information and education on how to avoid, recognize and report instances of exploitation, violence and abuse" and ensuring that "protection services are age-, gender- and disability-sensitive". Article 16(3) requires the independent monitoring of "all facilities and programmes" for persons with disabilities.[60]

(b) In addition, Article 16(4) requires the promotion of the "physical, cognitive and psychological recovery, rehabilitation and social reintegration" of victims, in settings fostering "the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs"; and

(c) Article 16(5) requires that unlawful conduct be "identified, investigated and, where appropriate, prosecuted", through "effective legislation and policies, including women- and child-focused legislation and policies".

(iii) Article 17, headed "Protecting the integrity of the person" sets out the "right to respect for his or her physical and mental integrity on an equal basis with others".

These CRPD provisions have two obvious values. First, there is the indication of the characterisation of problematic conduct that should be considered to breach rights. This may have the objection that the ICCPR and ECHR can only cover conduct that is covered by their terms. However, it has been established in case law from the European Court of Human Rights that there is a sliding scale of infringements of bodily integrity, with fatal or near fatal assaults being covered by the right to life, serious assaults by the right not to be tortured or subject to inhuman or degrading treatment, and other breaches of integrity covered by the right to privacy (Article 8 of the ECHR and Article 17 of the ICCPR).[61] As such, it is more a question of which provision of the ECHR or ICCPR is in play rather than whether the situation is covered.

Secondly, the detailed indications in Article 16 as to what should happen to seek to prevent and to respond to problematic treatment illustrate what is implicit in the duties to protect and respond to breaches that are found in the more general treaties, combined with their indications of the right to an effective remedy.

(d) Liberty

[60] Note also the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 4 February 2003, entered into force 22 June 2006), which requires monitoring of places of detention as a preventive step in relation to risks of ill-treatment.

[61] See Kris Gledhill, The Right to Life, Liberty and Security of Person in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds), *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017), 418.

The right to liberty and security of person aspects of Article 3 of the UDHR is supplemented by the indication in Article 9 that "[n]o one shall be subjected to arbitrary arrest, detention or exile". Article 9(1) of the ICCPR replicates and supplements these UDHR provisions, setting out that:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

The ECHR, as with the right to life, uses a list approach. Its Article 5(1) sets out, first, that "[e]veryone has the right to liberty and security of person", the same language as the ICCPR, and then provides:

> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

As with the right to life situation, the question of whether the "arbitrariness" standard in the ICCPR differs from the list approach in the ECHR turns on whether there are situations not in the list that would not be arbitrary detention. It is also to be noted that both the ICCPR and ECHR require a procedure set out in law, and also that the ECHR requires that any detention be "lawful" (which precludes arbitrariness).[62]

[62] See, for example, *Winterwerp v Netherlands* Appn no 6301/73, 24 October 1979, (1979-80) 2 EHRR 387, para 45: "… the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any

Both the ECHR and ICCPR then have equivalent supplemental provisions:

> (i) reasons for arrest have to be given, and any charge has to be detailed;[63]
>
> (ii) those detained on criminal charges have to be brought "promptly" before someone exercising judicial power, for bail to be considered, and trials have to be "within a reasonable time" or release.[64]
>
> (iii) there are habeas corpus rights, ie to have courts rule on the lawfulness of detention and order release if it is not lawful.[65]
>
> (v) compensation is required for detention in breach of rights.[66]

The ICCPR also provides in its Article 10(1) that anyone detained "shall be treated with humanity and with respect for the inherent dignity of the human person"; there is no equivalent in the ECHR, which means it is necessary to look to the provisions relating to inhuman and degrading treatment, noted below. In addition, Article 10(2) requires the separation of convicted and remand prisoners, and of remand juveniles from adults; and Article 10(3) requires rehabilitative regimes in prison, with juveniles separated from adults and given age and status appropriate treatment.

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measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary. …" This reference to the lack of arbitrariness in the process has been extended to the need for a lack of arbitrary detention: see *Witold Litwa v Poland* Appn 26629/95, ECtHR (Second Section), 4 April 2000, [2000] MHLR 226, (2001) 33 EHRR 53, para [78] – "… a necessary element of the "lawfulness" of the detention within the meaning of Art 5§1(e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances". The procedural aspect is also still evident: see *HL v United Kingdom* Appn 45508/99, ECtHR (4th Section), 5 October 2004, [2004] MHLR 236, (2005) 40 EHRR 32, para [115] – "… it must be established that the detention was in conformity with the essential objective of Article 5 § 1 of the Convention, which is to prevent individuals being deprived of their liberty in an arbitrary fashion … This objective, and the broader condition that detention be "in accordance with a procedure prescribed by law", require the existence in domestic law of adequate legal protections and "fair and proper procedures"" (citing *Winterwerp*).

[63] In Article 9(2) of the ICCPR requires reasons "at the time of arrest" and being "promptly informed" of charges; Article 5(2) of the ECHR uses "promptly" as the standard for both reasons for arrest and being told of any charges, and adds that the reasons shall be "in a language which he understands".

[64] There are some differences as to bail: Article 9(3) of the ICCPR refers to "trial within a reasonable time or to release", adding that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement". Of course, any detention is subject to the requirement in Article 9(1) that it not be arbitrary. The phraseology in Article 5(3) of the ECHR states that the entitlement is to "trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial". Note also that Article 10(2) of the ICCPR requires that accused juveniles be adjudicated "as speedily as possible".

[65] Article 9(4) of the ICCPR refers to courts making such decisions "without delay" and Article 5(4) of the ECHR refers to them being decided "speedily".

[66] Articles 9(5) of the ICCPR and 5(5) of the ECHR both refer to "enforceable right to compensation".

The CRPD's Article 14(1)(a) requires states to ensure that those with disabilities "[e]njoy the right to liberty and security of person" "on an equal basis with others", and Article 14(1)(b) adds that this equal right includes not losing liberty "unlawfully or arbitrarily", that any detention "is in conformity with the law", and that "the existence of a disability shall in no case justify a deprivation of liberty". Article 14(2) of the CRPD requires that any person with a disability who is deprived of liberty is provided equally with the guarantees of international human rights law and "be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation".

One way of interpreting these provisions in the CRPD is that they read the provisions of Articles 9(1)-(5) the ICCPR into the CRPD with the added requirement that they be applied equally to persons with disabilities; provide the reminder that such equal application must involve reasonable accommodation; and also set out that a consequence of this is that there cannot be detention based on disability. If so, this is of value for those who seek to argue that there should be limitations on the circumstances in which detention should be permitted.

(e) Summary

This relatively brief account, looking only at the text of the relevant documents, illustrates that there is scope for more detailed consideration of the potential for using the CRPD to encourage the interpretation of the other standards. Expanding on this, in particular by looking at how the relevant texts have been interpreted by relevant expert bodies such as the ECtHR and the CRPD Committee, including where they have considered each other's views, is the purpose of this thesis.

D. The Structure of the Articles/Chapters in the Thesis

The structure that has been adopted is as follows: there is one chapter on a broad theme and three on more specific areas of law. The three specific areas have been chosen for a reason, namely that they represent points on a continuum. The first involves an area where ECHR and CRPD standards have been assimilated, with the meaning ascribed to the former now largely reflecting the latter despite the ECHR standards having historically

been interpreted in a way that was inconsistent with the CRPD (before the CRPD was drafted). The second involves an area where there has not been assimilation but where there is no apparent tension, such that the ECtHR might well develop its approach in a CRPD-consistent manner if the need arises. (The ECtHR has the power to give some advisory opinions but it will not do so if that might be seen to pre-judge an issue that might come to it in an adversarial setting: see *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*.[67] As such, its jurisprudence develops on the ad hoc basis which is familiar to common law courts.) The third article is on an area where there is clear tension between the views of the CRPD Committee and those expressed to date by the ECtHR.

Expanding on this brief description to present an overview:

> (i) Chapter 2, which involves the broader theme, explores the jurisprudential basis for one human rights body (the ECtHR) being able to cite other documents or sources of international law, including the CRPD Committee. In the context of litigation, lawyers need to be aware of the basis for being able to cite material from a treaty other than the one which creates the body to which they are making submissions and over which that body has interpretive jurisdiction. It rests on theories of interpretation developed by the ECtHR, including that the terms of the ECHR represent a living instrument, such that developments in attitudes and in other texts can indicate the need for a changed interpretation; but also such matters as the ability of other standards in more specialised treaties or developed by more specialised bodies to illustrate the meaning of a broader treaty such as the ECHR.
>
> (ii) Chapter 3, the first of three chapters on substantive rights, has a focus on the right to education and in particular what the right to education together with the need for non-discrimination means in practice. In short, chapter 3 involves an article which traces how the ECHR used to be interpreted so as to allow segregated education in special schools on the basis that this was the best way to secure education for children with disabilities, but now is interpreted to require inclusive education with reasonable accommodation offered. This has involved the CRPD definition of discrimination being adopted by the ECtHR and the CRPD concept of educational equality requiring inclusive education being accepted as the safest way to secure the right to education for those with disabilities. This represents the standards in the CRPD being brought across to inform the modern meaning of the ECHR.
>
> (iii) Chapter 4 is on the topic of human trafficking. In particular, it reproduces the following published article:

[67] *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*, Request No A47-2021-001, ECtHR (Grand Chamber), 15 September 2021.

Kris Gledhill, The Committee on the Rights of Persons with Disabilities and the Fight Against Human Trafficking, (2021) 8 Journal of International and Comparative Law 249-282.

This article sets out how the CRPD Committee has gone further than the jurisprudence of the ECtHR, but explains how there is no apparent tension and so advocates bringing cases before the ECtHR for victims of trafficking who have disabilities should be willing to make use of the standards based on the CRPD text and how it has been interpreted.

(iv) Chapter 5 is on the topic of detention based on mental health grounds. This is a more controversial area in that detention in psychiatric hospitals is common, seems expressly authorised by Article 5(1)(e) of the ECHR, and the ECtHR has thus far indicated that this is so, albeit with various pre-requisites which are both procedural and substantive. In contrast, the CRPD Committee is clear that its text prohibits any form of non-consensual incarceration in a psychiatric hospital. As this is a somewhat crowded area in that many articles and texts have addressed the issue of who is right, the approach adopted here has been to produce an article which seeks to dial down the noise and present what a CRPD-compliant mental health law would look like. The reason for this is that much of the writing to date has focused on two provisions of the CRPD, namely its Article 14 (which precludes – or has been interpreted by the CRPD Committee to preclude - detention based on disability) and its Article 12 (which precludes – has been so interpreted by the CRPD Committee – acting in the best interests of people with constrained mental capacity and instead requires acting in accordance with that person's preferences). In the historical context of detention and forced treatment on mental health grounds, these interpretations are understandably challenging. The article suggests that it is necessary to look at how the CRPD fits together, that many more articles of the CRPD are seen to be relevant, and that therefore the discussion should not just focus on Articles 12 and 14. In the strategic litigation context, it is this broader picture that should be presented to seek to persuade the ECtHR to develop its case law.

The thesis then concludes with its Chapter 6, which presents a further research agenda. In essence, this chapter suggests that the methodology adopted in this thesis is one that can be used in a variety of other settings, including broader topics such as that covered in Chapter 2 and in other substantive areas such as those covered in Chapters 3 to 5. As a PhD has its word limits and time limits, the purpose of Chapter 6 is to illustrate that more can be done.

E. Other Introductory Matters

It is usual for a PhD thesis to include an account of the research methodology adopted. For this thesis, this can be done in a brief form because the methodology used is the dominant one used in law, at least in the common law legal tradition, often referred to as

"black letter" or "doctrinal" research.[68] Bartie refers to legal scholars "situating themselves within the judge's reasoning process, as well as acting as an external organiser or housekeeper of reason", seeking to "find the inner logic and principles required to guide practitioners, indoctrinate students in the tradition and move law forward".[69] Rubin contends that "the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decision-makers".[70] This, he suggests, is necessarily normative because "the subject of legal scholarship is law, and law is a mechanism through which our society operationalizes its normative choices", which are "a matter of conscious and continual debate".[71]

Since the aim behind this thesis is expressly one of suggesting potential litigation aimed at changing the law, the doctrinal methodology, with its focus on judicial or quasi-judicial decision-makers, is appropriate. The central method used is an analysis of collected documents produced by an expert body established under a UN human rights treaty to be a focal point for illuminating the meaning of that treaty. This is in the context of international law, and more particularly a sub-set, international human rights law. In addition to the texts of treaties, outlined above, the sources of international law (according to article 38 of the statute of the International Court of Justice) are

[68] Becher noted, based on interviews of an admittedly small sample, that "There are two main divisions among academic lawyers …: those who see law as a value-free science are to be contrasted with those who see it as open to external criticism. The first, 'black letter' lawyers, have a very different set of values and beliefs from the contextualists, who seek to analyse legal phenomena in social terms": Tony Becher "Towards a definition of disciplinary cultures", (1981) 6:2 Studies in Higher Education, 109-122, at 117. It is suggested that this is half correct in that there can be a focus on the propriety of a law in light of the internal logic of the law or a focus on the propriety of the outcome from a particular philosophical or political standpoint: but when carrying out the former, legal researchers can accept that the entire edifice is built on a framework that reveals preferences and so is not neutral. Indeed, underlying this thesis is a preference for human rights norms, which as the preambles discussed above make clear have an instrumental purpose aimed at securing equity. In this way, there is an overlap between the two groups referenced by Becher. This is not a criticism of Becher, as he was reporting the perceptions of the lawyers interviewed: it is a comment on those perceptions.

[69] Susan Bartie "The Lingering Core of Legal Scholarship: (2010) 30 Legal Stud 345, 348. She notes the challenges to "the intellectual coherence of law as an academic discipline" (at 345), concluding that "the core is afforded considerable status" (at p369), even though "treating judicial reasoning as a form of scientific endeavour and treating rules and principles in a positivist manner has been subject to much critique and is clearly out of vogue" (at 349). The core that remains, which she suggests "are captured by the concept of 'doctrinalism' or 'black letter law'", have several traits, including "focusing on legal principle (largely that generated by courts but also the legislature); basing argument and prescription on a normative premise which is not unpacked or explained; reacting to events comprising of changes to the law by judges or legislatures; and looking for deficiencies in legal principles, suggesting ways to improve them or clarifying the law so that judges or legislatures can better understand their development" (at 350). This is a good account of what this thesis seeks to follow, save that there is a focus on international law, whereas Bartie's account is centred on domestic law.

[70] Edward L Rubin "The Practice and Discourse of Legal Scholarship" (1988) 86 Mich L Rev 1835, 1847.

[71] Edward L Rubin "The Practice and Discourse of Legal Scholarship" (1988) 86 Mich L Rev 1835, 1853; he accepts that this means there is a connection with political science, though emphasising that the latter is different because it is descriptive.

international custom (if that is a state practice based on *opinio iuris*, ie the belief that it is required by law) and the general principles of international law, which might be identified by an expert body; and also judicial decisions and the writings of suitably qualified experts.

The views of a body of experts appointed to a UN body in order to give advice to states on the requirements of international human rights law seem within the final part of the definition. The CRPD Committee's views are expressed primarily in Concluding Observations made to individual states and General Comments addressed to all states. These arise from its central function of examining the regular reports made to it by the states that are parties to the CRPD.[72] The research process involved cataloguing and analysing this material, and then exploring the implications of this analysis, particularly in the context of its implications for another body of human rights, that set out by the ECtHR in its role as the interpretive body for the ECHR.

The system of international human rights law has an important feature. It involves – in effect - several different legal regimes in the sense that each treaty has an expert body whose function is to oversee its implementation. This, naturally, will include resolving disputes about the meaning of the phraseology used in the particular treaty. Accordingly, whilst the text of the various treaties emanates from the same body – the General Assembly of the United Nations – the interpretation of each of the core human rights treaties is in the hand of a different body: there is no unifying appellate body. Indeed, to the contrary, there are the additional treaties and their interpreting bodies in the second strand of the genealogical chart.

As already noted, there are parallel treaties that all aim to give effect to rights sourced in the UDHR, but which use different phrases and have different authoritative bodies to interpret them. The legal research question is how these interact, the context being another point made towards the outset of this chapter that all but one member of the Council of Europe and so bound by the ECHR is also a party to the CRPD and so bound by it. Importantly in this context, the CRPD does not claim to provide new rights, but at the same time has been described as producing a paradigm shift, in the sense

[72] See Articles 34-36 of the CRPD; other, less numerous, views are expressed on individual complaints it has adjudicated under the Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006 2518 UNTS 283 (opened for signature 13 December 2006, entered into force 3 May 2008).

understood in science of a new way of thinking about a field, because of its reinterpretation of existing rights.[73] Hence the central question: do those CRPD-based reinterpretations affect how the ECHR is understood? Do the parallel treaties lead to a unified understanding or is the content of a particular right different according to whether it is being interpreted by one body or another? As is discussed in Chapter 2, an important approach to human rights interpretation is that treaty texts should be treated as living instruments whose meaning can change over time: hence differences can narrow and be removed.

If that is to happen, the relevant expert bodies will have to decide to make that move. As is evident from the indication that it is the CRPD and its Committee that is said to have established the new way of looking at rights, the focus is whether the ECtHR will move in its interpretation of the ECHR if there is at present an inconsistency. This in turn means that a theme running through is the development of arguments that can be put that arise out of the CRPD text and the CRPD Committee's interpretation of it. The focus is therefore on primary sources: this is not to devalue secondary sources, but the data set of primary materials is significant. As of December 2022, the CRPD Committee had issued 7 General Comments and 105 Concluding Observations, all of which are public documents.[74] Concluding Observations tend to be 10-15 pages long (so giving a database of 1000+ pages of legal observation); the General Comments add another 150 or so pages.[75] Clearly, not all Articles of or principles arising under the CRPD have been subject to a General Comment. However, where there are repeated mentions made in Concluding Observations, that suggests what will emerge in a future General Comment: or, given the living instrument approach, repeated mentions after a General Comment has been issued suggest what will feature in a revised General Comment.

This process of reviewing material outputs of the CRPD Committee had been used by me in advance of commencing the PhD – which, as recorded at the outset of this

[73] Kristin Booth Glen "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 Columbia Human Rights Law Review 93. In its Concluding Observations to Slovakia, it was said that "The Committee welcomes the recognition of the paradigm shift required to realize the rights of persons with disabilities in the State party as well as the efforts to adopt a human rights-based approach to disability." Committee on the Rights of Persons with Disabilities, Concluding Observations to Slovakia, UN Doc CRPD/C/SVK/CO/1, 17 May 2016, para 4.

[74] An eighth General Comment was published and labelled "advanced and unedited", as were two additional Concluding Observations. As these were not final, they have not been included. Naturally, for any published piece, it will have used what had been published at the time it was written.

[75] Moreover, comparisons are often made with ECtHR jurisprudence, which is often significant: again, this leaves the focus on primary materials for practical reasons.

chapter, is limited to work done after supervision has commenced. This earlier work included:

> (i) A chapter in an OUP text on the CRPD involved a preliminary review of the Committee's Concluding Observations in order to illustrate the obligations arising under Article 37 (which requires states to cooperate with the Committee and obliges the Committee to seek to enhance national capabilities);[76]
> (ii) a co-authored article on the obligations of conference organisers towards persons with psycho-social disabilities includes a similar review of the rights to accessibility, education and communication of ideas;[77]
> (iii) an article in the journal Educational Philosophy and Theory also draws on this review of the obligations of universities to secure rights, including to tertiary education;[78] and
> (iv) an article based on a conference presentation that examined the role of the CRPD in terms of the right to legal education and how law schools and the legal profession should respond.[79]

Finally, a return to the research methodology. A more nuanced version of legal research has been developed by Arthurs and expanded by Chynoweth:[80] it plots legal research on a horizontal axis, which moves from (on the left) interdisciplinary research (ie research about law) to (on the right) doctrinal research (ie research in law). It adds a vertical axis representing the constituency to which the research is aimed, with pure research aimed at the academic community below the horizontal axis and applied research aimed at the profession above the axis. This then present four quadrants, with legal theory research (ie jurisprudence) in the bottom right (being doctrinal and pure), fundamental research (ie law and economics, critical legal studies) in the bottom left (being interdisciplinary and pure). The quadrants above the line are, on the right, expository research (doctrinal and applied, involving black letter law treatises and articles) and, on the left, law reform research (socio-legal and law in context research, being interdisciplinary and applied).

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[76] Kris Gledhill "Article 37: Cooperation between States Parties and the Committee" in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (Eds) *The Convention on the Rights of Persons with Disabilities: A Commentary* (OUP, Oxford, 2018), ch 38.
[77] Sarah Gordon and Kris Gledhill "What Makes a Conference Good from a Service User Perspective" [2017] International Journal of Mental Health and Capacity Law 109.
[78] Kris Gledhill "Tertiary institutions and human rights obligations", (2019) 51 (12) Educational Philosophy and Theory, 1252-1261 DOI: 10.1080/00131857.2018.1564277
[79] Kris Gledhill "The Convention on the Rights of Persons with Disabilities and Legal Education" *Kilaw Journal*, *Special Supplement No 4* (Part 1), (2019) 109-160.
[80] Paul Chynoweth, Legal Research, in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell, Oxford, 2008), Ch 3. It builds on HW Arthurs (1983) *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*, Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa (which I have not been able to locate).

This thesis is towards the applied level of the vertical axis, being aimed at strategic litigation: but it straddles the left and the right, being both black letter law that is designed to assist law reform because law reform is also achievable by persuading a human rights body, under its living instrument approach, to move the law.

Introduction to Chapter 2

As noted in the Introduction, Chapter 1, the focus of the thesis is the relationship between the ECHR/ECtHR and the CRPD/CRPD Committee. Since they are separate treaties, albeit with a common inheritance in the form of the UDHR, they amount to distinct legal regimes. Hence, a first question to be answered is how is it legitimate for the one to influence the other, or in the context of strategic litigation for lawyers representing applicants to the ECtHR to cite CRPD standards? (The question arises in a vice-versa situation as well, but the focus is on the newer CRPD standards influencing the existing ECHR standards.)

The search, therefore, is for rules of interpretation and what they permit. There is a relevant treaty in the form of the Vienna Convention on the Law of Treaties 1969 (discussed in Chapter 2), but the ECtHR has also developed a series of rules. The article which forms Chapter 2 examines the main ECtHR rules on the interpretation of the ECHR, including the circumstances where it is necessary to look outside the text of the ECHR and the documents that explain its purpose. It is suggested that there is a need to look outside the text for various reasons, which form two broad categories: one category is explanations for the existence of the ECHR (which may be seen as upstream from the text), and the other category is the search for tools that allow the text to be implemented (which may be seen as downstream).

The first category involves seeking underpinnings and purposes, including higher-level philosophical matters that support the human rights regime and higher-level concepts to which it gives effect. An example of the latter noted in Chapter 2 is "human dignity": the opening words of the UDHR reference that all people are equal in dignity and rights, and this concept is referred to in Article 10 of the ICCPR (relating to the treatment of detainees), but not in the ECHR. However, it has been identified by the ECtHR as a concept that assists interpretation, albeit that no definition of dignity is offered. Since it is part of several rights in the CRPD, this raises the question of the use that can be made of the CRPD in illustrating or pointing to a suitable definition.

Similarly, identified purposes of the human rights regime discussed in Chapter 2 have included the securing of modern, democratic traditions, including tolerance and broad-

mindedness, and the universality of rights: as noted in Chapter 1, the CRPD is aimed at securing full participation in society for persons with disabilities, which supports the integration of its approach into the existing understanding of the purpose of human rights.

As to the mechanics for assisting interpretation, the ECtHR refers to such matters – identified in Chapter 2 - as the living instrument approach to interpretation, one aspect of which involves identifying a consensus that standards have changed so that what might previously have been acceptable is no longer (eg, the use of corporal punishment); the need to seek consistency with other human rights instruments (on the basis they are a cohesive whole with a common heritage); and the recognition that universal respect for human rights does not override all domestic traditions and differences, such that balances between competing rights and interests may be secured by different methods and at different points on a spectrum in different jurisdictions. The latter has given rise to the concept of a margin of appreciation, where the role of the ECtHR is one of assessing whether an outcome in a given state is within that margin.

What the Chapter then seeks to do, having identified the main rules of interpretation adopted by the ECtHR, is to examine the rationales given when use has been made of the CRPD as a relevant external source of interpretation. Also examined is the outcome of this use of the CRPD. Here there has been a range, from assimilation to rejection (ie the ECHR has been interpreted as requiring interpretation that is consistent with the CRPD in some settings, but in other settings there has been rejection of consistency with the CRPD). There has been dispute within the ECtHR, at least in the context of voting rights, as to the speed with which the ECtHR should move. This provides a back-drop for a discussion as to which approach is correct, the conclusion of which is that there is a need for further questions to be answered before there can be a resolution of this dispute.

The Validity of Using the Convention on the Rights of Persons with Disabilities to Interpret the European Convention on Human Rights

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Abstract: This article analyses the views of the European Court of Human Rights (ECtHR) as to why it is proper for it to use material arising under the Convention on the Rights of Persons with Disabilities 2006 (CRPD) in its role of interpreting the European Convention of Human Rights (ECHR). It sets out both the general principles of interpretation of the ECHR, including such doctrines as the "living instrument" approach to interpretation and the higher-level concepts such as the purpose of the ECHR to support such necessary features of a constitutional democracy as pluralism and tolerance; and how the CRPD has featured. The latter has involved overlapping instances of illustrations of the need for consistency between human rights treaties, the existence of a consensus amongst parties to the ECHR, the living instrument approach, and also the value of a specialist treaty in illustrating what is implicit in a more general treaty. At the same time, there have been findings that the ECHR should be interpreted consistently with the CRPD (which has occurred in relation to various areas, including the understanding of discrimination and the need for inclusive education) and instances where it should be accepted that there are differences (which has occurred in relation to mental health detention and voting). There is a need to explore further what are the principles that should govern when consistency is or is not the outcome.

I. INTRODUCTION

This article focuses on the use by the European Court of Human Rights (ECtHR) of other treaties, and in particular the Convention on the Rights of Persons with Disabilities 2006

(CRPD),[81] in its interpretation of the European Convention on Human Rights (ECHR).[82] This has involved some tension as to the correct approach to take, as illustrated by *Caamaño Valle v Spain*.[83] Here, a majority of the ECtHR found no breach of the right to vote[84] from legislation allowing a judge to preclude a person with mental disorder from voting. In short, it was found acceptable under the ECHR to remove the vote from some people based on an impairment. Dissenting, Judge Lemmens found the legislation disproportionate and discriminatory, and in breach of Article 29 of the CRPD, which requires equal voting rights for persons with disabilities, including by making processes accessible and allowing assistance. His view was that, particularly as most Council of Europe countries have ratified the CRPD, the ECHR should be interpreted to reflect that consensus. The majority accepted that other treaties could be taken into account and harmony sought between them, but also determined that the ECtHR had no authority to ensure respect for other international obligations and was not bound by the interpretations of other international bodies of other international treaties. The majority and the dissentient both found the CRPD relevant but differed as to how far to follow it.

Some structural matters – which seemed particularly relevant to the majority's reluctance simply to apply the CRPD standard – should be noted at the outset. The ECtHR is a Council of Europe body, with the role to "ensure the observance of the engagements undertaken" by parties to the ECHR.[85] The ECHR was developed pursuant to Article 3 of the Council's founding Statute,[86] which requires member states to "accept the principles of the rule of law", that all persons have human rights, and to collaborate to achieve the Council's aims. These aims are set out in Article 1 as including agreements and actions to maintain and further realise human rights, as well as "safeguarding and realising the ideals and

[81] Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 December 2006, entered into force 3 May 2008) (CRPD). Article 1 notes 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". Supplementing this non-exhaustive definition is a more conceptual outline in the preamble, paragraph (e) of which records 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".

[82] Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221, CETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

[83] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100.

[84] More fully, the right to "free elections at reasonable intervals" so as to allow the "free expression of the opinion of the people in the choice of the legislature": Article 3 of Protocol 1, CETS 9 (opened for signature 20 March 1952, entered into force 18 May 1954).

[85] It does this by ruling on litigation taken by one state against another under ECHR Article 33, or by victims who have not got redress in domestic proceedings, who can complain under ECHR Article 34.

[86] Statute of the Council of Europe, 87 UNTS 103, ETS 1 (opened for signature 5 May 1949, entered into force 3 August 1949).

principles which are their common heritage and facilitating their economic and social progress". Article 1 also expressly preserves states working with the United Nations (UN) and other international bodies: this is important because it must have been understood that the UN's role included developing human rights standards.

The UN's human rights system involves processes arising under both the UN Charter[87] and the "treaty bodies" established by each of its main human rights treaties.[88] Under the CRPD, the expert body[89] is the Committee on the Rights of Persons with Disabilities (the CRPD Committee). As with other UN Treaty Bodies, it receives reports on the progress made by states and issues comments to states individually and general comments to states generally; states may also allow, under the Optional Protocol to the CRPD,[90] residents to complain that their CRPD rights have been breached, and the investigation of systemic problems.

The CRPD requires action against "discrimination on the basis of disability",[91] defined in its Article 2 as any "distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying" equality in rights, "including denial of reasonable accommodation", namely "modification and adjustments not imposing a disproportionate or undue burden" to secure that equal outcome. Accordingly, discrimination arises from something which secures a lesser outcome for those with impairments (direct discrimination), has that effect despite apparent neutrality (indirect discrimination), or fails to provide reasonable modifications for needs.[92] Whilst the CRPD does not purport to create new rights but rather to clarify them in context,[93] it has been

[87] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI.
[88] See Natalie Baird, The International Human Rights Framework in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds), *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017), ch 4; see also Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015), pp60-82. Both the Charter-based processes and the treaty-based ones can be found at https://www.ohchr.org/en/ohchr_homepage.
[89] Under Article 34 of the CRPD it shall consist of "twelve experts" when the Convention enters into force and an additional six once there are sixty ratifications: they have to be "of high moral standing and recognized competence and experience" in the area.
[90] Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006 2518 UNTS 283 (opened for signature 13 December 2006, entered into force 3 May 2008).
[91] For detailed accounts, see Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (Eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, Cham, Switzerland, 2017) and Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (Eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP, Oxford, 2018).
[92] In its General Comment No 6, the CRPD Committee identifies harassment as a fourth form of harassment: CRPD Committee, General Comment No 6 (2018) on equality and non-discrimination, para 18.
[93] See High Commissioner for Human Rights, the Department of Economic and Social Affairs of the UN, and the Inter-Parliamentary Union, *A Handbook for Parliamentarians on the Convention, From Exclusion to Equality, Realizing the rights of persons with disabilities*, p5 (available at

characterised as representing a new paradigm,[94] which "provides disability advocates and scholars with a powerful tool to hold states accountable" because it "re-states existing rights and then creates incidental rights to ensure that existing rights are realized".[95]

As such, its indication of what rights mean for persons with disabilities may differ from what was previously understood. For example, its Article 29 requires support in voting for those whose impairments undermine their ability to vote. Indeed, Spanish law since 2018 allows all adults to vote "whatever means of support" might be required.[96] Despite this change to be CRPD-compliant, Spain argued in *Caamaño Valle* that the previous law was ECHR-compliant: the majority agreed, the dissentient disagreed. All agreed the CRPD was relevant.

In the remainder of this article, the basis for the CRPD's relevance to interpretation of the ECHR is explored: Part II outlines the ECtHR's approach to interpretation, Part III examines its reasons for the CRPD being relevant, and Part IV discusses the approach.

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS RULES OF INTERPRETATION, INCLUDING THE USE OF OTHER SOURCES

Rules of interpretation for treaties are found in the Vienna Convention on the Law of Treaties 1969, which references the "ordinary meaning" of terms in their context and in

https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities.html, last accessed 14 October 2023).

[94] Kristin Booth Glen, in "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 Columbia Human Rights Law Review 93, refers to the move away from treating people with impaired capacity as objects of charity to be looked after under guardianship in their best interests towards being supported to make their own decisions as an "emerging paradigm" which "challenges our perceptions and our understanding of when, how, and even *if* the state may intervene in a person's life", moving society from its comfort zone to a new way of thinking (at 98). The CRPD Committee has accepted this: see, for example, the positive comment to Slovakia that it "welcomes the recognition of the paradigm shift required to realize the rights of persons with disabilities in the State party as well as the efforts to adopt a human rights-based approach to disability" (Concluding Observations on Slovakia UN Doc CRPD/C/SVK/CO/1 (17 May 2016), para 4); Belgium was criticised as "there is no sign that a paradigm shift has occurred following ratification of the Convention, whereby persons with disabilities are recognized as basic rights holders taking part in decisions affecting them and asserting their rights in society" (Concluding Observations on Belgium UN Doc CRPD/C/BEL/CO/1 (28 October 2014), para 17); and the failure of Cyprus to move to supported decision-making (required by Article 12 of the CRPD) needed "adequate human, technical and financial resources to support the transformation from the present paradigm to a new paradigm that is in line with the Convention …" (Concluding Observations on Cyprus UN Doc CRPD/C/CYP/CO/1 (8 May 2017), para 34(b)).

[95] Paul Harpur "Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities" (2012) 27:1 Disability and Society 1, 2.

[96] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, para 18.

light of the "object and purpose" of the treaty, but also "relevant rules of international law"[97] and any practice showing how parties agree the treaty should be interpreted; reference can also be made to supplementary means of interpretation, such as preparatory work done on the treaty, to resolve ambiguous or obscure meanings or correct an outcome which is "manifestly absurd or unreasonable".[98] The Grand Chamber of the ECtHR in *Demir and Baykara v Turkey* noted that these provided the primary rules of interpretation for the ECHR.[99] They have been supplemented.

Several rules of interpretation developed in early cases reflected the ECHR's purpose. One is the avoidance of narrowly interpreting the text: in *Wemhoff v Germany*, a grammatically possible outcome was rejected as "inconceivable" and a "restrictive interpretation" rejected as it would reduce the obligations on states.[100] This has developed into a need to ensure that rights are "practical and effective", which includes an expansive interpretation to identify implicit rights: see *Airey v Ireland*.[101]

Another rule rejects the "originalist approach", namely fixing the meaning as that intended by the original drafters, leaving any changes to formal updating of the treaty's language: instead, there is a "living instrument" approach.[102] This was referenced first in *Tyrer v*

[97] Article 38(1) of the Statute of the International Court of Justice, which is appended to the UN Charter (and is available at https://www.icj-cij.org/en/statute (last accessed 14 October 2023)), reflecting its role as the UN's "principal judicial organ" (UN Charter, Art 92), identifies the sources of international law as "(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[98] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), Articles 31 and 32; if a treaty is in more than one language, Article 33 indicates that they are presumed to mean the same, but the best reconciliation of different meanings is required.

[99] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 65.

[100] *Wemhoff v Germany* App no 2122/64, European Court of Human Rights, 27 June 1968, (1979) 1 EHRR 55: "trial within a reasonable time or … release pending trial" in Article 5(3) does not to exclude the former if the person is released (Law paras 4 and 5); and trial in "a reasonable time" under Article 6(1) extended to the end of the process not just the trial commencement (Law paras 7 and 8).

[101] *Airey v Ireland*, App no 6289/73, European Court of Human Rights, 9 October 1979, (1979) 2 EHRR 305, para 24: "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective": civil legal aid was required to secure a fair trial even though legal aid is mentioned expressly only for criminal cases.

[102] For exceptions that prove the rule, see *Witold Litwa v Poland* App no 26629/95, ECtHR, 4 April 2000, (2001) 33 EHRR 53, [2000] MHLR 226 ("alcoholics" under Article 5(1)(e) extends to those who are drunk and not just those addicted to alcohol, for reasons "confirmed" by reference to the documents relevant to the drafting of the Convention (para 63)); see also *Hilda Hafsteinsdóttir v Iceland* App no 40905/98, ECtHR (4th Section), 8 June 2004, para 42, and *Kharin v Russia* App no 37345/03, ECHR (1st Section), 3 February 2011, para 34. UK domestic law has accepted a middle ground, allowing the "living instrument" approach if factual developments are "within the same genus of facts" as those in play when the legislation was drafted, allowing the answer to be found within the legislation by interpretation: see Lord Wilberforce in *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 at 822B-E, as endorsed

UK, the ECtHR ruling that it had to "recall that the Convention is a living instrument which … must be interpreted in the light of present-day conditions" and "commonly accepted standards".[103] This legitimates the use of other sources of standards. To similar effect are findings in *Kjeldsen and others v Denmark* that the ECHR has a "general spirit" and is "an instrument designed to maintain and promote the ideals and values of a democratic society",[104] and in *Handyside v UK* that these standards include "pluralism, tolerance and broad-mindedness".[105] These standards must be external to the text of the ECHR since they are not defined in it.

The ECtHR has recognised the ECHR's constitutional nature. In *Loizidou v Turkey (Preliminary Objections)*, which related to events in Northern Cyprus, the Grand Chamber rejected Turkey's reliance on its declaration that only actions within its borders could be reviewed. Rather, jurisdictional provisions had to be interpreted having "regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms".[106] It also noted that allowing selective consent to jurisdiction "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)".[107]

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in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2005] 2 AC 561, at para 10 by Lord Bingham.

[103] *Tyrer v UK* App no 5856/72, ECtHR, 25 April 1978, (1978) 2 EHRR 1, para 31: corporal punishment was degrading, contrary to Article 3, in light of "developments and commonly accepted standards" in penal policy in Council of Europe states; at para 38, it noted that the Isle of Man was "part of the European family of nations" and so could not rely on the reference to "local conditions" in Article 63 of the ECHR (now Article 56) in relation to the application of the ECHR to "dependent territories", which only allowed lesser standards in lesser developed colonies. See also *Marckx v Belgium* App no 6833/74, ECtHR, 13 June 1979, (1979) 2 EHRR 330: distinctions between legitimate and illegitimate children in relation to inheritance rights could no longer be sustained and breached Article 8 and Article 14 with Article 8 and Protocol 1 Article 1 (though previous cases did not have to be reopened in light of the need for legal certainty – which confirms that the Court creates new law).

[104] *Kjeldsen and others v Denmark* App nos 5095/71;5920/72;5926/72, ECtHR, 7 December 1976, (1976) 1 EHRR 711 at para 53.

[105] *Handyside v UK* App no 5493/72, ECtHR, 7 December 1976, (1976) 1 EHRR 737, at para 49; and *Dudgeon v UK* App no 7525/76, ECtHR, 22 October 1981, (1981) 4 EHRR 149, at para 53. The "rule of law" is also identified: see *Golder v UK* App no 4451/70, ECtHR, 21 February 1975, (1975) 1 EHRR 524 at para 34.

[106] *Loizidou v Turkey (Preliminary Objections)* [GC], App no 15318/89, 23 March 1995, (1995) 20 EHRR 99, para 70. Living instrument reasoning also featured (para 71 – even if Turkey's contentions had been valid at the time of the drafting of the ECHR, that might have changed over the 40 intervening years), as did subsequent state understanding (paras 73 and 79, as allowed by Article 31 of the Vienna Convention), and the need to make rights practical and effective (para 72).

[107] *Loizidou v Turkey (Preliminary Objections)* [GC], App no 15318/89, 23 March 1995, (1995) 20 EHRR 99, para 76; at para 77, it noted that the aim in the preamble to the ECHR of achieving "greater unity in the maintenance and further realisation of human rights", would be undermined. The Court also determined that its different role compared to the International Court of Justice meant that the fact that states could limit their acceptance of the role of the ICJ did not apply across. See also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [GC], App no 45036/98, 30 June 2005, (2005) 42 EHRR 1, para 156:

As for other international standards, these featured when the Grand Chamber in *Demir and Baykara v Turkey* considered and rejected Turkey's contention that other international treaties could only be relevant if ratified and so binding.[108] Accepting this submission would mean that the ECHR could mean different things depending on what each state had ratified, which was not accepted. The Grand Chamber noted that in addition to the primary rules of interpretation in Articles 31-33 of the Vienna Convention,[109] account must be taken of what can be characterised as internal rules, the quest for "internal consistency and harmony" between the different articles of the ECHR,[110] the need for practical and effective rights,[111] and also "any relevant rules and principles of international law applicable in relations between the Contracting Parties"[112] and the living instrument approach of considering "present-day conditions, and … evolving norms of national and international law".[113]

Sources for evolving norms included "relevant international treaties that are applicable in the particular sphere" of the obligation;[114] "norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies";[115] the "general

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the right to property in aircraft seized pursuant to UN Security Council resolutions and European Community law, as part of a sanctions regime, was not breached in a disproportionate manner, significant weight being attached to obligations arising from EC membership, given the "growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations" (para 150), albeit that individual states remained responsible even if sovereign power was transferred (paras 152-153), since removing responsibility under the ECHR would be incompatible with its "purpose and object" and deprive it of its "peremptory character" and undermine the need for "practical and effective … safeguards" (para 154). If the relevant international organisation had equivalent protection of human rights, there was a presumption of compliance with the ECHR (para 155) unless the protection of rights was "manifestly deficient", in which case the constitutional role of the ECHR took precedence (para 156).

[108] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 61. The case involved a ban on public service workers forming trades unions and annulment of a collective agreement, which was held to breach Article 11 as it was not "necessary in a democratic society".

[109] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 65.

[110] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 66.

[111] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 66.

[112] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 67.

[113] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 68. At para 78, common domestic and international law standards were referred to as "a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty". See also the summary at para 85.

[114] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 69. It cited UN, International Labour Organisation and Council of Europe examples.

[115] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 75. It cited the European Commission for Democracy through Law ("the Venice Commission"), the European Commission against Racism and Intolerance and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (which is discussed below).

principles of law recognised by civilized nations",[116] including those arising from "intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly";[117] and common domestic law standards of European states.[118] Importantly, contrary to Turkey's submission, the Grand Chamber held that "common ground among the norms of international law" did not turn on whether the respondent state in the particular case had ratified a particular instrument.[119]

Importantly, the living instrument approach was found to be a duty, so the case law on which Turkey relied[120] "should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems", because:

> "While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement …"[121]

The final phrase, precluding judges from standing in the way of reform, supports the dissenting judge in *Caamaño Valle*, and has been used by the Grand Chamber on several occasions. It may originate with *Stafford v UK*,[122] when the Court moved on from its former view that those sentenced to life imprisonment for murder had no remaining liberty interest covered by Article 5(4) of the ECHR.[123]

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[116] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 71; examples included the status of the ban on torture as a peremptory norm (para 73).
[117] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 74.
[118] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 75.
[119] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, paras 78, 79 and 86. *Marckx v Belgium* (fn xx above) was cited as an example.
[120] To the effect that collective bargaining agreements were not covered by Article 11.
[121] *Demir and Baykara v Turkey* [GC], App no 34503/97, 12 November 2008, (2009) 48 EHRR 54, para 153.
[122] *Stafford v UK* [GC], App no 46295/99, 28 May 2002, (2002) 35 EHRR 32, [2002] Prison LR 181, para 68.
[123] See also a changed approach to double jeopardy in *Sergey Zolotukhin v Russia* [GC], App no 14939/03, 10 February 2009, (2012) 54 EHRR 16, paras 78-81; to benefitting from a reduction in the maximum sentence for an offence in *Scoppola v Italy (no 2)*, App no 10249/03, 17 September 2009, (2010) 51 EHRR 12, paras 104-109; to rights for transsexual people to marriage and amended birth certificates in *Christine Goodwin v UK* [GC], App no 28957/95, 11 July 2002, (2002) 35 EHRR 447, para 74 and *I v UK* [GC], App no 25680/94, 11 July 2002, (2003) 36 EHRR 53, para 54; to conscientious objection in *Bayatyan v Armenia* [GC], App no 23459/03, 7 July 2011, (2012) 54 EHRR 15, para 98; and to extended coverage of Article 6 fair trial rights in *Eskelinen and Others v Finland* [GC], App no 63235/00, 19 April 2007, (2007) 45 EHRR 43, para 56, and *Micallef v Malta* [GC], App no 17056/06, 15 October 2009, (2010) 50 EHRR 37, paras 81. Naturally, there are various Chamber judgments also.

Another established interpretive feature is that supplemental sources of norms may illustrate what is implicit in an overarching treaty such as the ECHR. For example, the ECtHR regularly cites findings of the European Committee on the Prevention of Torture (CPT), which exists under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[124] Accordingly, in *Muršić v Croatia*, the Grand Chamber emphasised that, whilst its function of ruling whether something was inhuman and degrading differed from the CPT's role in preventing such conditions, "it remains attentive to the standards developed by the CPT and, notwithstanding their different positions, it gives careful scrutiny to cases where the particular conditions of detention fall below the CPT's standard of 4 sq m".[125]

The language of "careful scrutiny"[126] allows the ECtHR to incorporate other standards but also to determine not to follow them. Supporting the latter is the fact that Article 53 of the ECHR accepts that domestic law and other international agreements impose higher standards than those in the ECHR.[127] This article now turns to one relevant alternative source of norms, the UN's premier standard to combat disability discrimination, the CRPD.

III. THE USE MADE BY THE EUROPEAN COURT OF HUMAN RIGHTS OF THE STANDARDS ARISING UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Using the HUDOC database of the ECtHR to locate rulings in which the CRPD was cited, and then analysing them to determine whether there was reliance by the ECtHR (rather than merely a mention in passing), four main rationales are given for using the CRPD as an interpretive aid: (i) the living instrument approach, (ii) demonstrating a consensus, (iii) the need for consistency and (iv) the role of the CRPD in explaining a standard. These

[124] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126 (Opened for Signature 26 November 1987, Entered into Force 1 February 1989).
[125] *Muršić v Croatia* [GC], App no 7334/13 20 October 2016, (2017) 65 EHRR 1, para 113. See also *Simeonovi v Buglaria* [GC], App no 21980/04, 12 May 2017 (paras 88-91 – relying on CPT reports about poor conditions in various prisons to find a breach of Art 3), and *Rooman v Belgium* [GC], App no 18052/11, 31 January 2019 (para 158 – the Grand Chamber took into account "worrying findings" by the CPT in concluding that the conditions at a preventive detention facility breached Art 3; and *Ilias and Ahmed v Hungary* [GC], App no 47287/15, 21 November 2019 (paras 189-194 – the Grand Chamber took account of the CPT's finding that conditions in a transit zone were acceptable as part of its conclusion that Art 3 was not breached).
[126] This evokes the requirement in ss2 and 3 of the Human Rights Act 1998 (UK) that domestic courts must take into account the jurisprudence of the Strasbourg bodies in interpreting the ECHR, the rights in which are to be enforced by judicial interpretation so far as possible.
[127] It provides that the ECHR shall not be construed to limit or derogate from other guarantees of rights.

overlap: new norms relevant to a living instrument can arise from further treaties that reflect a new consensus and support the need for consistency; and standards set out in greater detail reflect a consensus on what is consistent with higher level principles in an overarching document. References began from soon after the CRPD's entry into force[128] and are regular, albeit occurring only in a small proportion of the many cases the ECtHR considers: in turn, most case before the Court are not about disability rights. (It has also featured in various concurring and dissenting judgments, but majority reasoning is most important.)

A. Living Instrument

In *IC v Romania* (Article 3 breached from inadequate prosecution of rape of person with intellectual impairments), the ECtHR referred to "contemporary standards and trends" which required the "penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".[129] It cited the need to protect 'vulnerable' persons and also UN material that, in the context of the CRPD, people with disabilities, particularly children, were more likely to be victims of violence.[130]

In mental health cases, the Court has referenced the "growing importance" of the CRPD's norms, along with compliance with them becoming "quite common" or reflecting "today's paradigm". Accordingly:

(i) *Stanev v Bulgaria* (Article 6 breached from lack of court access to seek relief from guardianship): having set out Articles 12 and 14 of the CRPD as relevant international materials, the ECtHR commented that it was "also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible".[131]

[128] The first, *Ada Rossi and Others v Italy*, App no 55185/08 and others, ECtHR (2nd Section), 16 December 2008, was an inadmissibility decision in which applicant claimed that state action in allowing the withdrawal of nutrition from those in a persistent vegetative state was a direct breach of provisions of the ECHR and of the CRPD, and so was an unrealistic complaint that the ECtHR should enforce the CRPD directly. More realistically, see *Glor v Switzerland*, App no 13444/04, ECtHR (1st Section), 30 April 2009 and *Jasinskis v Latvia*, App no 45744/08, ECtHR (3rd Section), 21 December 2010, discussed below under consensus and consistency.

[129] *IC v Romania*, App no 36934/08, ECtHR (4th Section), 24 May 2016, [2019] MHLR 106, paras 51 and 52.

[130] *IC v Romania*, App no 36934/08, ECtHR (4th Section), 24 May 2016, [2019] MHLR 106, para 44.

[131] *Stanev v Bulgaria*, App no 36760/06, ECtHR (GC), 17 January 2012, [2013] MHLR 23, para 44.

(ii) *N v Romania* (Article 5(1) breached in part from failure to comply immediately with court order to release from psychiatric hospital): the ECtHR commented that such orders "were based on practices which have become quite common at the international level in recent years, geared to promoting, as far as possible, treatment and care for persons with disabilities in the community".[132] Article 19 of the CRPD and the CRPD Committee's Guidelines on Article 14 of the CRPD were amongst the sources referenced.[133]

(iii) *Hiller v Austria* (no breach of Article 2 in apparent suicide of absconding psychiatric patient): the ECtHR cited Articles 10 and 14 of the CRPD and other material resting on the CRPD and noted that it was "evident from the international law sources pertaining to the issue" that the government had been correct that "today's paradigm in mental health care is to give persons with mental disabilities the greatest possible personal freedom in order to facilitate their re-integration into society", which was "desirable in order to preserve as much as possible their dignity and their right to self-determination".[134]

At the same time, as in *Caamaño Valle*, limits to the appropriate use of the CRPD have been found. Accordingly, the Grand Chamber in *Rooman v Belgium*, considering what was required for preventive detention to be lawful, determined, first, that providing treatment was necessary "in the light of the developments in its case-law and the current international standards which attach significant weight to the need to provide treatment for the mental health of persons in compulsory confinement" (expressly a living instrument approach); but, secondly, that "Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities in points 6-9 of its 2015 Guidelines concerning Article 14 of the CRPD …"[135] Since a living instrument necessarily allows future developments, and prior to *Rooman*, the ECHR "as currently

[132] *N v Romania*, App no 59152/08, ECtHR (4th Section), 28 November 2017, [2018] MHLR 288, para 166. The Guidelines on Article 14 are to be found at: https://www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc.

[133] The Guidelines on Article 14 are to be found at: https://www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc.

[134] *Hiller v Austria*, App no 1967/14, ECtHR (4th Section), 22 November 2016, [2018] MHLR 21, para 54; this would avoid potential problems under Articles 3, 5 and 8 of the ECHR (para 55).

[135] *Rooman v Belgium* [GC], App no 18052/11, 31 January 2019, [2020] MHLR 1, para 205. It referenced Articles 14 and 15 of the CRPD as well as the Guidelines. At para 238, the ECtHR referred to "the growing importance which international instruments for the protection of people with mental disorders are now attaching to the need for persons placed in compulsory confinement to be able to benefit from personalised and appropriate treatment to fulfil the therapeutic aim of detention", for which the CRPD was cited, though without any specificity.

interpreted" did not require treatment to be offered (though it did require a therapeutic environment), the Grand Chamber is clearly not ruling out future development.

This is also apparent from its *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*:[136] here, it refused to offer guidance on the necessary "protective conditions" for treatment without consent because that might be a live issue in a future adversarial argument. It noted that a draft Additional Protocol to the Oviedo Convention covering mental health detention was opposed by, inter alia, the CRPD Committee.[137] It also rejected calls by Interveners to declare that Article 5(1) ECHR did not allow psychiatric detention,[138] but noted the need to follow "as a minimum" its "extensive" case law on the need for safeguards was "characterised by the Court's dynamic approach to interpreting the Convention, which in this field is guided inter alia by evolving legal and medical standards, national and international".[139]

B. Consensus

Early citation of the CRPD in *Glor v Switzerland* (breach of Article 14 with Article 8 in discrimination against person with diabetes required to pay a tax to be exempt from military services unlike other people with disabilities) involved the Court noting – possibly of its own motion as it is not recorded that the applicant cited the CRPD – that:[140]

> "… there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment (see, for example, ... the United Nations

[136] *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*, Request No A47-2021-001, ECtHR (Grand Chamber), 15 September 2021: this arises under the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, ETS no 164 (opened for signature 4 April 1997, entered into force 1 December 1999), also known as "the Oviedo Convention".
[137] *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*, Request No A47-2021-001, ECtHR (Grand Chamber), 15 September 2021, para 28. The CRPD Committee has called on Council of Europe states to challenge the Draft Additional Protocol issued in 2018 in relation to mental health-based detention (available at https://www.coe.int/en/web/bioethics/-/frequently-asked-questions-on-draft-additional-protocol-concerning-the-protection-of-human-rights-and-dignity-of-persons-with-mental-disorder-with-reg): for example, Greece was recommended to "oppose the adoption" of this in light of its non-compliance with Article 14 of the CRPD (Concluding Observations to Greece, CRPD/C/GRC/CO/1, 29 October 2019, para 23), and Bulgaria was commended for its opposition based on this non-compliance (Concluding Observations to Bulgaria, CRPD/C/BGR/CO/1, 22 October 2018, para 6).
[138] *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*, Request No A47-2021-001, ECtHR (Grand Chamber), 15 September 2021, para 68.
[139] *Decision on the competence of the Court to give an advisory opinion under Article 29 of the Oviedo Convention*, Request No A47-2021-001, ECtHR (Grand Chamber), 15 September 2021, para 69.
[140] *Glor v Switzerland*, App no 13444/04, ECtHR (1st Section), 30 April 2009, para 53 (the government argument was that diabetes was an illness not a disability).

Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008)."

Similarly, in *Negovanović and Others v Serbia* (breach of Protocol 12, Article 1 in not extending rewards for winners of international chess championships to competitions involving blind people),[141] the Court noted that the margin of appreciation in allowing differential treatment was reduced when people with disabilities were adversely affected,[142] the need for protection being recognised by consensus.[143]

Consensus reasoning also has limits. In *A-MV v Finland* (no breach of Article 8 or Protocol 4 Article 4 in overriding choice of residence of man with intellectual disabilities as lawful, justified, and proportionate),[144] the Court reiterated the search for consensus ("its consistent practice" whereby "the Court takes into account relevant international instruments and reports in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field concerned"). However, it also noted that "It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them".[145]

This is similar to the *Caamaño Valle* situation discussed in the Introduction; the majority concluded that there was "no consensus" on an unconditional right to vote for persons with a mental disability (and indeed most states in Europe allowed restrictions).[146] In addition to not being bound by interpretations of other instruments by other bodies, whilst seeking harmony and taking them into account, the majority also recognised that "other

[141] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, para 76.
[142] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, para 78, citing *Glor v Switzerland*, discussed at XXX above.
[143] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, paras 78 and 79. Also recognised was that non-discrimination required not providing reasonable accommodation: this is discussed below as an illustration of providing meaning.
[144] *A-MV v Finland*, App no 53251/13, ECtHR (1st Section), 23 March 2017, [2018] MHLR 20.
[145] *A-MV v Finland*, App no 53251/13, ECtHR (1st Section), 23 March 2017, [2018] MHLR 20, para 74. CRPD Articles 12 and 16, and the CRPD Committee's General Comment No 1 on Article 12 were cited as relevant international law.
[146] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, para 59. See also *Anatoliy Marinov v Bulgaria*, App no 26081/17, ECtHR (Fourth Section), 15 February 2022, [2022] MHLR 121, para 48: it was noted that there could be restrictions on the right to vote by those with mental impairments in light of the lack of consensus to the contrary, but this could not cover those subject to partial guardianship without individualised judicial consideration.

instruments can offer wider protection than the Convention",[147] and that it was not the ECtHR's role to ensure respect for other obligations.[148] This allows window-dressing, namely ratifying the CRPD but not implementing its requirements, thereby breaching the obligation to perform treaties and not rely on contrary domestic law:[149] this is rewarded by the ECtHR examining consensus through implementation rather than obligation.

However, the current ECtHR position is established. In *Strøbye and Rosenlind v Denmark* (acceptable to remove right to vote if person needed guardianship and lacked capacity to prevent financial exploitation or risk of major financial loss),[150] similar international and comparative material led to the finding that there was no consensus within Europe "to uncouple disenfranchisement from deprivation of legal capacity".[151] Accordingly, the approach in the CRPD – the CRPD Committee having found a breach of the CRPD[152] – did not represent an international consensus because other international bodies, including the Council of Europe's European Commission for Democracy through Law (aka the Venice Commission), did not contend the same.[153]

Similarly, in *Toplak and Mrak v Slovenia* (no requirement for all polling stations to be accessible or to use technology such as voting machines to allow secret voting without human assistance), the Court set out that the CRPD and views of the CRPD Committee are relevant, including that any margin of appreciation as to assessing the justification for differential treatment is subject to "changing conditions" as to the protection of human rights, including "any emerging consensus as to the standards to be achieved".[154]

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[147] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, para 54; it cited *Rooman v Belgium*, App no 18052/11, ECtHR (GC), 31 January 2019, [2020] MHLR 1, discussed at XXX above.

[148] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, para 53.

[149] Vienna Convention on the Law of Treaties 1969, Articles 26 and 27.

[150] *Strøbye and Rosenlind v Denmark*, App nos 25802/18, 27338/18, ECtHR (Second Section), 2 February 2021, [2022] MHLR 79; the Applicant relied on the lack of individual judicial decisions, see paras 78-82.

[151] *Strøbye and Rosenlind v Denmark*, App nos 25802/18, 27338/18, ECtHR (Second Section), 2 February 2021, [2022] MHLR 79, para 111.

[152] *Strøbye and Rosenlind v Denmark*, App nos 25802/18, 27338/18, ECtHR (Second Section), 2 February 2021, [2022] MHLR 79, para 70, citing Committee on the Rights of Persons with Disabilities, Concluding Observations to Denmark, CRPD/C/DNK/CO/1, 30 October 2014, paras 60-61.

[153] *Strøbye and Rosenlind v Denmark*, App nos 25802/18, 27338/18, ECtHR (Second Section), 2 February 2021, [2022] MHLR 79, para 112. The Court also found no breach of Article 14 ECHR together with Protocol 1 Article 3 because the differential treatment was justified.

[154] *Toplak and Mrak v Slovenia*, App nos 34591/19 and 42545/19, ECtHR (Second Section), 26 October 2021, para 112. At paras 54-57, it set out provisions from the CRPD and views from the CRPD Committee (which in *Given v Australia*, Communication No 19/2014, found that failing to allow a person with a disability to vote in secret breached Article 29 and other provisions of the CRPD); it noted the need to seek harmony between different international standards and accepted the need for reasonable accommodation to avoid discrimination (para 112), discussed below.

However, it found that enough had been done, within that margin of appreciation, even though only some polling places were accessible;[155] and, whilst voting machines might help with accessibility,[156] "there is no indication in the present case of a consensus having been reached among the member States as to the use of voting machines as a requirement for the effective exercise of the voting rights by people with disabilities".[157] Nations had to consider the particular vulnerability of persons with disabilities, but otherwise were free to determine what to do:[158] in short, people with disabilities need to be patient until there is a consensus that they receive equal treatment, even though that is what those who have ratified the CRPD have agreed, subject only to the argument that some modifications are unduly burdensome and so outside the realms of reasonable accommodation.

C. Consistency

One part of the reasoning in *Toplak and Mrak*, and a general principle noted in Part II, is the need to seek "harmony" between the ECHR and other international law standards. Such consistency arguments have arisen from an early stage in various contexts, with outcomes ranging from assimilation to distinguishing CRPD standards. A broader rationale, set out in *Enver Şahin v Turkey*, was that "respect for human dignity and human freedom, which necessarily includes a person's freedom to make his or her own choices" was "the very essence of the Convention", which was also of "of cardinal importance and … central to the CRPD".[159]

1. Tending Towards Assimilation

[155] *Toplak and Mrak v Slovenia*, App nos 34591/19 and 42545/19, ECtHR (Second Section), 26 October 2021, paras 119-121: accessibility was a long-term project, "requisite diligence" had been shown and there was no "indifference to their needs".
[156] *Toplak and Mrak v Slovenia*, App nos 34591/19 and 42545/19, ECtHR (Second Section), 26 October 2021, para 127.
[157] *Toplak and Mrak v Slovenia*, App nos 34591/19 and 42545/19, ECtHR (Second Section), 26 October 2021, para 128: the Court referred to problems relating to cost and also the potential for machines to undermine secrecy. At para 25, it noted that personal assistants had to maintain confidentiality and were acceptable for the purposes of Article 29 of the CRPD: with respect to the Court, it is for the CRPD Committee to make that determination, including whether the person should have the right to choose between a personal assistant or a voting machine.
[158] *Toplak and Mrak v Slovenia*, App nos 34591/19 and 42545/19, ECtHR (Second Section), 26 October 2021, paras 129-130.
[159] *Enver Şahin v Turkey*, App no 23065/12, ECtHR (2nd Section), 20 January 2018, para 63. The breach of the ECHR arose from a failure to make a proper assessment of the Applicant's needs, including for "security, dignity and autonomy": para 64.

Important instances of assimilation include the understanding of discrimination under Article 14 of the ECHR, which turns on unjustified differential treatment based on a status. Consistency with the CRPD has assisted to determine both what amounts to a status and what is unjustified. In *Kiyutin v Russia*, the conclusion that having HIV was a status was noted to be consistent with various international standards including "the United Nations Convention on the Rights of Persons with Disabilities which imposed on its States Parties a general prohibition of discrimination on the basis of disability".[160]

As to what is prohibited, in *RP and Others v UK* (imposing litigation guardian for woman with intellectual disabilities did not breach Article 6 right to fair trial) the Court suggested its established case law as to the need for special procedural arrangements to promote the "good administration of justice" and to "protect the health of the person concerned" was "in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings".[161] Similar outcomes can be found in *Kocherov v Russia*[162] and *SS v Slovenia*.[163]

More detailed use of the CRPD featured in *Cînta v Romania* (Article 8 alone and with Article 14 breached from differential treatment of separated parents based on mental disorder).[164] In finding discrimination, the ECtHR noted that Romania was a party to the CRPD, which "recognises persons with disabilities as full subjects of rights and as rights holders" (including those with mental disorder),[165] and that:[166]

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[160] *Kiyutin v Russia*, App no 2700/10, ECtHR (1st Section), 10 March 2011, para 57 (residence permit, combining Article 14 ECHR with Article 8).
[161] *RP and Others v UK*, App no 38245/08, ECtHR (4th Section), 9 October 2012, para 65. Indeed, at para 67, it was suggested that Article 6(1) might have been breached by not imposing representation.
[162] *Kocherov and Sergeyeva v Russia*, App no 16899/13, ECtHR (3rd Section), 29 March 2016, para 98: in concluding that a child taken into care – away from a parent with a disability – led to an obligation to work toward reuniting the family, it was noted "Moreover, as was pointed out by the third-party interveners in paragraph 85 above, the same principles are established in the relevant international instruments" (which had included Articles 5 and 23 of the CRPD).
[163] *SS v Slovenia*, App no 40938/16, ECtHR (4th Section), 30 October 2018, para 90: in the context of taking into care the children of a woman with schizophrenia, the ECtHR noted that "on account of her vulnerability the authorities were required to show particular care and afford her increased protection", for which it cited its own case law and Article 23 of the CRPD.
[164] *Cînta v Romania*, App no 3891/19, ECtHR (4th Section), 18 February 2020. Articles 1, 2, 3, 4, 5, 8, 12, 22 and 23 of the CRPD were cited as relevant sources of international law, together with General Comments 1 and 6 of the CRPD Committee (which relate to Articles 12 and 5 respectively).
[165] *Cînta v Romania*, App no 3891/19, ECtHR (4th Section), 18 February 2020, para 75.
[166] *Cînta v Romania*, App no 3891/19, ECtHR (4th Section), 18 February 2020, para 76; note also the reference in para 41 to a reduced margin of appreciation in relation to any restrictions on 'vulnerable' groups who have been subject to past discrimination leading to social exclusion, citing *Alajos Kiss v Hungary*, App no 38832/06, ECtHR (2nd Section), 20 May 2010, [2010] MHLR 245, (2013) 56 EHRR 38, in which the

> the international community has consistently strived for better and more coherent protection for the rights of persons with mental illness and mental disabilities. The international standards and recommendations … encourage respect for equality, dignity and equal opportunities for persons with mental disabilities. Of particular relevance for the facts of the present case, mentally-ill persons must receive appropriate assistance from the State in the performance of their child rearing responsibilities, and children must not be separated from their parents without a proper judicial review of the matter by the competent authorities …

The CRPD was one of the relevant international standards, including for the final proposition as to the need for judicial review (on which, see its Article 23(4)). The reference to positive assistance to parents with disabilities reflects the need for reasonable accommodation to secure an equal outcome and avoid discrimination, reflecting a CRPD concept becoming part of the understanding of what is required for non-discrimination under the ECHR.

Similarly, in *ZH v Hungary* (breach of Article 5(2) from inadequate reasons to detainee with communication impairments), the ECtHR noted that it was "regrettable that the authorities did not make any truly "reasonable steps" … – a notion quite akin to that of "reasonable accommodation" in Articles 2, 13 and 14 of the UN Convention on the Rights of Persons with Disabilities … – to address the applicant's condition, in particular by procuring for him assistance by a lawyer or another suitable person".[167]

In a series of education cases, the ECtHR has expressly adopted the reasonable accommodation standard into Article 14. In *Çam v Turkey* (breach of Protocol 1 Article 2 alone and with Article 14 from denying entry to music academy for student with vision impairments) discrimination arose because "the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment".[168] The ECtHR noted the need for consistency in relation to the right to education, taking into account both the CRPD and other relevant standards as part of interpreting the ECHR "in harmony" with other rules of international law.[169]

CRPD was cited by the applicant and intervener, and was set out by the Court as relevant international material, though not used directly in the reasoning.

[167] *ZH v Hungary*, App no 28973/11, ECtHR (2nd Section), 8 November 2012, [2014] MHLR 1, para 43.

[168] *Çam v Turkey,* App no 51500/08, ECtHR (2nd Section), 23 February 2016, para 69.

[169] *Çam v Turkey,* App no 51500/08, ECtHR (2nd Section), 23 February 2016, para 53.

Consistency was also required in the approach to discrimination, in relation to which it was held:

> 65. The Court considers that Article 14 of the Convention must be read in the light of the requirements of those texts regarding reasonable accommodation – understood as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case" – which persons with disabilities are entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the Convention on the Rights of Persons with Disabilities ...). Such reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination …

See also *Sanlisoy v Turkey*,[170] *Enver Şahin v Turkey*,[171] *GL v Italy*,[172] and *Stoian v Romania*, in which the ECtHR noted that reasonable accommodation could not impose an undue or disproportionate burden on the authorities and indeed that it was not for the Court to define it as it could take many forms.[173] This approach was also applied to discrimination in relation to the free-standing right to non-discrimination in Protocol 12 Article 1: *Negovanović and Others v Serbia*.[174]

The reasonable accommodation duty to meet needs may also arise under other Articles. In *Jasinskis v Latvia* (breach of Article 2 substantive and procedural from failure to seek medical treatment for arrestee with communication impairments known to have been knocked unconscious), having referred to Article 14(2) of the CRPD and other relevant international standards, the ECtHR's reasoning as to the substantive breach noted that taking into detention a person with disabilities required "special care in guaranteeing such conditions as correspond to his special needs resulting from his disability", and:

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[170] *Sanlisoy c Turquie*, App no 77023/12, ECtHR (2nd Section), 8 November 2016: the need to interpret the ECHR right to education in a way that is consistent with the other sources of international law (para 57) and to have reasonable accommodation to avoid a breach of Art 14 (para 60).

[171] *Enver Şahin v Turkey*, App no 23065/12, ECtHR (2nd Section), 20 January 2018, para 53 (need for harmony with other standards relating to the right to education), and para 60 (reasonable accommodation implied into the definition of discrimination).

[172] *GL v Italy*, App no 59751/15, ECtHR (1st Section), 10 September 2020: failure to assess what would have amounted to reasonable accommodation.

[173] *Stoian v Romania*, App no 289/14, ECtHR (4th Section), 25 June 2019, paras 102 and 103; at para 103, the Court noted that the reasonable accommodation could be "physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities".

[174] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (2nd Section), 25 January 2022, para 79.

> More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge.[175]

Similarly, the procedural breach arose in part from failing to consider whether officers were arguably at fault from not taking into account "the special needs of persons with disabilities like the applicant's son".[176] The required "disability perspective" is an implicit requirement for consistency.

Reference can also be made to *MH v UK* (breach of Article 5(4) from overly difficult process for mental health detainee to apply to judicial body prior to domestic courts' revised interpretation of process): the ECtHR cited both its own case law and also Articles 5, 12 and 13 of the CRPD as supporting the need for "special procedural safeguards" and "compensatory safeguards … to remove … legal or practical obstacles", which provides an implied consistency argument.[177]

Also in the mental health detention setting, breaches of the Article 8 and 9 rights to privacy (sharing patient information with parents and journalists) and to freedom of religion (limited access to religious services) were found in *Mockutė v Lithuania*: as to Article 8, the ECtHR cited its own case law about protecting information relating to a person's "moral integrity", adding that it "also notes that under the United Nations Convention on the Rights of Persons with Disabilities, which was adopted in 2007, the States have a duty to protect persons with disabilities from unlawful attacks on their honour and reputation …"[178]

[175] *Jasinskis v Latvia*, App no 45744/08, ECtHR (3rd Section), 21 December 2010, para 59.
[176] *Jasinskis v Latvia*, App no 45744/08, ECtHR (3rd Section), 21 December 2010, para 80.
[177] *MH v UK*, App no 11577/06, ECtHR (4th Section), 22 October 2013, [2014] MHLR 249, (2014) 58 EHRR 35, para 93.
[178] *Mockutė v Lithuania*, App no 66490/09, ECtHR (4th Section), 27 February 2018, [2018] MHLR 343, para 97, citing Art 22 of the CRPD; see also para 102, in which it noted that "The duties to protect the confidentiality of all personal data relating to a person with disability, as well as to protect such persons from attacks on their honour or dignity, have been underlined within the framework of the United Nations" (also citing Art 22 of the CRPD). It set out the preamble to the CRPD and its Article 22 as relevant international materials, and also views of the UN Special Rapporteur on Health as to the impact of the CRPD.

Indeed, in *N v Romania*, supplementing the living instrument arguments noted above, the Court flirted with the CRPD's stricter approach to mental health detention, giving supporting reasoning for finding a breach of Article 5(1):[179]

> 159. Furthermore, the Court considers that such detention is open to question, particularly in the light of the provisions of Art 14§1(b) CRPD, which lays down that the existence of a disability shall in no case justify a deprivation of liberty …

As set out above, the approach was then clarified in *Rooman*, just as other cases have led to findings of limitations on the impact of the CRPD's standards, albeit that in *Rooman* the ECtHR referred to the ECHR in its current interpretation.

2. Accepting but Distinguishing

Of course, a breach is not always found. In *SHH v UK* (Article 3 not breached from deporting to Afghanistan person with a disability without family support there), the majority of the Court, though "mindful of" the need for consistency, held that "even interpreting Article 3 of the Convention in harmony with the United Nations Convention of the Rights of Persons with Disabilities" it was "unable to conclude that the high threshold set by Article 3 has been met in the applicant's case".[180]

Similarly, in *Glaissen v Switzerland*, (no arguable breach of Articles 8, 10 and 14 with 8 and 10 of the ECHR from non-accessibility of commercial cinema), the Court noted that Articles 1, 3, 5 and 9 of the CRPD supported the need for full integration into society, but held that Article 8 of the ECHR required access only in exceptional circumstances, such as where it was necessary to secure personal development or allow the maintenance of relationships with others.[181] This is disappointing reasoning: the right to accessibility most

[179] *N v Romania*, App no 59152/08, ECtHR (4th Section), 28 November 2017, [2018] MHLR 288, para 159. The Court had referred to Articles 13, 14, and 19 of the CRPD, the CRPD Committee's Guidelines on Article 14; and also to *MS v Croatia (No 2)*, App no 75450/12, ECtHR (1st Section), 19 February 2015, [2015] MHLR 294 (in which an intervener had cited the CRPD and argued that the ECHR should be interpreted compliantly, but the Court had not used the CRPD in its reasoning that Article 5(1) was breached from inadequate legal representation (and Article 3 from unnecessary force), though it did set out Articles 13, 14 and 15 of the CRPD as relevant international material and also concluding observations from the Committee to Hungary and Austria), *Hiller v Austria*, discussed at IIIA; and the CRPD Committee's decision of *Marlon James Noble v Australia*, Communication No 7/2012, 10 October 2016, [2017] MHLR 215, which involved a finding of a breach of various parts of the CRPD from detention based on a finding of unfitness to stand trial.

[180] *SHH v UK*, App no 60367/10, ECtHR (4th Section), 29 January 2013, para 94. The Court set out Articles 1, 11, 15, 16 CRPD (and other international standards).

[181] *Glaissen v Suisse*, App no 40477/13, ECtHR (3rd Section), 25 June 2019, para 47.

naturally arises under Article 8; and, in any event, personal development can arise through attending cultural events.

Finally, CRPD arguments were made in in *Popovic and Others v Serbia* (no arguable breach of Article 14 with Protocol 1 Article 1 from higher pension payments to those who acquired disability in war): however, despite the need for harmony in international law and the need to avoid interpreting the ECHR in a vacuum:[182]

> ... even where the provisions of the Convention and those of another international human rights instrument are almost identical, the interpretation of the same fundamental right by another international body and by this Court may not always correspond …

As such, as had happened in *Caamaño Valle*, the ECtHR accepted the value of consistency, and also the views of the CRPD Committee on the situation in a country, but also commented that different interpretations were possible.

D. Explanatory Role

Broad treaties such as the ECHR or the ICCPR state principles at a relatively high level of generality. The UN and the Council of Europe have various other treaties on more specific matters: as mentioned, the CRPD purports to explain rights in the ICCPR and ICESCR in the context of persons with disabilities. The natural suggestion is that there should not be any difference in outcome between an interpretation of the generalist and the specifics set out: consistency should be presumed. As such, one of the effects of a treaty such as the CRPD is to illustrate what is meant in the more specific situations it sets out. Hence the comment above that *Glaissen* involved disappointingly narrow reasoning because accessibility should be viewed as an example of what is implicit in Article 8 of the ECHR or its UN equivalent, Article 17 of the ICCPR.

[182] *Popovic and Others v Serbia*, App nos 26944/13; 14616/16; 14619/16; 22233/16, ECtHR (4th Section), 30 June 2020, para 79. It also commented that the expressed views of the CRPD Committee did not support the Applicant because, in Concluding Observations, "despite a detailed analysis of the situations in Serbia, Bosnia and Herzegovina and Croatia only identified potential issues in respect of the latter two countries …". Note that when the matter was communicated, the question expressly asked was "Have the applicants suffered discrimination in the enjoyment of their disability benefits, respectively, contrary to Article 14 of the Convention, read in conjunction with Article 1 of Protocol No 1, or Article 1 of Protocol No 12 (see, mutatis mutandis, Concluding observations on the initial report of Croatia, CRPD/C/HRV/CO/1, paragraphs 7 and 8, of 15 May 2015, and Concluding observations on the initial report of Bosnia and Herzegovina, CRPD/C/BIH/CO/1, paragraphs 10 (b) and 11 (b), of 2 May 2017)?": *Popovic v Serbia and Three Other Applications*, App nos 26944/13; 14616/16; 14619/16; 22233/16, ECtHR (3rd Section), 6 February 2019.

1. Reframing Cases as Illustrative

Some of the cases already mentioned could be reframed as illustrations. For example, the education and discrimination cases suggest that Article 24 and its emphasis on inclusive education expresses what is implicit in the ECHR right to education combined with non-discrimination. In other words, "separate but equal" cannot be good enough under the ECHR and reasonable accommodation – although not mentioned in Article 14 of the ECHR – was always implicit if the egalitarian calculus opening the UDHR was applied correctly. Similarly, *Jasinskis v Latvia* explains a disability perspective in relation to the right to life, picking up, even if implicitly, that the equal right to life in Article 10 of the CRPD may require that more be done to protect a person with a disability; and *RP and Others v UK*, endorsing litigation guardians, illustrates procedural accommodation required in Article 13 of the CRPD.[183]

2. Illustrating Human Rights Values and Wider Concepts

The reference to "equality in dignity and rights" in Article 1 of the UDHR indicates that human dignity is a core value. Although not mentioned in the ECHR text, it was invoked to illustrate that the unnecessary slapping of a juvenile in police custody was troubling rather than trifling. The Grand Chamber in *Bouyid v Belgium* determined that, as it was not strictly necessary, it thereby breached a core value, human dignity, and so had to be marked: and it noted that dignity is a component of various parts of the CRPD (the preamble and Arts 1, 3, 8, 16, 24 and 25), supporting its importance.[184]

The ECtHR has also developed a core concept that the ECHR does not impose uniformity where rights are in balance but gives a margin of appreciation for states to competing claims. The Court, as a transnational supervisory body, reviews whether a balance is

[183] It should be noted, however, that the CRPD Committee might well reject this conclusion on the basis that the litigation friend made decisions rather than seeking to support the decisions of the person with an impairment. See also *MH v UK* App no 11577/06, ECtHR (4th Section), 22 October 2013, [2014] MHLR 249, (2014) 58 EHRR 35, para 93: in finding inconsistency with Article 5(4) until English law was re-interpreted to require a low threshold to apply for a judicial review of detention (and allow various people to be agents to pass on the decision to apply), the ECtHR set out Articles 5, 12 and 13 of the CRPD and cited the CRPD as supporting, along with its earlier case law, the need for "special procedural safeguards" and "compensatory safeguards … to remove … legal or practical obstacles"; this is close to invoking the obligation in Article 13 of the CRPD for "procedural accommodation", of which these would be illustrations.
[184] Unfortunately, the Court did little to seek to define it, and nor does the CRPD: and attempting to do so is beyond the scope of this article.

outside an acceptable margin. It has also determined that it is a flexible concept which may be narrower in certain settings, including where another international standard such as the CRPD is in play. Accordingly, tax policy might seem like an obvious area for a wide margin: but in *Guberina v Croatia*,[185] the issue was whether the lack of a tax exemption when a family had to move to meet the needs of a child with multiple disabilities breached Article 14 of the ECHR together with Protocol 1 Article 1, the right to property. The Court accepted as a starting point that taxation, being linked to economic strategy, has a wide margin of appreciation. However, the involvement of people with disabilities, a 'vulnerable' group subject to historical discrimination, led to a "substantially narrower" margin of appreciation and the need for "very weighty reasons for the restrictions in question" because the impact of discrimination could include "legislative stereotyping which prohibits the individualised evaluation of their capacities and needs".[186]

The reasons for finding discrimination included that Croatia, as a party to the CRPD, had undertaken to consider "its relevant principles …, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life" but had not done so on the facts.[187] In short, the ECtHR uses the CRPD in two ways. It helps to explain the need for a reduced margin of appreciation because of need for care towards people within its ambit. Further, Croatia being bound by the CRPD supports the finding of discrimination. This comes close to an indirect enforcement of the CRPD by the ECtHR, but can also be characterised as illustrating how the more detailed explanation of discrimination should be given effect in the ECHR context.

Similarly, *Negovanović and Others v Serbia*, discussed in B and C above, involved a reduced margin of appreciation when assessing the justification for differential treatment of those with disabilities,[188] the consensus as to the need to protect those with disabilities

[185] *Guberina v Croatia*, App no 23682/13, ECtHR (2nd Section), 22 March 2016.
[186] *Guberina v Croatia*, App no 23682/13, ECtHR (2nd Section), 22 March 2016, para 73, citing *Glor v Switzerland*, App no 13444/04, ECtHR (1st Section), 30 April 2009, discussed at IIIB above, *Alajos Kiss v Hungary*, App no 38832/06, ECtHR (2nd Section), 20 May 2010, [2010] MHLR 245, (2013) 56 EHRR 38, footnoted in IIIC above, and *Kiyutin v Russia*, App no 2700/10, ECtHR (1st Section), 10 March 2011, discussed at IIIC above.
[187] *Guberina v Croatia*, App no 23682/13, ECtHR (2nd Section), 22 March 2016, para 92. The ECtHR also set out Articles 2, 3, 4, 5, 7, 9, 19, 20 and 28 CRPD, and General Comment No 2 on Accessibility from the CRPD Committee. The CRPD was then used as part of explaining the reduced margin of appreciation and why there was discrimination.
[188] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, para 78, citing *Glor v Switzerland*, discussed at IIIB above.

from discriminatory treatment,[189] and the meaning of discrimination included a failure to provide reasonable accommodation, which the CRPD introduced into the definition of discrimination.[190]

Again, this does not mean that applicants always succeed. In *JD and A v UK*, the ECtHR set out Article 28 of the CRPD and Concluding Observations from the CRPD Committee to the UK as relevant international material in a challenge to changes to the benefits regime, and noted the reduced margin of appreciation in relation to 'vulnerable' groups, arising from "the need to prevent discrimination against people with disabilities and foster their full participation and integration in society", and the consequent need for "very weighty reasons" to justify differential treatment.[191] CRPD principles thereby illustrated what was required under the ECHR. However, the ECtHR found no breach of Article 14 of the ECHR together with Protocol 1 Article 1 in relation to a mother with a child with disabilities because special provision made was within the margin of appreciation (although a breach was found in relation to a victim of domestic violence, a group predominantly female). This involves the ECtHR using principles more clearly stated in the specialist treaty to illustrate the requirements of the principles under the ECHR.

3. Illustrating Specific Rights

The meanings of other rights have also been illustrated. For example, there is a need for participation in decisions about where the balance lies. In *AN v Lithuania*,[192] removal of capacity without a fair trial breached Article 6. The government argued that a claimed breach of Article 8 was inadmissible due to non-exhaustion of domestic remedies; AN countered that he had not been served with a judgment and so could not appeal in the domestic setting. The ECtHR, which had set out Articles 12 and 13 of the CRPD as relevant international material, joined the admissibility argument to the merits, commenting that:

[189] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, para 79, citing *Glor v Switzerland*, discussed at IIIB above.
[190] *Negovanović and Others v Serbia*, App nos 29907/16; 30022/16; 30322/16; 31142/16, ECtHR (Second Section), 25 January 2022, para 79, citing *Çam v Turkey,* App no 51500/08, ECtHR (2nd Section), 23 February 2016, *Enver Şahin v Turkey*, App no 23065/12, ECtHR (2nd Section), 20 January 2018, and *GL v Italy*, App no 59751/15, ECtHR (1st Section), 10 September 2020, all discussed at IIIC above.
[191] *JD and A v UK*, App nos 32949/17, 34614/17, ECtHR (1st Section), 24 October 2019, para 89, citing *Glor v Switzerland*, App no 13444/04, ECtHR (1st Section), 30 April 2009, discussed at IIIB above, and *Guberina v Croatia*, App no 23682/13, ECtHR (2nd Section), 22 March 2016, discussed above; it also found that gender equality was an important aim that required a similar approach.
[192] *AN v Lithuania*, App no 17280/08, ECtHR (4th Section), 31 May 2016, [2017] MHLR 38.

> … whilst noting that the UN Convention on the Rights of Persons with Disabilities was not in force in respect of Lithuania at the relevant time, the Court nevertheless stresses the State's obligation to help to ensure that disabled people have effective access to justice (see Article 13 of that Convention …). …[193]

Then, as part of its conclusion that the processes in place were not sufficiently robust for Article 8, the objection to admissibility was formally dismissed because:

> … the applicant was a person suffering from mental illness, a factor which militated in favour of the State employing measures to help him to ensure effective access to justice (see Article 13 of the UN Convention on the Rights of Persons with Disabilities, …). …[194]

As such, although Lithuania was not bound by the CRPD, as the CRPD illustrated what was required under the ECHR for due process, the requirements in the CRPD became binding indirectly through the ECHR.

Loss of capacity and due process concerns have featured in other settings. In *Nikolyan v Armenia* (Article 6 breached in process leading to loss of capacity when conflict of interest issues), the ECtHR referred to

> Article 12§4 of the CRPD which requires appropriate and effective safeguards ensuring that measures relating to the exercise of legal capacity by persons with disabilities be free of conflict of interest and undue influence … and which Armenia, by adhering to the CRPD, undertook to take into consideration.[195]

The ECtHR thereby used the CRPD to illustrate the requirements of the more broadly stated ECHR principles, including the fact that Armenia, being bound by it, should be taking it into account (which is akin to indirect enforcement).

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[193] *AN v Lithuania*, App no 17280/08, ECtHR (4th Section), 31 May 2016, [2017] MHLR 38, para 80.
[194] *AN v Lithuania*, App no 17280/08, ECtHR (4th Section), 31 May 2016, [2017] MHLR 38, para 102.
[195] *Nikolyan v Armenia*, App no 74438/14, ECtHR (1st Section), 3 October 2019, [2021] MHLR 21, para 95. The ECtHR cited *Guberina v Croatia*, discussed above, and confirmed that it was particularly important to have a conflict-free guardian, given it was his only way to access courts. See also *N v Romania (No 2)*, App no 38048/18, ECtHR (Fourth Section), 16 November 2021, [2022] MHLR 177. In *Blokhin v Russia*, App no 47152/06, ECtHR (GC), 23 March 2016, para 219, the Court noted that "rights should be secured in an adapted and age-appropriate setting in line with international standards"; the Convention on the Rights of the Child was cited as the primary relevant standard, and the CRPD as a secondary in determining that procedural safeguards were needed for children.

Similarly, in finding in *Kacper Nowakowski v Poland* that Article 8 was breached in relation to contact with children after separation, where the applicant's communication impairment was viewed as a barrier to contact rather than as a feature requiring support, the ECtHR cited Articles 5 and 23 of the CRPD as relevant international materials and noted that:[196]

> … the authorities were required to implement particular measures that took due account of the applicant's situation. The Court refers here to the second sentence of Article 23§2 of the Convention on the Rights of Persons with Disabilities, which provides that "State Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities".

Finally, in *Jivan v Romania* (Article 8 breached - failure to provide personal assistant for elderly person whose needs inadequately assessed) the ECtHR (i) noted that Romania was a party to the CRPD and so had undertaken to respect wider concepts such as dignity and autonomy and more specific features such as personal mobility and inclusion in the community;[197] but (ii) had not adequately taken into account respect for autonomy and dignity, and so could not show a fair balance.[198]

IV. DISCUSSION

As made clear by the general rules on interpretation outlined in Part II, arguments about the content of rights under the ECHR cannot rest solely on the text and documents showing its purpose. As rights reflect the conditions of the modern day, external evidence of those conditions is important. Further, the ECHR's constitutional nature, setting out broad principles, has two implications: (i) those principles have to be put into context by finding higher level rationales for them; and (ii) more detailed rules have to be found by implication. The higher-level rationale found by the ECtHR is that the ECHR is designed to promote a democratic, rule of law-based society, involving such features as pluralism, tolerance and broad-mindedness. At the same time, democracy also allows states to differ about where balances are drawn between competing interests, which has led to the margin of appreciation doctrine.

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[196] *Kacper Nowakowski v Poland*, App no 32407/13, ECtHR (4th Section), 10 January 2017, para 93.
[197] *Jivan v Romania*, App no 62250/19, ECtHR (Fourth Section), 8 February 2022, paras 44 and 45.
[198] *Jivan v Romania*, App no 62250/19, ECtHR (Fourth Section), 8 February 2022, paras 49, 51 and 52. There was also reliance on the reduced margin of appreciation (at para 42). The finding that Article 8 was engaged and breached here is a further reason to challenge the *Glaissen* decision, discussed above.

What is the role for the CRPD in this? It is suggested that a variety of the points summarised in Part III are relevant. First, there is the overarching concept of human dignity, which, although not mentioned in the ECHR, is at the core of the foundational UDHR. As dignity features in the CRPD in various rights, it was referenced in the *Bouyid* case about the characterisation of treatment about which there could be reasonable differences of view as to whether it breached Article 3.[199]

Secondly, the CRPD provides the important reminder that pluralism requires a society inclusive of the needs of those with disabilities: this illustrates when margins of appreciation should be narrow, in case they perpetuate a history of exclusion. As outlined in Part I, preventing this is central to the rationale for the CRPD.

Thirdly, and linked to the first two points, non-discrimination is also a core human rights concept. Although perhaps hidden slightly by being placed in Article 14 of the ECHR,[200] it is written into every other right. The CRPD has been significant here, since its definition of discrimination, including the need for reasonable accommodation, has been adopted by the ECtHR for use in applying Article 14.

This overlaps with the second implication of the ECHR's constitutional position, namely reading in extra rights to make what is express practical and effective. This is something that may change over time, in accordance with living instrument principles (as in *Rooman*). In this context, treaty standards such as the CRPD illustrate what makes a right practical and effective. They also reveal a consensus on how standards have developed. This may lead to the ECtHR, in seeking harmony between various standards, applying the CRPD standard even when it has not been ratified by a state.

Returning to the dispute between the majority and the dissenting judge in *Caamaño Valle v Spain*, the latter found that taking the "cautious approach" of the majority[201] was ironic because Spain had, in the meantime, modified its law to be compliant with the CRPD.[202]

[199] In *Bouyid*, the ECtHR does not seek to define or even conceptualise dignity, meaning this is a matter for further clarification: however, it indicates that the CRPD is one source for the further analysis.
[200] Contrast the equivalent requirement being in Article 2 of the ICCPR, which also has its Article 26 right to non-discrimination which did not appear in the ECHR until Protocol 12.
[201] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, dissent para 17.
[202] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, dissent para 19

Such caution was also problematic for the judicial role since it risked the ECHR becoming "a bar to the alignment of the Convention and domestic laws with the inclusive approach to equality as introduced by the CRPD in human-rights law".[203]

It is suggested that there is much to favour this dissenting position. The entrenched "living instrument" nature of the ECHR gives rise to a further question of its pace and also whether it should be founded in the ratification of other standards or their implementation. This is an important question because of the role of the ECHR within the countries of the Council of Europe, which should not be understated: it was clear in *Strøbye and Rosenlind v Denmark* that the Danish authorities were aware that their laws conflicted with the CRPD but it was not considered to have the same binding quality as the ECHR.[204] Since the Vienna Convention's clear indication that failings in domestic law cannot excuse non-compliance with international obligations applies to both the ECHR and the CRPD, the Danish position here rests on a legally unprincipled distinction. But the decision of the Court in that case and of the majority in *Caamaño Valle* means that a breach of the CRPD was, if not ignored, not found sufficient to assess the living instrument outcome on the basis of de jure obligations rather than de facto implementation.

As outlined in Part II, the Grand Chamber in *Demir and Baykara v Turkey* made clear that the ECHR can lead to the implementation of standards that have not been ratified (and efforts to limit the ECHR's jurisdictional provisions will be rejected because of the ECHR's constitutional nature, as was decided in *Loizidou v Turkey*). Further, as outlined in Part III, the ECtHR has now adopted the model of inclusive education made express in the CRPD, and has aligned its approach to discrimination to require reasonable accommodation, the requirement for which is a CRPD-based clarification: this was in the context of non-implementation of these standards. Similarly, as illustrated in *Nikolyan v Armenia* and *Kacper Nowakowski v Poland*, ratification was legally significant.[205]

[203] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, dissent para 19

[204] *Strøbye and Rosenlind v Denmark*, App nos 25802/18, 27338/18, ECtHR (Second Section), 2 February 2021, [2022] MHLR 79, para 60 (view of Minister of Justice in a report to Parliament).

[205] See, by analogy, the New Zealand common law move from the traditional common law dualist position that unincorporated international law is not legally relevant to interpreting domestic statutes and discretions to finding that they should be interpreted to be compliant with international obligations as far as possible. The judges have been concerned to avoid the "window dressing" of signing up to but not implementing an international obligation. See the discussion in Kris Gledhill, Human Rights Acts: the Mechanisms Compared (2015, Hart Publishing, Oxford), pp138-144.

So why not in relation to voting? Is there a principled distinction? Or are there factors that allow a proper distinction between situations such as education and voting? Judge Lemmens in *Caamaño Valle* commented that "While some of the CRPD Committee's interpretations may not be directly transposable to the Convention, others are" and his view was that the interpretation of the right to vote was one that could.[206] This suggests a significant issue that lawyers appearing before the ECtHR should seek to explore in suitable cases. It is suggested that these are the key questions:

(i) Since the ECHR and CRPD can be traced back to the UDHR and the CRPD claims not to create new right but to rephrase existing rights, are they substantively the same?

(ii) Where there are apparent textual inconsistencies, are these explicable by the understandings of 1950 that led to the ECHR text that should no longer govern in light of features such as the living instrument approach?

(iii) Given the ratification of the CRPD by all but one party to the ECHR, should the need for harmony between human rights instruments or the recognition of a consensus turn on ratification or implementation?

(iv) Given the existence of the CRPD and its mechanisms (which, as shown in *Caamaño Valle v Spain*, led to a change in Spanish law when the ECHR did not require that change), are there situations where, despite the common heritage of the UDHR, it should be accepted that the ECHR does not go as far as the CRPD?

[206] *Caamaño Valle v Spain*, App no 43564/17, ECtHR (Third Section) 11 May 2021, [2022] MHLR 100, dissent para 17. *Rooman* might be such a case: it was cited by the majority (at para 54) in the context of their view that other instruments might offer wider protection than the ECHR and that standards would not necessarily be the same. Judge Lemmens does not deal with this in his dissent.

Introduction to Chapter 3

Although the focus of Chapter 2 is the proper basis for the use of the CRPD when it comes to the interpretation of the ECHR, one aspect revealed is that there have been instances where the ECtHR has accepted that the terms of the CRPD can be replicated in its interpretation of the ECHR, but also other instances where there is a tension. Chapters 3-5 now delve more deeply into how this applies to some substantive rights protected by both the ECHR and the CRPD, arranged along a continuum. The next chapter, chapter 3 relates to the right to education and how it interacts with the right to non-discrimination. This is an instance where the modern interpretation of the language of the ECHR, which presents a largely undefined right to education, is that avoiding discrimination requires the provision of inclusive education with reasonable accommodation being made for the needs to children with impairments.

However, this was not the interpretation adopted under the ECHR prior to the Twenty-First Century. Rather, there was both significant deference to choices made by states as to whether to favour the use of special schooling arrangements for children with special educational needs (including in segregated settings); and also commentary that it was inconceivable that all children could be accommodated in mainstream schools.

Chapter 3 provides an account of how the case law has developed. It suggests that there was a (failed) process of strategic litigation designed to secure the endorsement of inclusive education in the late Twentieth Century, the arguments for which were not even found arguable. There was then a (successful) campaign of strategic litigation which had a focus on the misuse of special schools in relation to Roma children in various countries, the effect of which was to require the authorities to ensure equality of opportunity and the mixing of children on grounds of ethnicity. In this context, there was then acceptance of the principles set out in the CRPD and the endorsement of inclusive education.

This chapter has the following elements: first, the brief language setting out the right to education in the ECHR is contrasted with the more expansive account of the right in the CRPD; secondly, the definition of discrimination in the CRPD is adopted as a suitable aid for interpreting the undefined definition of discrimination in the ECHR, replacing a narrower explanation of discrimination that had previously developed; and, thirdly, the CRPD's express explanation of what is required to combine the right to education with

the right to non-discrimination, namely the use of inclusive model of education with reasonable accommodation offered, is accepted as the proper interpretation of the ECHR.

In this way, the legal standards are equated. However, there is also the question of how far this new legal standard has been implemented in reality: here, the article posits that information from the CRPD Committee suggests that gaps in implementation persist, which may mean that the legal journey is not yet completed, albeit that the focus can move from the development of legal standards to their implementation.

The Right to Inclusive Education for Persons with Disabilities under the European Convention on Human Rights: Strategic Litigation in Action, With More to Come?

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Abstract: Education for children and other persons with disabilities is (i) a right that (ii) must be enjoyed equally: but what does this entail? Can it be met by "separate but equal" segregated education, or does it have to follow an inclusive education model? The Convention on the Rights of Persons with Disabilities 2006 (CRPD) is clear that inclusive education is required. Case law under the European Convention on Human Rights (ECHR) initially rejected this requirement: but the European Court of Human Rights (ECtHR) has now determined that non-discrimination concepts from the CRPD, in particular that not providing reasonable accommodation of the needs of those with disabilities is discriminatory, inform the understanding of the non-discrimination requirement in Article 14 of the ECHR. It has also accepted that inclusive education is the most obvious way to secure equality. An analysis of the case law reveals that strategic litigation played a role in both the failed initial attempt to secure a right to inclusive education and then in changing the approach adopted by the ECtHR so as to allow the revised approach. However, since it is clear that many Council of Europe members have not fully implemented inclusive education, there is scope for further strategic litigation to advance the implementation of inclusive education.

Keywords: Right to Education, Non-Discrimination, Persons with Disabilities, Strategic Litigation

I. Introduction

The central purpose of this article is to examine changes in the understanding of the right to education in the context of non-discrimination principles under the European Convention on Human Rights ("ECHR"),[207] and to explore possible further litigation relying

[207] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953), more commonly referred to as the European Convention on Human Rights ("ECHR").

on the impact of the UN Convention on the Rights of Persons with Disabilities 2006 (CRPD).[208]

A. The Relevant Standards

The relevant standards are these. Under Article 2 of Protocol 1 to the ECHR (P1A2):[209]

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 14 of the ECHR precludes "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" in relation to any rights set out in the ECHR.

The ECHR notes in its preamble that its aim is "the collective enforcement of certain of the rights" in the Universal Declaration of Human Rights 1948 (UDHR).[210] It has various non-discrimination standards and also recognises that education is a right. Supplementing the UDHR's powerful emphasis in its Article 1 that everyone is "equal in dignity and rights", are the right to non-discrimination in relation to rights (Article 2) and to the equal protection of the law (Article 7).[211] The right to education (including at the tertiary and life-long learning levels) is recognised in Article 26 of the UDHR. It also recognises a parental role in the education of their children; and sets out the purposes of the right as more than simply the receipt of knowledge, but including developing the human personality and promoting respect for human rights.

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[208] Convention on the Rights of Persons with Disabilities 2006 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

[209] ETS 009, opened for signature 20 March 1952, entered into force 18 May 1954. The rights in the Protocol are Convention rights for the purposes of Article 14: see P1A5.

[210] Resolution 217(III) of 10 December 1948; the text is available at http://www.un.org/en/universal-declaration-human-rights/index.html. The UN Charter of 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945, available at http://www.un.org/en/charter-united-nations/index.html, is also to be noted: its preamble refers to the desire "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women …" – this need to reaffirm is also a textual indication of the purpose in place.

[211] Article 2 of the UDHR is reflected in Article 14 of the ECHR, but Article 7 of the UDHR is not properly recognised until Protocol 12 (ETS 177, opened for signature 4 November 2000, entered into force 1 April 2005): Article 1 requires non-discrimination on the basis of status in relation to any right set out in law and no discrimination based on status by any public authority.

The UDHR is also put into effect by UN treaties, including the other two components of the International Bill of Rights: the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)[212] and the International Covenant on Civil and Political Rights 1966 (ICCPR).[213] Both require non-discrimination in relation to the rights they set out: Article 2(2) of the ICESCR and Article 2(1) of the ICCPR. Moreover, Article 26 of the ICCPR makes equal protection before the law a civil and political right. The right to education, in Article 13 of the ICESCR, expands on the UDHR language, referencing all levels of education, parental roles, private schools, and the value of education in developing the human personality and sense of dignity and allowing effective participation in a free and tolerant society.[214]

Supplementing the International Bill of Rights, the UN's core human rights treaties and definitions and indications of what rights mean in certain contexts. Accordingly, the CRPD definition of disability discrimination in its Article 2 covers direct and indirect discrimination ("any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of" causing a lesser enjoyment of right);[215] added is the express indication that a failure to counter the effects of disability by not making reasonable accommodation is disability discrimination.[216] Reasonable accommodation is defined in Article 2 as

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

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[212] International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

[213] International Covenant on Civil and Political Rights 1966 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

[214] In addition, Article 14 requires a plan of action to introduce free primary education if that is not in place. More generally, Article 2(1) of the ICESCR makes rights in the ICESCR subject to a requirement of progressive realisation, albeit using the maximum of available resources. Articles 2(1) and 14 are clearly aimed to allow developing countries to be bound by standards they cannot yet fully realise. For those that can, the status of education as a right means it is not discretionary.

[215] This builds on the definitions of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) (ICERD) and of discrimination against women in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) (CEDAW). Article 5(e) of ICERD prohibits racial discrimination in relation to education and training, and Article 10 of CEDAW requires equal access at all levels.

[216] The CRPD Committee suggests that there are four forms of discrimination, direct – treating someone less favourably in light of their status (even if that is not the motive or intention); indirect – neutral criteria which exclude people in practice; failure to provide reasonable accommodation; and harassment – conduct that creates "an intimidating, hostile, degrading, humiliating or offensive environment": see Committee on the Rights of Persons with Disabilities, General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 18.

The substantive content of the right to education of persons with disabilities, expressed in Article 24(1), is the right to "an inclusive education system at all levels". Articles 24(2) and (5) preclude exclusion from mainstream education on the basis of disability but instead require reasonable accommodation, individualised support measures and suitable environments. Reference is also made in Article 24(4) to suitable staff training and the use of augmentative and alternative modes of communication. The CRPD also gives education a role in relation to several rights: awareness raising of the rights and value of persons with disabilities (Article 8), reducing exploitation and abuse (Article 16), securing equal access to family planning advice (Article 23) and habilitation and rehabilitation (Article 26).[217]

B. Summary and Structure

The research for this article rests on analysing two datasets. The first is cases in the HUDOC database of decisions under the ECHR that discuss Article 14 of the ECHR together with P1A2. The second is the Concluding Observations issued by the Committee on the Rights of Persons with Disabilities (the CRPD Committee), the expert body supervising the implementation of the CRPD.

The analysis indicates that:

> (i) until the end of the Twentieth Century, the ECHR was interpreted so as to permit – and arguably even require in some circumstances – that there be "special schools", involving segregated provision for children with impairments and hence additional needs; but
> (ii) case law now requires placement in mainstream schools with reasonable accommodation for additional needs, the European Court of Human Rights (ECtHR) now adopting definitions from the CRPD to explain the approach to non-discrimination in the context of education; and
> (iii) that identifiable campaigns of strategic litigation have been involved both in the initial failed attempt to secure a right to inclusive education and in the changed position; and

[217] See also Art 7 of ICERD (countering prejudice and promoting tolerance through education); Article 10(c) of CEDAW encourages mixed-gender schooling to help remove stereotypes about roles, and Articles 5(b), 10(h) and 16(1)(e) note the role for education in marriage and family matters. In the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), Article 28 follows Article 13 of the ICESCR (with additional specific references to reducing truancy and premature school-leaving school and to ensuring that disciplinary systems are rights-compliant; Article 29(1) notes the role of education in developing a child's "personality, talents and mental and physical abilities to their fullest potential", and cites wider societal benefits from respect for rights (and the natural environment); and education relevant to protecting children from mistreatment (Article 19), health (Article 24), work (Article 32), protecting from illegal drugs (Article 33), and rehabilitation in criminal justice (Article 40). Article 23(3) contains specific reference to the right of children with disabilities to be education (and Article 24(4) refers to the importance of disseminating international best practice).

(iv) that material from the CRPD Committee suggests that further strategic litigation is appropriate.

The term "strategic litigation" means litigation designed to establish a legal principle that can be used by others.[218] Other descriptors could be used, such as "cause lawyering",[219] "public interest litigation",[220] or "impact litigation".[221]

The phrase "inclusive education" means making changes within a mainstream setting to accommodate the needs of a student, rather than exclusion (ie keeping someone away from education), segregation (ie schools designed for those with impairments) and integration (requiring a student to comply with the requirements of a mainstream school).[222] The CRPD Committee has suggested it "entails a transformation in culture, policy and practice",[223] at a variety of levels. These are a "whole systems" approach (led by central government education ministries, controlling the allocation of resources and work on awareness-raising and training), a "whole educational environment" (involving educational staff adopting the inclusive approach), and a "whole person approach" (setting high expectations of all students, and meeting their needs, including through relevant support).[224]

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[218] See Michael Ramsden and Kris Gledhill "Defining Strategic Litigation" (2019) 38 (4) Civil Justice Quarterly 407-426 for the suggestion, based on its use in academic settings, policy papers and websites that its central features are (i) seeking long-term impacts beyond the origins of the claim (ie a legacy component), (ii) being a method of advocacy and so adaptable to various purposes, (iii) seeking effects beyond those within the court system, and (iv) a broad view of litigation, including international bodies. It is often used without definition: for example, in P Barnett and MA Stein 'Strategic Litigation and Inclusive Education' in G de Beco, S Quinlivan and J Lord (Eds) *The Right to Inclusive Education in International Human Rights Law* (CUP, Cambridge, 2019), ch 10, pp 241-268, no definition is offered: critiques of its use, essentially that it overstates the power of courts to effect social change, implies that it is litigation to advance a cause.

[219] In Stuart Scheingold and Austin Sharat *Something to Believe In: Politics, Professionalism and Cause Lawyering* (Stanford University Press, Stanford, 2004), they suggest at p3 that, although it cannot be defined, its "core" is "using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or, indeed, legal".

[220] See Alan Chen and Scott Cummings *Public Interest Lawyering: A Contemporary Perspective* (Walters Kluwer, New York, 2014) pp5-32 for a general discussion – including its start as legal aid for under-represented groups, before developing to cover wider topics; at p7, they define it as "a broad and contested range of activities that includes legal advocacy focused on the representation of individuals shut out of the private market for legal services as well as lawyering to advance the collective interests of defined groups or constituencies (both liberal and conservative)".

[221] See Lucie White "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1987) 16 NYU Review of Law & Social Change 535, fn 1, for a suggested definition of "litigation oriented toward the change of institutional norms or practices, rather than the resolution of individual problems".

[222] Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to education*, A/HRC/25/29, 18 December 2013, [4].

[223] Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [9]. See also Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to education*, A/HRC/25/29, 18 December 2013, [7].

[224] Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [12]. The Committee has also expressly endorsed the approach in the SDGs and the Incheon Declaration: in its Concluding Observations Slovakia, UN Doc CRPD/C/SVK/CO/1 (17 May 2016) at [68] it noted the need to "(a) Introduce an enforceable right to

This article proceeds as follows: Part 2 sets out and critiques the outcome of the initial phase of case law; Part 3 describes the development of the revised approach, and how it has incorporated concepts from the CRPD; and Part 4 explains the scope for further strategic litigation.

II. The Initial Case Law

A. Precursors: Foundational Explanations of the Right to Education and Non-Discrimination

The first right to education case that proceeded from the European Commission of Human Rights[225] to the ECtHR involved a group of parents who were intent on changing government policy for the benefit of many more families, a component of strategic litigation. The *Belgian Linguistics Case*[226] involved challenges to policies less favourable to French-speaking Belgians. The general practice was that all schools in each region of the country taught in the major language of the region, though schools teaching in Dutch or in French existed in Brussels/Bruxelles and in Leuven/Louvain. The focus was on six communes on the outskirts of Brussels/Bruxelles which could have schools in Dutch or French: here, parents who wanted Dutch-language education could enrol their children in a school in any of the communes, but those who wanted French-language education could only enrol their children in a school on their home commune (and otherwise had to send their children into Bruxelles if there was no local school). This differential treatment breached P1A2 together with Article 14: but the rest of the policy was found not to breach rights.

The ECtHR set out some foundational points as to Article 14:

inclusive and quality education in the Education Act, including by defining inclusive education in accordance with the Incheon Declaration on education 2030".

[225] Under Articles 20-37 of the ECHR as drafted, if the relevant state accepted its jurisdiction, the former European Commission of Human Rights determined the admissibility of an application; it tried to secure a settlement of an admissible case and, if unable, set out a view of the merits. Under Articles 38-56, the Court could rule on the merits if requested by the state or the Commission.

[226] *Belgian Linguistics Case* Appn nos 1474/62 and others, (1968) 1 EHRR 252.

(i) it "formed an integral part of each of the Articles laying down rights and freedoms", such that a situation which does not breach the right in question "may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature";[227]
(ii) "discrimination" is understood by distilling the common approach in democratic states, namely whether "a distinction has no objective and reasonable justification"; any difference must both "pursue a legitimate aim" and reflect a "reasonable relationship of proportionality between the means employed and the aim sought to be realised";[228] but
(iii) the Court's "subsidiary" role meant that the state assesses the relevant balance, though with the Court retaining a power of review.[229]

As to the right to education, its elements were "a right of access to educational institutions existing at a given time" and also "the possibility of drawing profit from the education received" through "official recognition of the studies which he has completed",[230] albeit that the negative formulation of the right meant that states could not be required to fund any particular form of education.[231] In addition, it was noted that the right "… by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals".[232] A gloss upon this gloss was that "such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention"; it also had to reflect the fact that the Convention as a whole "implies a just balance between" community interests and individual rights "while attaching particular importance to the latter".[233] The Court upheld the way Belgium balanced these factors save in relation to differential treatment of Dutch and French speaking families in the communes on the outskirts of Brussels/Bruxelles.

The role of the parents' religious or philosophical convictions, which have to be respected by reason of the second sentence of P1A2, was considered in *Kjeldsen, Busk Madsen and*

[227] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [9].
[228] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [10].
[229] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [10].
[230] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [4].
[231] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [3]. On the facts, it was also noted that the right would be meaningless unless education was in one of the official languages of the state (even if this did not mean a language of choice): The Law, Part I.B. [11].
[232] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [5].
[233] *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [5]. Such balancing of collective and individual rights, expressly required by Articles 8-11, is implicit in relation to the right to education because implementation involves a collective effort and has societal impacts, but involves questions on which reasonable people may differ (which is reflected in the role of parental preferences, discussed below).

Pedersen v Denmark,[234] which turned on religiously-based parental objection to compulsory sex education in state primary schools. Again, there was the hallmark of strategic litigation that the applications were designed to have wider impact, and it is recorded that "the Busk Madsens and Pedersens … regarded their applications as closely linked with that of the Kjeldsens".[235]

The Court found a wide role for parental convictions: they were relevant to all aspects of education, including its organisation and financing,[236] and secured "pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention".[237] However, they were subservient to the right to education of the child.[238] More generally, there was deference to states in curriculum design, given the choices involved.[239]

In the third foundational case, *Campbell and Cosans v UK*, the ECtHR confirmed that ancillary functions such as discipline were covered, because education was "the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young" and so was broader than "teaching or instruction", which covers "the transmission of knowledge and … intellectual development".[240] "Philosophical convictions" were akin to the "beliefs" protected by Article 9 and "philosophical" meant that things outside some "fully-fledged system of thought" were covered as long as they

[234] *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711. Language preferences were not covered: *Belgian Linguistics Case* Appn nos 1474/62 and others, The Law, Part I.B. [4].

[235] *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711, [44]: the Commission joined the three applications.

[236] The government suggested that parental convictions extended only to a requirement to exempt children from denominational religious teaching: *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711, [51].

[237] *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711, [50]. It included private schools, confirmed by reference to the travaux preparatoires; and part of the reasoning in dismissing the application was that these schools, although largely state funded, did not have to teach sex education.

[238] The Court referred to the parental right being "grafted" onto the "fundamental right", namely "the right of everyone to education": *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711, [50]. At [51], it was noted that the wording of the article as a whole is "dominated by its first sentence", such that the second sentence set out an "adjunct" right, which also reflected the parental duty to educate their children.

[239] *Kjeldsen, Busk Madsen and Pedersen v Denmark* Appn nos 5095/71, 5920/72, 5926/72, 7 December 1976, (1979) 1 EHRR 711, [53]. Religion and philosophy could be taught in an "objective, critical and pluralistic manner" not involving indoctrination.

[240] *Campbell and Cosans v UK* Appn nos 7511/76 and 7743/76, 25 February 1982, [33]. Discipline was noted to be integral to the educational system: [34]. Parental views as to discipline were therefore covered: [35]. The case involved parental objections to corporal punishment; the applications were made in the context of policy moves towards its abolition (paras [16]-[18]) and can be characterised as seeking to speed up the process.

were not trivial, namely "such convictions as are worthy of respect in a "democratic society" … and are not incompatible with human dignity" and not in conflict with the child's right to education.[241] The requirement to "respect" protected views, as with the need to respect family and private life under Article 8, involved an undefined positive obligation, going beyond to "acknowledge" or "take[] into account", and involving procedural safeguards.[242]

B. Strategic Litigation Aimed at Inclusive Education

These early cases recognised education as a broadly-conceived process of developing adults, requiring pluralism and non-discrimination. However, linked cases forming strategic litigation[243] challenging special schools for children with various intellectual impairments were found inadmissible on 2 October 1989: *PD v UK*,[244] *PD and LD v UK*,[245] *JL and BL v UK*,[246] and *Connolley v UK*.[247] Arguments focussed on not only parental views supporting inclusivity but also the social and intellectual benefits of mainstream provision and the benefits to other children of improved tolerance, such that special schools were unacceptable.[248] These arguments were rejected in each case as:

- philosophical convictions of parents could not require the provision of facilities needed for mainstreaming,[249] and in any event they were subordinate to the right of the child to education;

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[241] *Campbell and Cosans v UK* Appn nos 7511/76 and 7743/76, 25 February 1982, [36]. No doubt what was "religious" would also involve a cross-reference to Article 9.

[242] *Campbell and Cosans v UK* Appn nos 7511/76 and 7743/76, 25 February 1982, [37]. The Court relied on *Marckx v Belgium* Appn no 6833/74, 13 June 1979, (1980) 2 EHRR 330, [31]. On the facts, merely acknowledging parental objections was not enough; and suspending a child who would not accept corporal punishment (which was inhuman and degrading - *Tyrer v UK* Appn no 5856/72, 25 April 1978, (1980) 2 EHRR 1) was outside the ambit of permissible regulation of the right to education.

[243] The same academic lawyer was involved, and the common arguments were that the UK was not doing enough to implement its commitment to inclusive education.

[244] *PD v UK* Appn No 14137/88, Commission decision of 2 October 1989 (introduced on 4 September 1987, registered on 23 August 1988) (daughter with Downs Syndrome).

[245] *PD and LD v UK* Appn No 14135/88, Commission decision of 2 October 1989 (introduced on 25 February 1988, registered on 23 August 1988) (daughter with developmental delay resulting from foetal brain damage).

[246] *JL and BL v UK* Appn No 14136/88, Commission decision of 2 October 1989 (introduced on 25 February 1988, registered on 23 August 1988) (son with delayed development from ataxia and dyspraxia).

[247] *Connolley v UK* Appn No 1413/88, Commission decision of 2 October 1989 (introduced on 8 July 1988, registered on 23 August 1988) (son with developmental delay from a chromosomal abnormality).

[248] In each case, it is recorded that the argument put was that, in light of Article 14 taken together with Protocol 1 Article 2, "The continuing segregation of handicapped children has no objective or reasonable justification in the light of contemporary knowledge, as demonstrated in countries like Denmark and Italy, and is disproportionate. The rights and freedoms of able children in a mainstream school would not be infringed, instead they would benefit, their understanding and tolerance being enhanced".

[249] This was said to flow from *X v UK* Appn no 7782/77, Commission Decision of 2 May 1978, another narrow decision in which it was determined that the government did not have to support efforts to establish non-denominational schools in Northern Ireland and so could properly leave the situation of Protestant state

- arguments for inclusive education "cannot apply to all handicapped children" and did not mandate that children with severe learning problems should be accommodated in a mainstream school "with the expense of additional teaching staff which would be needed" when there was an available place in a special school;
- the need to "place weight" on parental views was in the context of a "wide measure of discretion" as to the best use of resources for disabled children;
- Article 14 was not breached as it was not shown that there were fewer education options; and
- special schools, where necessary, involved "no element of discrimination…, but rather the contrary, the special requirements of certain disabled children being catered for where necessary".

This reasoning involves, first, deference to state choices to allocate resources to segregation rather than support in mainstream settings; and, secondly, a view that inclusive education is a philosophical viewpoint that may conflict with the right to education of children with disabilities, which may require segregated settings.

This deferential and narrow approach was applied in various other cases:

(i) *Graeme v United Kingdom*:[250] no right to inclusive education;
(ii) *Klerks v The Netherlands*:[251] no right to inclusive education, including a finding that it had been open to the authorities to reject inclusion as it would "disrupt[] the educational needs of the other pupils";
(iii) *Simpson v UK*[252] and *Smith v UK*:[253] decisions to place children with dyslexia within state schools – noted to reflect the trend to inclusivity - not open to challenge because of deference to state choices as to use of resources to benefit children with disabilities; since the right to education was about access to facilities and the possibility of benefit, the central concern of the parents as to the adequacy of state provision was not considered, even though the need for benefit must turn on what is provided;[254]
(iv) *SP v UK*:[255] a claim that education had been inadequate because dyslexia had not been identified was rejected because ECHR institutions did not have a role of assessing the standard of teaching (which seems inconsistent with the need for education to have a potential benefit).

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schools and Catholic schools which were private though largely state funded. In essence, parents who wanted a non-denominational school had to make the same contribution as the Catholic Church-supported private schools.
[250] *Graeme v UK* Appn no 13887/88, Commission decision of 5 February 1990.
[251] *Klerks v the Netherlands* Appn no 25212/94, Commission decision of 4 July 1995, Decisions and Reports 82.
[252] *Simpson v UK* Appn no 14688/89, Commission decision of 4 December 1989 (introduced on 31 January 1989 and registered on 24 February 1989)
[253] *Smith v UK* Appn no 15186/89, Commission decision of 4 December 1989 (introduced on 5 May 1989 and registered on 30 June 1989)
[254] Indeed, the assertion of the Commission in the first four inadmissibility decisions that not all children with disabilities can be in a mainstream setting must turn on the quality of what is provided: but here they did not engage in that.
[255] *SP v UK* Appn no 28915/95, Commission decision of 17 January 1997.

A case summarising the lack of progress to inclusivity is the Commission's inadmissibility decision in *McIntyre v United Kingdom*.[256] A wheel-chair using pupil was unable to access the science room and library at her junior school: it had not been made accessible in the past and expense was cited as the reason for not installing the necessary lift. The government contended that Ms McIntyre's right to education did not require "the most effective possible education" or access to every part of a school, as well as contending that a suitable balance had been drawn between "the needs of disabled pupils, the wishes of parents, the interests of other pupils and the availability of public funds"; and they argued that disability was not covered by Article 14.

This appalling latter submission was not ruled on as the Commission found that Ms McIntyre's education was adequate and not discriminatory because she "was treated differently" from her peers "only in that they could attend classes on the first floor whereas she could not": having minimised the difference, the Commission added that there was a "legitimate aim" for inequality, namely the need for "a practical and efficient use of resources and public funds".

C. The Inadequacy of This Position

In the inadmissibility decisions of 1989, no basis is set out for the view that the right to education may require special schools for children with disabilities. It is open to challenge, without the benefit of hindsight, because it overlooks other treaty standards. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) also promulgates standards. Its Convention against Discrimination in Education 1960[257] also states that it builds on the UDHR. Article 1 defines discrimination in education by, first, a general reference to any status-based distinction which has the purpose or effect of undermining "equality of treatment in education": this pre-dates the express coverage of direct and indirect discrimination in the core human rights treaties referenced above. Secondly, it includes several specifics, namely denial of access to any education at any level, subjection to a lesser standard of education, and "establishing or maintaining separate

[256] *McIntyre v the United Kingdom* Appn no 29046/95, Commission decision of 21 October 1998.
[257] UNESCO Convention against Discrimination in Education (opened for signature 14 December 1960, entered into force 22 May 1962), 429 UNTS 93. There is also a Recommendation against Discrimination in Education, adopted at the same time. They are available at https://en.unesco.org/: see also Y Daudet and PM Eisemann, Right to education: commentary on the Convention against Discrimination in Education, UNESCO 2005.

educational systems or institutions for persons or groups of persons". Whilst there is an express exemption to the latter proscription in that Article 2 allows single sex schools, schools based on religious or linguistic differences[258] and private schools, provided that equal standards are maintained, there is no exemption for separate schooling on the basis of disability. States parties have to take various steps to combat discrimination in education by reason of Article 3; and Article 5 includes the requirement that education be aimed at developing the human personality and supporting human rights.

Thirty-seven of the 46 members of the Council of Europe are parties to the UNESCO Convention, most from its early years,[259] but this treaty-based acceptance of not segregating children with disabilities – which has been endorsed in various statements and comments from other UN Treaty Bodies[260] - was not referenced in the ECHR case law.

[258] See also Article 5, which allows schools promoted by national minorities.

[259] The Russian Federation, formerly a member of the Council of Europe, ratified it on 1 August 1962. The dates of ratification or acceptance are as follows: there are also numerous successions, reflecting that various member states of the Council of Europe were previously part of conglomerate states and might have been bound in that basis. Albania, ratification 21 November 1963; Andorra, acceptance 13 March 2018; Armenia, succession 5 September 1993, Bosnia and Herzegovina, succession 12 July 1993; Bulgaria, acceptance 4 December 1962; Croatia, succession 6 July 1992; Cyprus, acceptance 9 June 1970; Czechia, succession 26 March 1993; Denmark, ratification 4 October 1963; Finland, ratification 18 October 1971; France, ratification 11 September 1961; Georgia, succession 4 November 1992; Germany, ratification 17 July 1968; Hungary, ratification 16 January 1964; Iceland, acceptance 6 July 2021; Italy, ratification 6 October 1966; Latvia, acceptance 16 June 2009; Luxembourg, ratification 20 January 1970; Malta, succession 5 January 1966; Monaco, acceptance 28 August 2012; Montenegro, succession 26 April 2007; Netherlands, ratification 25 March 1966; North Macedonia, succession 30 April 1997; Norway, ratification 8 January 1963; Poland, ratification 15 September 1964; Portugal, ratification, 8 January 1981; Republic of Moldova, succession 17 March 1993; Romania, ratification 9 July 1964; San Marino, ratification 11 March 2020; Serbia, succession 11 September 2001; Slovakia, succession 31 March 1993; Slovenia, succession 5 November 1992; Spain, acceptance 20 August 1969; Sweden, ratification 21 March 1968; Ukraine, ratification 19 December 1962; United Kingdom, acceptance 14 March 1962. It has not been ratified by the following Council of Europe states: Austria, Azerbaijan, Belgium, Estonia, Ireland, Liechtenstein, Lithuania, Switzerland and Turkey.

[260] See various UNESCO conferences, including the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, the outcome of the World Conference on Education for All - *Meeting Basic Learning Needs* at Jomtien, Thailand, 5-9 March 1990, UNESCO, Paris, 1990; the Dakar Framework for Action – Education for All: Meeting Our Collective Commitments, the outcome of the World Education Forum, Dakar, Senegal, 26-28 April 2000 (and several regional meetings), UNESCO, Paris, 2000; and The GEM Final Statement – The Muscat Agreement, outcome of the Global Education for All Meeting, Muscat, Oman, 12-14 May 2014. The Jomtiem declaration was expressly endorsed as being relevant to the right to education in Art 13 of the ICESCR (which is where the UN gave treaty-based effect to the right to education in the UDHR): Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [5]; the UNESCO Convention is also expressly endorsed at paras [31]-37], along with other relevant standards about non-discrimination. See also Committee on Economic, Social and Cultural Rights *General Comment No 5: Persons with disabilities*, 1994, [35], which endorses the view that "persons with disabilities can best be educated within the general education system", with support. There is also support from the Committee on the Rights of the Child: see Committee on the Rights of the Child, General Comment No 9: the Rights of Children with Disabilities, CRC/C/GC/9, 27 February 2007, [62]; at [66]-[67], the Committee expressly supports the goal of inclusive education.

The position at the turn of the century was that some 50 years after the UDHR's indication that everyone was equal in dignity and rights, and some 30 years after UNESCO had promulgated a treaty on the need for non-discrimination in education, the European Commission of Human Rights determined that it was not even arguable that a different education for a child with disabilities breached her rights. This was soon to change.

III. Further Strategic Litigation Changing the Dialogue

The failure to secure recognition of inclusive education via interpretation of the ECHR is not the end of the story because a "living instrument" approach applies: the meaning of rights is not fixed as at the date of drafting (with updates depending on protocols) but can change over time.[261] Accordingly, arguments found unpersuasive in the past can be revisited. This was done: and, importantly, the range of material taken into account extended.

A. Strategic Litigation to Counter the Use of Special Schools for Ethnic Discrimination

Towards the end of the Twentieth Century, the European Commission of Human Rights was dis-established, leaving the ECtHR to determine admissibility and merits.[262] It restated and expanded the relevant principles, and accepted that the UNESCO Convention was relevant. This was first done in the context of strategic litigation involving Roma. The key case is *DH and Others v Czech Republic*,[263] brought by an NGO, the European Roma Rights Centre, challenging the significant over-representation of Roma children in special schools for children with intellectual impairment. A majority of a Chamber of the ECtHR determined that, as there was testing, consent of a parent or guardian, non-Roma

[261] In *Tyrer v UK* Appn no 5856/72, 25 April 1978, (1980) 2 EHRR 1, at [31], the Court noted that "the Convention is a living instrument which … must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field". The context was whether corporal punishment was inhuman and degrading, and in ruling that it was the Court accepted that the judgment turned not on what was acceptable at the time the Convention was drafted but the modern view taken.

[262] See Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No155 (Opened for signature 11 May 1994, Entered into force 1 November 1998).

[263] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber).

children were placed in these schools and some Roma children were moved on, the situation was not shown to be discriminatory.[264] The Chamber accepted that indirect discrimination from "disproportionately prejudicial effects on a group of people" would breach rights,[265] but held that could not be proved by statistics alone;[266] and held that its role was to "examine the individual applications before it" rather than "to assess the overall social context".[267] It also determined that, curriculum content being for the state,[268] the approach to students with learning difficulties involved a difficult balancing exercise, meaning that:[269]

> States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs.

The Grand Chamber took a different approach to key aspects. First, the meaning of discrimination was developed. The core meaning from *Belgian Linguistics* of differential treatment of those in similar situations without an objective and reasonable justification, supplemented by indirect discrimination,[270] was the acceptance that positive discrimination "to correct "factual equalities"" was permitted and that:[271]

> indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article …

Secondly, racial or ethnic discrimination was categorised as "particularly invidious" with "perilous consequences", so as to require "special vigilance and a vigorous reaction"

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[264] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [48]-[52]

[265] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [46]. It had accepted that discrimination was "treating differently, without an objective and reasonable justification, persons in relevantly similar situations" ([44]), that "States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment", albeit subject to Court review ([44]).

[266] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [46].

[267] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [45].

[268] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [47]. Authority for this proposition was *Valsamis v Greece* Appn no 21787/93, Judgment of 18 December 1996, (1997) 24 EHRR 294: but this case cited the *Kjeldsen* case, discussed above, as authority.

[269] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [47].

[270] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [176]. At [184], the Grand Chamber noted that this was consistent with the approach to indirect discrimination.

[271] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [175].

through using "all available means to combat racism".[272] Given the value of pluralism, differential treatment based largely on ethnic origin could not be justified objectively.[273]

Thirdly, the Grand Chamber revisited the approach to proof: if the applicant showed a difference of treatment, which could arise from statistical information,[274] as was allowed in EU law and by various UN Treaty Bodies, the burden of proof shifted to the government to show that it was not discriminatory.[275] There was already established flexibility in how evidence was evaluated.[276]

The Chamber had cited material about the disadvantaged position of Roma, including reports from the European Commission against Racism and Intolerance (ECRI) and under the Council of Europe Framework Convention for the Protection of National Minorities,[277] but had not found it legally significant, even though the information included that the Czech Republic accepted that there was a problem with the use of special schools. The Grand Chamber cited significant additional material,[278] including UN Treaty standards relating to discrimination and the UNESCO Convention against Discrimination in Education. This material transferred the burden of proof,[279] requiring the state to show an objective and reasonable justification, ie a legitimate aim and proportionate means.[280]

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[272] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [176].
[273] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [176].
[274] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [184]-[195]. It was noted that EU law and UN Treaty Bodies allowed this.
[275] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [177]; see also at [189], where the approach is repeated. The approach of shifting the burden applied already to injuries in custody, resting on control over relevant information: see *Selmouni v France* [GC] Appn no 25803/94, Judgment of 28 July 1999, (2000) 29 EHRR 403, [87], and *Salman v Turkey* Appn no 21986/93, Judgment of 27 June 2000, (2002) 34 EHRR 17, [100]-[102].
[276] See *Ireland v UK* Appn no 5310/71, Judgment of 18 January 1978, (1980) 2 EHRR 25, [161]; for a case involving Roma and the use of fatal force, see *Nachova and Others v Bulgaria* [GC] Appn nos 43577/98 and 43579/98, Judgment of 6 July 2005, (2006) 42 EHRR 43, [147].
[277] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 7 February 2006, (2006) 43 EHRR 41 (Chamber), [24]-[27]. The Framework Convention ETS No 157, Opened for signature 1 February 1995, entered into force 1 February 1998. It featured in the cases of *Chapman v UK* Appn no 27238/95, Judgment of 18 January 2001, (2001) 33 EHRR 18 (and linked cases) relating to the position of Roma in the UK.
[278] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [54]-[107].
[279] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [190]-[195]. Indeed, at [195], the Grand Chamber was of the view that the material supported a "strong presumption of indirect discrimination". At [181], reference was made to an emerging consensus on the need for a regulatory framework to protect minority interests and cultural diversity.
[280] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [208]. It was noted implicitly that the government seemed to have accepted this by legislation to abolish special schools and bring about integration.

This, an uphill task in light of the racial element, was not met.[281] As for the factors that had featured in the Chamber judgment:

> (i) The expert tests on which the placements were based were inadequate because they were not culturally neutral and seemingly interpreted in a biased fashion;[282]
> (ii) Parental consent to waive rights had to be fully informed and unequivocal, which it was not, and was ineffective in light of the public interest in prohibiting racial discrimination.[283]
> (iii) The margin of appreciation and deference to the state on matters such as curriculum design was not a safeguard because "… whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation …". [284]

The conclusion was that inadequate steps had been taken to remedy an existing problem, which indeed had been made worse by the lesser curriculum and segregation from the wider community in the special schools.[285]

Following this case, various other cases were taken relating to the segregation of Roma children, importantly including findings that de facto segregation – namely, not just by the overuse of special schools – was problematic.[286]

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[281] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [196].
[282] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [198]-[201]. The conclusion (at [201] was that there was at least "a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them". Given the reverse burden of justification, this precluded reliance on them.
[283] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [202]-[204].
[284] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [206]. This is a well-established approach under Art 8, as an implicit procedural requirement. See *W v UK* Appn no 9749/82, Judgment of 8 July 1987, (1988) 10 EHRR 29, re taking children into care; there was a need for parents to be heard ([62]); *McMichael v UK* Appn no 16424/90, Judgment of 24 February 1995, (1995) 20 EHRR 205, [87]. See also *Buckley v UK* Appn no 20348/92, Judgment of 25 September 1996, (1997) 23 EHRR 101, [76], re removal of a traveller from an unofficial site.
[285] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [205]-[209].
[286] See *Sampanis and Others v Greece* Appn no 32526/05, Judgment of 5 June 2008, *Oršuš and Others v Croatia* [GC] Appn no 15766/03, Judgment of 16 March 2010, (2011) 52 EHRR 7, *Sampani and Others v Greece* Appn no 59608, Judgment of 11 December 2012, *Horvath and Kiss v Hungary* Appn no 11146/11, Judgment of 29 January 2013, (2013) 57 EHRR 31 and *Lavida and Others v Greece* Appn no 7973/10, Judgment of 30 May 2013. The Greek cases involved de facto segregation; the Croatian case involved segregation purportedly to assist children to learn Croatian; the Hungarian case involved the over-use of special schools, albeit not to the same extent as the *DH* case. More recently, see *Elmazova and Others v North Macedonia*, Appns 11811/20 and 13550/20, ECtHR (2nd Section), 13 December 2022, and *Szolcsán v Hungary*, Appn 24408/16, ECtHR (1st Section), 30 March 2023.

B. Inclusive Education for Persons with Disabilities

The Grand Chamber in *DH* accepted that special schools could be used for the special educational needs of pupils who were properly placed there.[287] Of course, arguments against this will not have featured in cases about ethnic segregation. However, the narrowness of the decisions from the Twentieth Century was soon challenged, assisted by a series of cases taking an expansive approach to PIA2:

> (i) Confirmation that P1A2 applied to higher education: although determining that laws against religious insignia to promote secularism did not breach the right to education, the Grand Chamber in *Leyla Şahin v Turkey*[288] confirmed that higher education was covered. The reasons included its instrumental value in securing other rights,[289] meaning that it was "indispensable to the furtherance of human rights", and had "such a fundamental role that a restrictive interpretation" of its coverage "would not be consistent with the aim or purpose of" the language.[290]
>
> (ii) Confirmation of the value of other standards came from the Grand Chamber in *Catan and Others v Moldova and Russia*,[291] where the breach arose from various actions (including using the Cyrillic rather than Latin alphabet) detrimental to Moldovan students in the Russian-supported break-away Moldovan Republic of Transniestra. The Grand Chamber required a contextual approach, involving (a) matters internal to the ECHR text (reading "as a whole" and seeking "internal consistency and harmony between its various provisions", particularly Arts 8, 9 and 10), (b) a purposive approach to the ECHR (it "is a treaty for the effective protection of individual human rights" and must be made "practical and effective"), and (c) recognition of the international context, including UN and UNESCO treaties (so that the ECHR "should so far as possible be interpreted in harmony with other rules of international law of which it forms part").

These various developments represent a significant step-forward from the position that had allowed such disappointing rulings as *McIntyre* and the others noted in part II above.

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[287] *DH and Others v Czech Republic* Appn no 57325/00, Judgment of 13 November 2007, (2008) 47 EHRR 3 (Grand Chamber), [198].

[288] *Leyla Şahin v Turkey* [GC] Appn no 44774/98, Judgment of 10 November 2005.

[289] *Leyla Şahin v Turkey* [GC] Appn no 44774/98, Judgment of 10 November 2005, [134]-[142]. See also *Ponomaryovi v Bulgaria* Appn no 5335/05, Judgment of 21 June 2011 (value of secondary education in modern society requiring more than basic educational skills meant that reduced margin of appreciation, on facts relating to charging non-permanent residents); and *Velev v Bulgaria* Appn no 16032/07, Judgment of 27 May 2014 (remand prisoner to be given same access to education as convicted prisoners as inadequate justification offered for differential treatment).

[290] *Leyla Şahin v Turkey* [GC] Appn no. 44774/98, Judgment of 10 November 2005, [137]. See also *Timishev v Russia* Appn nos 55762/00 and 55974/00, Judgment of 13 December 2005, (2007) 44 EHRR 37 (restrictions on movement of Chechen national breached the right to education of his children): the Court used the principles in *Leyla Şahin* and also commented that elementary education was "of primordial importance for a child's development" (at [64]) and the Court "would not tolerate a denial of the right to education" (at [66]).

[291] *Catan and Others v Moldova and Russia* Appn nos 43370/04, 8252/05, 18454/06, Judgment of 19 October 2012.

The UNESCO treaty and other international standards were relevant, the instrumental value of the right to education was enhanced, margins of appreciation were reduced for 'vulnerable' groups and segregation in education was problematic when based on ethnicity. The CRPD was introduced into this setting and soon had impact.

(i) Incorporating CRPD Standards

The ECtHR has now adopted the CRPD approach to discrimination generally and to the need for inclusive education. First, in *Çam v Turkey*,[292] a vision-impaired young woman passed the entrance examinations for Turkish National Music Academy but was not allowed to enrol because of the lack of facilities, including that no staff could use Braille. This was a practical problem that could only be solved by resources, just as the absence of a lift was a practical problem in *McIntyre* that could not be compelled because it was a choice about resourcing. However, the CRPD provided interpretive assistance,[293] and discrimination incorporated the idea that "in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article".[294] Indeed, it was accepted that "discrimination on grounds of disability also covers refusal to make reasonable accommodation",[295] the Court consciously adopting the definition of disability discrimination in Article 2 of the CRPD as Article 14 of the ECHR "must be read in the light of the requirements of those texts regarding reasonable accommodation".[296] This flowed from the living instrument approach, which required that "the Court … must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved" including those supporting "universality and non-discrimination in the exercise of the right to education" and the role of "inclusive education as the most appropriate means of guaranteeing the aforementioned fundamental principles".[297]

The Court found a breach of Article 14 with PIA2: whilst reasonable accommodation might take various forms, which the national authorities were better placed to assess,[298] failure

[292] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016.
[293] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [53]. See also [64]. Reliance was placed on *Catan*.
[294] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [54]. Reliance was placed on *DH*.
[295] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [67].
[296] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [65].
[297] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [64].
[298] *Çam v Turkey* Appn no 51500/08, Judgment of 23 February 2016, [66]: "reasonable accommodation may take a variety of forms, whether physical or non-physical, educational or organisational, in terms of

to assess needs or consider any options precluded the demonstration of any objective and reasonable justification for the differential treatment.

Similarly, in *Enver Şahin v Turkey*,[299] where budgetary restrictions led to the non-implementation of accessibility plans and an inability to accommodate the access and other needs of a university student who was paralysed in an accident during his first year of study, the Court held that the obligation to guarantee the right to education necessitated "positive measures", meaning that the authorities "must not merely remain passive" and so "shelving … the question of the accessibility of the faculty premises for the applicant pending the availability of all the funds required to complete all the major development work laid down in legislation" was not acceptable.[300] The margin of appreciation was in essence limited to how to meet needs,[301] though choices were also constrained by the need to "take great care" in light of the "particular vulnerability" of persons with disabilities.[302] Reference was also made to the "cardinal importance" and centrality to the CRPD of "the ability of persons with disabilities to live autonomously with a fully-developed sense of dignity and self-respect".[303] As in *Çam*, there had been no individualised assessment of needs, which precluded a finding of reasonable accommodation.[304] Indeed, there was only mention by the government of an offer of support in moving him around university buildings: the limited support to Ms McIntyre of bringing books from the school library to her seems analogous, suggesting that it would be found unacceptable now.

The inability of governments to use resource constraints has also featured in the austerity economics of recent years. *GL v Italy*[305] involved the non-provision of assistance to a child

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the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities", the appropriate steps being for the national authorities in light of their contact with the relevant needs and conditions.

[299] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018.

[300] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018, [58].

[301] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018, [57].

[302] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018, [61].

[303] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018, [63]. (The Court also referred to various aspects of the CRPD, including accessibility (Article 9), personal mobility (Article 20) and education (Article 24).) The promotion of dignity was noted to be central also to Council of Europe recommendations – specifically Recommendation No R (92) 6 of 9 April 1992 on a coherent policy for persons with disabilities (Committee of Ministers) and Recommendation No 1185 (1992) of 7 May 1992 on rehabilitation policies for the disabled (Parliamentary Assembly); and also to be the essence of the ECHR.

[304] *Enver Şahin v Turkey* Appn no 23065/12, Judgment of 30 January 2018, [62]-[65]. At [66]-[67], the Court noted the inadequate supervision by the domestic judiciary, which provides a useful reminder that this can found state responsibility under the ECHR (as in *Storck v Germany Appn no* 61603/00, Judgment of 16 June 2005, *[*2005] Mental Health Law Reports 211, (2005) 43 EHRR 96).

[305] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020.

with non-verbal autism despite domestic law requiring reasonable accommodation to allow inclusive education, the problem being that education authorities were not funded adequately.[306] The Court accepted that education is "complex to organise and expensive to run" and "resources … are necessarily finite", meaning that in regulating "access to education, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them".[307] The Court also recalled that "education is one of the most important public services in a modern State", that it plays a "fundamental role" and is "indispensable to the furtherance of human rights";[308] and that "unlike some other public services, education is a right that enjoys direct protection under the Convention".[309] Moreover, in assessing whether Italian authorities "effectively honoured their obligations", "made reasonable accommodation" and were ready "to react to the situation submitted to them",[310] the Court confirmed using the CRPD approach that denial of "reasonable accommodation" is discrimination, and that reasonable accommodation is designed to correct factual inequalities and so is permitted.[311]

As GL did not receive her legal entitlement, there was a disability-based denial of "conditions equivalent to those enjoyed by non-disabled pupils":[312] and budgetary constraints should affect all children equally, rather than "tampering with the reasonable accommodation measures guaranteeing equal opportunities for children with disabilities".[313] In short, 'vulnerable' people should not be the first or only ones to suffer. There was a breach of Article 14 together with P1A2 as Italy "failed to demonstrate that the national authorities had reacted with the requisite diligence to ensure that [GL] could enjoy her right to education on an equal footing with the other pupils, such as to strike a fair balance between the competing interests".[314] This was "particularly serious", because

[306] It was recorded that available "disability" funds had been allocated to students with amyotrophic lateral sclerosis (ALS), a form of motor neuron disease.
[307] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [49].
[308] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [49].
[309] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [49].
[310] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, paras [57] and [58].
[311] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [62].
[312] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [66]. At para [65], the Court dismissed the government contention that the school had made some arrangements to help by noting that the evidence was that the expenditure was minimal and there was no indication that any assistance was by people with suitable skills for GL's needs.
[313] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [68].
[314] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [72].

the early years of education are foundational to future education, "social integration and the first experiences of living together".[315]

This case illustrates well the approach to the margin of appreciation. It exists "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment",[316] but "is substantially narrower" when any differential treatment restricts the rights of "a particularly vulnerable group in society, who have suffered considerable discrimination in the past" – which includes people with disabilities: indeed, here, any restrictions "must have very weighty reasons".[317] Moreover, regard must be had to "any emerging consensus" in international and European law: and in the education context, this means that "universality and non-discrimination", leading to inclusive education, is central to various standards.[318] This means that "Inclusive education therefore forms part of the States' international responsibility in this sphere".[319]

Whilst the Court also suggests that Italy's decision to adopt inclusive education involved it "effect[ing] a choice in the framework of its margin of appreciation",[320] that margin of appreciation – about whether to make that choice - is constrained. The interpretation of the ECHR in the context of previous discrimination against persons with disabilities and the identified consensus as to inclusive education means that inclusive education is the standard. The choice remaining is about implementation, as national authorities are "much better placed" to decide what reasonable accommodation should be offered, as it "can take on different material and non-material forms".[321] The reminder offered that states must "pay particular attention to their choices in this sphere in view of their impact on children with disabilities, whose high level of vulnerability cannot be overlooked"[322] is

[315] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [68]. This is a clear contrast to the approach in *McIntyre*.
[316] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [52] (though always subject to the review of the Court, para [54]).
[317] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [54]. It is also noted, citing Article 7(2) of the CRPD, that measures affecting children with disabilities must prioritise their best interests.
[318] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [53]. The Court references commentary under the ICESCR, the CRPD, the European Social Charter, recommendations of the Council of Europe Committee of Ministers and Parliamentary Assembly. See also para [61].
[319] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [53]. *Enver Şahin v Turkey* is cited as authority for the proposition.
[320] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [60]. See also at para [57], where the Court identifies its task as determining whether the state honoured its obligation within the margin of appreciation.
[321] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [63].
[322] *GL v Italy*, Appn 59751/15, ECtHR (1st Section), 10 September 2020, para [63].

a suitable summary of the fact that the Court retains a review role in relation to this margin of appreciation.

(ii) Where the Limits Lie

Nevertheless, reasonable accommodation has its limits. Accordingly, in *Stoian v Romania*,[323] the Court found that a whole range of steps taken to assist the education of a child in a wheel-chair, both to secure accessibility to the school and also in the form of support teachers and therapists, amounted to reasonable accommodation in spite of suggestions by the parents that more could have been done. Similarly, in *TH v Bulgaria*,[324] the Court found that the authorities "made a series of reasonable adjustments" in relation to a pupil with a hyperkinetic disorder and a developmental disorder: this required "a difficult balancing act between his interests and those of his classmates", and that "reasonable accommodation" did not require "all possible adjustments which could be made to alleviate the disparities resulting from someone's disability regardless of their costs or the practicalities involved".[325]

There have also been some inadmissibility decisions, each involving children with autism: *Hrazdíra v Czech Republic*[326] (complaint in substance about failure to admit to a particular school, and a problem with non-exhaustion of domestic remedies), *Sanlisoy v Turkey*[327] (complaint about failure to admit to a particular school, which did not show a breach of the right to education), and *Dupin v France*.[328] This latter case is more difficult in that the complaint was about the lack of mainstreaming, as presumed in French law, but this was inadmissible because expert evidence suggested that there was a benefit from a special school. This runs counter to other case law, though the evidence adduced was key.

IV. The Agenda for Ongoing Strategic Litigation Using the CRPD

[323] *Stoian v Romania* Appn 289/14, Judgment of 25 June 2019.
[324] *TH v Bulgaria*, Appn 46519/20, ECtHR (3rd Section), 11 April 2023.
[325] *TH v Bulgaria*, Appn 46519/20, ECtHR (3rd Section), 11 April 2023, paras [118]-[122]. The Court also reiterated of reasonable accommodation that the Court could not "define its modalities in a given case", the national authorities being better placed to decide ([104]). In addition, there were various complaints of discrimination, but the Court found that each complaint involved actions that had reasonable and objective justifications ([109]-[117]).
[326] *Hrazdíra v Czech Republic* (dec) Appn no 62565/14, Decision of 23 February 2016. See also *Charle et autres c France* (dec), Appn 3628/14, ECtHR (5th Section Committee), 17 December 2020, which also involved a child with autism but was found inadmissible for the failure to exhaust domestic remedies.
[327] *Sanlisoy v Turkey* Appn no 77023/12, Decision of 8 November 2016.
[328] *Dupin v France* Appn no 2282/17, Decision of 18 December 2018.

A. General Points

The developments outlined in Part 3 above have implications for lawyers for applicants who may access the ECtHR for applicants who are within the ambit of the CRPD. First, the approach to discrimination under the ECHR reads across the approach set out in the CRPD, most importantly the need for reasonable accommodation and the need to counter historical disadvantage. Secondly, the right to education, which extends to all levels of education and is a precursor to the enjoyment of other rights, is the right to inclusive education.[329] Thirdly, evidence relevant to a claim may be much broader, including reports from respected sources as to the extent to which inclusive education is being met: this might lead to burdens of proof being placed on the state, as in the Roma cases. Fourthly, and building on the second and third points, since the various components of Article 24 of the CRPD explain what a right connotes, material relating to such matters as training of staff and the use of specialist communications – as outlined in Part 1 above – may be relevant to whether enough has been done. In this connection, the CRPD Committee's General Comment No 4 on the right to inclusive education sets out what is needed to implement the CRPD, including having an overarching commitment, legislation based on the human rights model, a coordinated legislative and policy framework with a right to inclusive education, quality standards, monitoring, and data collection, including a proper time frame, complaints mechanisms, legal remedies and sanctions for non-compliance, and resourcing.[330]

B. Country by Country Specifics

[329] Note also that the UN's Sustainable Development Goals - UN General Assembly *Transforming our world: the 2030 Agenda for Sustainable Development* A/Res/70/1 (25 September 2015) - now provide additional impetus: the 17 goals and 169 targets support, inter alia, a wish for a "world with equitable and universal access to quality education at all levels" (para 7) and commitments to "inclusive and equitable quality education at all levels" and to "life-long learning opportunities" – both for utilitarian skills-building purposes but also to support participation in society (para 25). Goal 4 is "Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all", and the specific elements of this include, in Target 4.5: "By 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations". Supplementing this, Goal 4(a) refers to the building and upgrading of "inclusive and effective learning environments for all". UNESCO, working with other bodies, has developed a programme for the implementation of Goal 4, the Incheon Declaration and Framework for Action: UNESCO, Education 2030 – Incheon Declaration and Framework for Action, available at http://en.unesco.org/education2030-sdg4.

[330] Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [59]-[76].

In that General Comment No 4, the Committee notes that:

> Recognition of inclusion as the key to achieving the right to education has strengthened over the past 30 years and is enshrined in the Convention on the Rights of Persons with Disabilities, the first legally binding instrument to contain a reference to the concept of quality inclusive education.[331]

The time-scale is much longer if one goes back to the UNESCO Convention of 1960 and its right to non-segregated education. Failure to have inclusive education is therefore a failure of decades: but Concluding Observations of the CPRD Committee suggest that only a small minority of member states of the Council of Europe comply with CRPD standards, which are now also ECHR standards. The following table summarises the comments made (including to former member, Russia). Only Liechtenstein is not a party to the CRPD (which supports the consensus that inclusive education is the legal standard required). All but eight states have been reviewed and several more than once. Only three states have been found to have made good progress, Austria (initially – though on its second review, major changes were required), Denmark and Sweden. Particular mention can be made of Sweden, as it indicates the standard to reach: only 1.5% of children are not in mainstream education, which is recorded as a matter of the choice of their families.

Of the others, the vast majority require major changes and eleven (including Russia) require significant changes: the distinction turns on such matters as whether there is a decent legislative and policy framework in place that simply requires a speedier implementation (a significant matter) or more being required, such as wholesale revision of legislation to recognise key elements of the right to inclusive education.[332] Naturally, some reports are close to the borderline between needing significant or major change: however, irrespective of the grouping, the problems are such that further strategic litigation might properly be taken with a view to securing change.

The position of individual states, with the relevant reference in the Concluding Observations of the CRPD Committee, is set out alphabetically for ease of reference in the following table:

[331] Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [2].

[332] Significant changes are identified as necessary for Andorra, Armenia, Azerbaijan, Czech Republic, Estonia, France, Hungary (2012), Italy, Malta, Portugal, Russian Federation; major changes are required in all others, including Hungary (2022), which, like Austria, had gone backwards and so appears in two lists.

Albania (2019) - CRPD/C/ALB/CO/1, 14 October 2019, at [39]-[40]: major changes needed, including wholesale legislative change to recognise right to inclusive education, comprehensive policy with various strategies, accessibility of school environments (including teaching materials), individualised accommodation, resources, staff training and data collection.
Andorra (2023) - CRPD/C/AND/CO/1, 9 October 2023, at [49]-[50]: significant changes needed as, despite progress (including personal assistance and data collection), no long-term policy on implementation and monitoring with targets and timelines, limited gender and disability perspective in legislation, ongoing use of special schools for those with high needs, need for more augmented communications, including Catalan sign language.
Armenia (2017) - CRPD/C/ARM/CO/1, 8 May 2017, at [41]-[42]:[333] significant changes needed, ie more to secure trend to inclusivity (including some legislative changes), accessibility, resources to guarantee reasonable accommodation, staff training.
Austria (2013) - CRPD/C/AUT/CO/1, 30 September 2013, at [40]-[43]: less problematic as various positives, particularly in some areas; further progress required, including clarifying difference between "inclusive" education and "integrated" education, providing more training for teachers with disabilities, training more teachers to use sign language, and doing more to secure access at tertiary level. *Austria* (2023) - CRPD/C/AUT/CO/2-3, 28 September 2023, at [55]-[56]: major changes needed as 2017 legislation had prioritised segregated provision – so need to reverse course, redevelop relevant teacher training, and ensure access to inclusive education and reasonable accommodation, and collect data.
Azerbaijan (2014) - CRPD/C/AZE/CO/1 (12 May 2014) at [40]-[41]:[334] significant changes needed to implement agreed policy on inclusive education, including greater efforts and resources to provide reasonable accommodation, accessibility of buildings and materials, and teacher training; research and data collection.
Belgium (2014) - CRPD/C/BEL/CO/1, 28 October 2014, at [40]-[41]:[335] major changes needed as reasonable accommodation within mainstream schools not guaranteed; need coherent strategy for inclusive education, involving reasonable accommodation, accessible buildings and materials, and teacher training.
Bosnia and Herzegovina (2017) - CRPD/C/BIH/CO/1, 2 May 2017, at [42]-[43]: major changes needed, involving coherent strategy on inclusive education, reasonable accommodation, accessible buildings and materials, with sufficient resources and teacher training.
Bulgaria (2018) - CRPD/C/BGR/CO/1, 22 October 2018, at [49]-[50]:[336] major changes needed as children with disabilities could not enrol in mainstream schools, including implementing inclusive system in place of segregated one, raising awareness of its advantages, providing resources for reasonable accommodation, and collecting data to inform strategy for inclusion.
Croatia (2015) - CRPD/C/HRV/CO/1 (15 May 2015) at [35]-[36]: major changes needed as many children with disabilities not complete primary school, only 30% complete secondary school, and segregated education not considered discriminatory; hence need for changed attitudes, staff training, accessibility of facilities and introduction of inclusive education, including reasonable accommodation.
Cyprus (2017) - CRPD/C/CYP/CO/1 (8 May 2017) at [49]-[50]: major changes needed, namely clarity in legislation as to inclusive education, plus monitored plan of action including reasonable accommodation and staff training.
Czech Republic (2015)- CRPD/C/CZE/CO/1 (15 May 2015) at [47]-[48]: significant changes needed: although legislation exists, many children, particularly those with intellectual disabilities, autism, and deaf-blind children, in special schools; additional resources and efforts at implementation required.
Denmark (2014) - CRPD/C/DNK/CO/1, 30 October 2014, at [52]-[55]: less problematic given relevant reform, but discrepancies in achievement levels to be reduced, adequate staff training improved and reasonable accommodation provided to all children with disabilities (and improved complaint system relating to educational support, open to children with lesser needs).

[333] Note also at para [4(a)], a positive aspect noted was "The adoption, in 2014, of the Law on making supplements and amendments to the Law on general education, which provides for a transition from general education to inclusive education for children with disabilities by 2025".

[334] Note also at para [5], a positive included "… the State Programme on Inclusive Education …".

[335] Note also at para [17], ongoing stigmatisation and exclusion from various policies, including "the maintenance of the segregated education system", was noted.

[336] Note also at para [5], a positive aspect was that "inclusive education had become "a national priority"".

Estonia (2021) - CRPD/C/EST/CO/1, 5 May 2021, at [46]-[47]: significant changes needed, as legislation exists but special schools remain and reasonable accommodation not universally available; strategy with targets, timelines and budget is required, and policy framework covering reasonable accommodation.
Finland: nothing yet, ratified 11 May 2016
France (2021) - CRPD/C/FRA/CO/1, 4 October 2021, at [50]-[51]: significant changes, as many children in segregated education (with particular concerns about those with intellectual or psychosocial disabilities, or autism), and reasonable accommodation inadequate (especially for those with autism or Down syndrome); bullying problems also identified; various remedial steps required, including programmes to promote access to tertiary education.
Georgia (2023) - 18 April 2023, CRPD/C/GEO/CO/1 18 April 2023, CRPD/C/GEO/CO/1, at 49-50: Georgia (2023): major changes needed to include inclusive education in national strategy and have DPOs in monitoring progress; have inclusive education for all, including those with hearing impairments, autism and higher needs, and girls and those from ethnic and religious minorities; ensure use of Georgian sign language and other forms of communication; collect data, identify and respond to issues of dropping out; promote access to vocational programmes.
Germany (2015) - CRPD/C/DEU/CO/1 (13 May 2015) at [45]-[46]: major changes needed, as majority segregated, including strategy and action plan with time-line, targets and resources, justiciable right to reasonable accommodation, and teacher training. *Germany* (2023) - CRPD/C/DEU/CO/2-3, 3 October 2023: major changes needed as lack of full implementation of inclusion and ongoing prevalence of special schools and classes, from lack of clear mechanism to promote inclusion, negative perceptions of inclusion, pressure on parents to use special education, inaccessible schools and transport, inadequate teacher training, all of which to be countered; and need for better data re refugees.
Greece (2019) - CRPD/C/GRC/CO/1 (29 October 2019) at [34]-[35]: major changes needed, involving coherent strategy, accessibility of educational settings and materials through universal design and individualised support, sufficient resources and training for teachers (and ensure migrant and Roma children with disabilities benefit).
Hungary (2012) - CRPD/C/HUN/CO/1 (22 October 2012) at [39]-[42]: significant change to build on progress, as many remain segregated, more resourcing required for reasonable accommodation, staff training should continue, and specific attention to needs of Roma children. *Hungary* (2022) - UN Doc CRPD/C/HUN/CO/2-3 (20 May 2022) at [48]-[49]: major change as legislation still provides for segregated education and reduced teaching hours for children with disabilities, and ongoing lack of reasonable accommodation and problems for Roma and others.
Iceland: nothing yet, ratified 23 September 2016.
Ireland: nothing yet, ratified 20 March 2018.
Italy (2016) - CRPD/C/ITA/CO/1, 6 October 2016, at [55]-[60]:[337] significant changes needed, to consolidate long-standing commitment to inclusive education, namely action plan for monitoring implementation and improving quality and accessibility, including of materials.
Latvia (2017) - CRPD/C/LVA/CO/1, 10 October 2017, at [40]-[41]: major changes needed, as majority of children segregated (in special schools or at home) because of accessibility issues and lack of reasonable accommodation, which requires more resource provision.
Liechtenstein: not signed or ratified.
Lithuania (2016) - CRPD/C/LTU/CO/1, 11 May 2016, at [45]-[48]: major changes needed because of lack of reasonable accommodation and such factors as lack of accessible transport and charges by some special schools, including coherent strategy, with timelines and targets, for accessibility of buildings and materials, reasonable accommodation, staff training, accessible transport, underpinned by legally enforceable right to equal treatment.
Luxembourg (2017) - CRPD/C/LUX/CO/1, 10 October 2017, at [42]-[43]: major changes – legislation, action plan, awareness raising, training - needed as segregation persists, particularly for children with intellectual disabilities, reasonable accommodation not understood or legally required, teachers inadequately trained, low expectations of students and data lacking.
Malta (2018) - CRPD/C/MLT/CO/1, 17 October 2018, at [35]-[36]: significant changes needed to implement existing law on education, ensure reasonable accommodation at all levels, provide accountability mechanisms for discrimination, and additional research.

[337] See also at para [4], where the Committee "commends the State party, which for the last three decades has been striving to implement an inclusive education system free of segregation".

Monaco: nothing yet, ratified 19 September 2017.
Montenegro (2017) - CRPD/C/MNE/CO/1, 22 September 2017, at [44]-[45]: major changes, given lack of comprehensive legislation, including coherent strategy and action plan with time frames and monitoring to implement inclusive education with reasonable accommodation and accessible environments and materials, and staff training.
Netherlands: nothing yet, ratified 14 June 2016.
North Macedonia (2018) - CRPD/C/MKD/CO/1, 29 October 2018, at [39]-[40]: major changes needed, including legislative promotion of inclusive education, prohibiting disability discrimination and denial of reasonable accommodation, transition plan incorporating support and resources and accessibility.
Norway (2019) - CRPD/C/NOR/CO/1, 7 May 2019, at [37]-[38]: major changes needed, including legislation explicitly covering disability discrimination in education, national standards as to individualised support, adequate resources and trained teachers in suitable environments.
Poland (2018) - CRPD/C/POL/CO/1, 29 October 2018, at [41]-[42]: major changes needed as majority of students with disabilities segregated, namely legislation to provide for individualised reasonable accommodation and secure inclusive (not just integrated) teaching in accessible environments, and awareness raising for parents and teacher-training.
Portugal (2016) - CRPD/C/PRT/CO/1, 20 May 2016, at [44]-[48]: significant changes needed as fiscal austerity has produced pockets of segregation despite general use of inclusive education, such that need for updated legislation, additional resources and upgraded facilities.
Republic of Moldova (2017) - CRPD/C/MDA/CO/1, 18 May 2017, at [44]-[45]:[338] major changes needed as law still allows segregation, children with psychosocial and intellectual impairments segregated, and negative attitudes persist, so law needs amendment, and accessibility, reasonable accommodation and staff training required.
Romania: nothing yet, ratified 31 January 2011.
Russian Federation (2018) - CRPD/C/RUS/CO/1, 9 April 2018, at [48]-[50]:[339] significant changes needed to build on progress (varied in different regions), via action plan to increase inclusive education, with time frame, relevant indicators and budgetary transparency.
San Marino: nothing yet, ratified 22 February 2008.
Serbia (2016) - CRPD/C/SRB/CO/1, 23 May 2016, at [47]-[50]: major changes needed through concrete targets towards inclusive education and reasonable accommodation, with special attention to certain groups, including children in residential institutions, more than half of whom receive no education; and staff training.
Slovak Republic (2016) - CRPD/C/SVK/CO/1, 17 May 2016, at [67]-[68]:[340] major changes needed, including legislating for enforceable right to inclusive education and adopting binding plan with timelines and resources to transition from segregation to inclusion (and stop segregating Roma children).
Slovenia (2018) - CRPD/C/SVN/CO/1, 16 April 2018, at [39]-[40]:[341] major changes needed, by abandoning segregated schemes, recognising right to inclusive education and having action plan with clear time frame and monitoring mechanism, including training of teachers and transport for children to schools.
Spain (2011) - CRPD/C/ESP/CO/1, 19 October 2011, at [43]-[44]: major changes needed to implement fully laws relating to principle of inclusion, prohibition of discrimination, and provision of specialist teachers and appropriate materials, by recognising that reasonable accommodation not subject to progressive realisation and required proper resourcing without parental payments, and rights to appeal any placements in segregated settings. *Spain* (2019) - CRPD/C/ESP/CO/2-3, 13 May 2019, at [45]-[47]: major changes needed because of limited progress, maintenance of regulatory provisions allowing segregated

[338] See also at para [5(b)] where the positives noted include "(b) Government decision No 523 (11 July 2011), approving the programme for the development of inclusive education 2011-2020, providing equal opportunities for all children to access quality education".

[339] See also para [4(d)], where the Committee notes that positives include "The increase in the number of students with disabilities in inclusive education …".

[340] See also at para [4], where the Committee "notes with appreciation that the State party … has become a member of the European Agency for Special Needs and Inclusive Education through government resolution No 682/2011 …". This agency is also a useful source of information on the extent to which students in member states are in inclusive education settings.

[341] Committee on the Rights of Persons with Disabilities, Concluding Observations Slovenia, UN Doc CRPD/C/SVN/CO/1 (16 April 2018) at [39]-[40].

education and high numbers of children so placed, requiring expedited legislative reform to establish right to inclusive education with relevant supports and comprehensive policy.
Sweden (2014) - CRPD/C/SWE/CO/1, 12 May 2014, at [47]-[48]:[342] relatively minor changes required to allow all children, including those with extensive support needs, to attend mainstream schools.
Switzerland (2022) - CRPD/C/CHE/CO/1, 13 April 2022: major changes are required as high numbers are segregated and there is an agreement between cantons to stream children into special education; in a.ddition, there are resourcing issues for reasonable accommodation; a constitutional right to inclusive education is required, as well as other changes.
Turkey (2019) - CRPD/C/TUR/CO/1, 1 October 2019, at [48]-[49]: major changes needed, building on improved physical accessibility of schools, by legislative right to inclusive education, implementing policies and resources for individualised reasonable accommodations and staff training, plus data collection.
Ukraine (2015) - CRPD/C/UKR/CO/1, 2 October 2015, at [44]-[45]: major changes needed as segregated schooling predominant, by legislating to recognise right to inclusive education, universal design and reasonable accommodation, and resourcing staff training and making buildings and materials accessible.
United Kingdom (2017) - CRPD/C/GBR/CO/1 (3 October 2017) at [50]-[53]: major changes needed to overcome dual system, including withdrawing reservation to Art 24 relating to educating children away from local community,[343] developing complete legislative and policy framework for inclusive education and strategy to secure it.

It will be seen that, consistently with comments made in General Comment No 4, the Committee reiterates the need for a legislative right to inclusive education and a relevant policy framework for implementation, with targets and timelines, resources, accounting for intersectionality and the like.

Strategic litigation before the ECtHR secured advances towards integrated education for Roma children: the drafting of the CRPD was being finalised at the time of the *DH* litigation. Developments subsequently incorporated CRPD standards. *DH* also reveals the importance of evidence of systemic problems: and the CRPD Committee paints a picture of ongoing problems. This article rests on the integration of the case law of the ECtHR and the standards set out in the CRPD, but then points out that the expert body that sits under the CRPD is firmly of the view that much more needs to be done. That integration of standards means that further litigation before the ECtHR might be warranted if

[342] See also at para [4], where a positive noted was Sweden's "inclusive education system, where 1.5 per cent of children are instructed outside of regular schools in accordance with the decision made by their family" and an extension of the right to appeal support decisions.

[343] The UK's ratification of the CRPD on 8 June 2009 came with a reservation retaining "the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere", whilst allowing parents to state a preference as to the school; and a declaration setting out a commitment "to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children" but also noting that its system "includes mainstream, and special schools, which the UK Government understands is allowed under the Convention". This understanding may be contentious, even if what the UK had in mind was that reasonable accommodation inevitably means that some scenarios involve unduly burdensome changes that are not required. However, given the Committee's comments in relation to Sweden as to the need for children with the most extreme needs to be in mainstream schools, it may determine that very few accommodations are unduly burdensome, particularly in light of the importance of the right.

domestic efforts do not secure the relevant outcome: and reliance on guidance from the CRPD Committee as to what a state should be doing suggests the evidence that should be sought to support a challenge through further strategic litigation.

Introduction to Chapter 4

The central points made in chapter 3 are:

(i) that case law in the ECtHR has developed and has done so in part through litigation designed to amend the law and allow new standards to be used by others – namely through strategic litigation;

(ii) that the developments have been such that the standards found in the CRPD have been integrated into the standards enforced through the ECHR (reflecting processes that are outlined in chapter 2, which explores the propriety from the perspective of the ECtHR of its judges and hence of lawyers appearing in front of the ECtHR in building arguments that are based on material that is external to the ECHR text and directly relevant sources such as its travaux preparatoires or decisions of Convention bodies);

(iii) but that material originating under the CRPD's own expert body, the CRPD Committee, indicates that this integration of standards does not mean that there is compliance with those standards; indeed far from it, meaning:

(iv) that there is scope for significant further litigation, raising concerns from most Council of Europe states.

The point made from the perspective of this thesis is that the rights arising in the context of education have become as one de jure but not de facto. If there is de jure and de facto fulfilment of a right, the need for further strategic litigation would end. However, the lack of de facto fulfilment means that strategic litigation should be considered to be part-way through its role, though it can move its focus from developing the law to enforcing the legal standards that have been identified.

The next chapter, which consists of an article published in the Journal of International and Comparative Law, has a focus on human trafficking. What is explored is the recent developments in case law about the importance of protecting the victims of human trafficking, in which the ECtHR has taken an expansive view, including by using other international treaties. What the article seeks to do is to summarise what the CRPD Committee has identified as the rights engaged by human trafficking: it indicates that various of these rights are part of the ECHR but have not been used in ECtHR case law on human trafficking. Naturally, the relevant rights in the CRPD are stated are in the context of victims of trafficking who have disabilities, but since the CRPD aims to rephrase

rights that already exist in other treaties to ensure that they are applicable to persons with disabilities, its views on the underlying rights should apply to all victims of trafficking. Hence, the wider point is that those litigating for the victims of trafficking and building rights-based arguments should look beyond the existing ECHR case law because another expert body supports the view that other rights are relevant.

From a thesis perspective, this differs from chapter 3 in that there has not been case law that supports a de jure equivalence between the standards: however, this may well be because the relevant arguments have not yet been put before the ECtHR. The purpose of the article is to encourage that to happen.

THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE FIGHT AGAINST HUMAN TRAFFICKING

Kris Gledhill*

Abstract: The imperative to counter human trafficking, as reflected in the Modern Slavery Act 2015, is invariably presented as responding to the prohibition on slavery. Accordingly, the growing body of case law from the European Court of Human Rights involving "modern day slavery" focuses on art.4 of the European Convention on Human Rights. This has been interpreted in accordance with other relevant standards such as the Palermo Protocol to the UN Convention against Transnational Organised Crime and the Council of Europe Anti-Trafficking Convention. However, when material arising from the core human rights treaties of the United Nation is considered, including that from the Committee sitting under the Convention on the Rights of Person with Disabilities (CRPD), it becomes apparent that a wide variety of other human rights are implicated. This article provides a comprehensive analysis of the comments made by the CRPD Committee, along with material emanating from the other UN Treaty Bodies. It provides a useful framework to assess state action against trafficking, which must reflect these other features, most clearly that it is abusive and exploitative and so inhuman and degrading, and often involves victims who are subject to discrimination, including on intersectional grounds. It illustrates why advocates for victims should not limit themselves to slavery-based arguments.

Keywords: *human trafficking; modern-day slavery; fundamental rights; UN Human Rights Standards; Convention on the Rights of Persons with Disabilities*

I. Introduction

In *VCL and AN v United Kingdom*,[1] the European Court of Human Rights found that the United Kingdom had breached art.4 of the European Convention on Human

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1 Appn nos 77587/12 and 74603/12 (16 February 2021) (ECtHR).

[(2021) 8:1 JICL 249–282]

Rights (ECHR),[2] the right not to be subject to slavery or servitude, by prosecuting the victims of trafficking (who were trafficked to work in cannabis production) rather than protecting them. The Court noted that, building on established case law as to the duty to protect against private actors whose conduct breaches human rights standards, the state has three duties: to have legislation and policies that prohibit and punish trafficking; sometimes to take operational measures to protect victims/potential victims; and the investigative duty where potential trafficking is evident.[3] It noted further that prosecuting those who are credibly suspected to be victims "may . . . be at odds with" the duty as to operational measures of protection.[4] This was because the need to prevent further harm and facilitate recovery might be hampered by a prosecution and its potential for causing further trauma, reducing the chance of reintegration and undermining access to support services: this in turn required an assessment of whether there was sufficient evidence for/or public interest in a prosecution.[5] Failure to do that led to findings that art.4 had been breached.

Importantly for present purposes, the Court placed significant reliance on a variety of other international sources of law, including the Council of Europe's Convention on Action Against Trafficking in Human Beings,[6] the European Union's Anti-Trafficking Directive,[7] the Palermo Protocol to the United Nations Convention against Transnational Organised Crime[8] and International Labour Organisation material relating to forced labour.[9] This neatly makes the point that those who argue human rights standards under the ECHR and its domesticated versions, including the Human Rights Act 1998, must be alert to human rights standards arising elsewhere. They may be important in their own right and may inform the views of the European Court of Human Rights.

Accordingly, this article presents an analysis of the views of the Committee on the Rights of Persons with Disabilities, the expert body sitting under the Convention on the Rights of Persons with Disabilities[10] and puts those views in the context

2 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

3 Appn nos 77587/12 and 74603/12 (16 February 2021) (ECtHR), [156].

4 *Ibid*., [159].

5 *Ibid*., [160]–[162].

6 CETS no 197, adopted by the Committee of Ministers of the Council of Europe on 3 May 2005 and entered into force on 1 February 2008. The expert body established under the Convention, known as GRETA, was an intervener in the proceedings.

7 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

8 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), adopted by resolution A/RES/55/25 of 15 November 2000 and entered into force on 25 December 2003.

9 Appn nos 77587/12 and 74603/12 (16 February 2021) (ECtHR), [97]–[101].

10 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (opened for signature on 30 December 2006, entered into force 3 May 2008) (CRPD). Article 1 notes 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". Supplementing this non-exhaustive definition is a more conceptual outline in the

of statements from other United Nations (UN) Treaty Bodies sitting under the core human rights treaties of the UN.[11]

II. The CRPD and Trafficking

A. Introduction

The UN's main human rights treaties are monitored by expert committees established under each treaty and known as the Treaty Bodies. Their primary process is to receive regular reports from states as to the progress that is being made and to comment on gaps in that progress.[12] They also issue General Comments or General Recommendations on what the treaty obligations entail, thereby expanding upon the invariably high-level statements contained in each treaty. The CRPD Committee has issued several General Comments and a significant number of Conclud- ing Observations arising from the reviews of states.[13] From these documents, it is apparent that various rights, not just the right not to be subject to slavery, servitude or forced labour, have been considered in the context of trafficking and related problems, including forced labour and forced marriage. Indeed, the most frequently cited right is that not to be subjected to exploitation, violence and abuse (which under the ECHR would arise under its art.3). Also prevalent has been the importance of recalling intersectionality because of the vulnerability of certain groups, particularly women and children, to discrimination on more than one ground.

B. Slavery and servitude—art.27(2)

(i) The CRPD text and context

At first sight, the CRPD has an unusual structure in relation to the prohibition of slavery and servitude. Article 27(1) sets out, at some length, the elements of the equal right to work of persons with disabilities and adds in art.27(2) that: "States Parties shall ensure that persons with disabilities are not held in slavery or in

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preamble, para.(e) of which records 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".

11 This is not a comprehensive statement of the standards arising under the auspices of the UN: there is a Special Rapporteur on trafficking in persons, especially women and children, who exists as part of the Special Procedures of the UN Human Rights Council. The Office of the High Commissioner for Human Rights has also developed Principles and Guidelines, available at https://www.ohchr.org/EN/Issues/Trafficking/TiP/Pages/Index.aspx (visited 1 April 2021).

12 The process involves inviting civil society bodies to put in "shadow reports", which will often counter the impressions of progress that might naturally be found in the state report.

13 As at the time of writing, there have been 92 concluding observations issued by the CRPD Committee in the period to the end of 2019; none was issued in 2020. Most are first reviews, but a handful relate to second reviews.

servitude, and are protected, on an equal basis with others, from forced or compulsory labour".

This is something of a contrast to the overarching Covenant, the International Covenant on Civil and Political Rights 1966 (ICCPR),[14] which the CRPD translates into the disability sphere. Article 8 of the ICCPR sets out the right to be free from slavery and servitude, and the Human Rights Committee of the UN, which supervises the implementation of the ICCPR, has made it clear how fundamental this is. Accordingly, in General Comment No 29 on States of Emergency, when the question of derogations from international human rights obligations may arise, the Human Rights Committee noted that the prohibition on slavery and the slave trade and servitude is a standard that cannot be subject to any derogation.[15] Moreover, in General Comment No 24 on Reservations, the Committee reminded states that it was not possible to enter a reservation if that breached customary international law or a peremptory norm, such that "a State may not reserve the right to engage in slavery".[16] As such, the need to prevent slavery and servitude, including all its forms, has taken on an enhanced status of a peremptory norm (unless the Human Rights Committee, an expert body, is incorrect in this assessment of international law).[17]

The other overarching Covenant, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),[18] is monitored by the Committee on Economic, Social and Cultural Rights.[19] This Committee has raised trafficking

14 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

15 Human Rights Committee, General Comment No 29: States of Emergency (Article 4), CCPR/C/21/Rev1/Add11, 31 August 2001. Article 4(1) of the ICCPR allows derogations if there is a "public emergency which threatens the life of the nation", but art.4(2) precludes any derogation from various obligations, including arts.8(1) and (2). There can therefore be a derogation from art.8(3), which precludes "forced or compulsory labour", though only if it meets the art.4(1) test of being "to the extent strictly required by the exigencies of the situation" and otherwise non-discriminatory and not in breach of other aspects of international law.

16 Human Rights Committee, General Comment No 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev1/Add6, 11 November 1994, para.8. Also given this enhanced status are the prohibitions on torture and cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, arbitrary arrest and detention, executing pregnant women or children, presuming guilt; the rights to freedom of thought, conscience and religion, marry and fair trial (though aspects might be subject to a reservation); and permitting the advocacy of national, racial or religious hatred or denying minorities the right to their own culture, religion or language.

17 It is also specifically recognised by the Committee that non-citizens have a right to be protected against slavery (and other breaches of rights): General Comment No 15: The position of aliens under the Covenant (1986), para.7.

18 International Covenant on Economic Social and Cultural Rights, 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

19 The ICESCR mentions the Economic and Social Council of the UN as the body responsible, but it delegated this: ECOSOC Resolution 1985/17, 28 May 1985, "Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights".

matters in the context of the right to work: it reiterated the need to "abolish, forbid and counter all forms of forced labour"[20] and, in relation to children, the need to protect them "from all forms of work that are likely to interfere with their development or physical or mental health" and also from "any form of economic exploitation or forced labour".[21] In a separate statement about the business sector, the Committee also reiterated the importance of eliminating forced or compulsory labour and child labour.[22] In addition, in its General Comment No 5 on persons with disabilities, the Committee noted that the right to work is not respected when people with disabilities work in "so-called 'sheltered' facilities under substandard conditions" nor by ""therapeutical treatment" in institutions which amounts to forced labour".[23]

In Concluding Observations to the United Kingdom in 2016, the Committee welcomed the ratification of the CRPD and the passing of the Modern Slavery Act 2015[24] but was concerned that "migrant domestic workers are at greater risk of being victims of abusive working conditions" (in breach of art.7 of the ICESCR, the right to just and fair conditions of work) and strongly recommended steps to secure equal protection, including through "effective implementation of the Modern Slavery Act 2015", improved "complaint mechanisms and legal assistance" and "effective inspection mechanisms for monitoring the conditions of work of migrant workers and migrant domestic workers".[25]

In the full context, therefore, placing the right not to be subject to forced labour as part of the right to work in the CRPD is understandable. It was, however, something of an afterthought, added to the Convention at a late stage in the drafting process.[26]

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20 Committee on Economic, Social and Cultural Rights, General Comment No 18: The right to work (art.6), 35th session, 2005, para.9. See also at para.4, where the Committee endorses views expressed by the International Labour Organisation that states must both create the conditions for full employment and ensure the absence of forced labour. At paras.23 and 25, it is noted that forced or compulsory labour must be prohibited; and at paras.32 and 34, it is noted that a breach might occur if a state engages in forced labour.

21 *Ibid*., para.15; see also para.24.

22 Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, E/C12/2011/1, 20 May 2011, para.2.

23 Committee on Economic, Social and Cultural Rights, General comment No 5: Persons with disabilities, 11th session, 1994, para.21. The Committee refers to the ICCPR prohibition on forced labour. The Committee has also commented on its own obligations in assisting development (arising from providing assistance to states by virtue of arts.2, 22 and 23), which have to be done in a way that precludes forced labour: see General Comment No 2: International technical assistance measures (art.22 of the Covenant), 4th session, 1990, para.6.

24 Committee on Economic, Social and Cultural Rights: Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C12/GBR/CO/6, 14 July 2016, paras.3 and 4.

25 *Ibid*., paras.34 and 35. Concerns had been expressed in the previous concluding observations, particularly in relation to migrant fishing workers: E/C12/GBR/CO/5, 12 June 2009, para.22.

26 See I Bantekas, F Pennilas and S Trömel, "Art 27 Work and Employment" in I Bantekas, MA Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford: OUP, 2018) 770, 799.

(ii) The CRPD Committee's limited comments on art.27(2)

In Concluding Observations, the Committee has raised art.27(2) once, in relation to Mexico, expressing concern at the paucity of information about working conditions and recommending the establishment of "mechanisms to protect persons with disabilities from all forms of forced labour, exploitation and harassment in the workplace".[27] However, as is noted below, the Committee has raised issues of forced labour and slavery in relation to China and Korea under art.16. Further, Concluding Observations to Italy expressed concern under art.19, which sets out an "equal right . . . to live in the community, with choices equal to others" and "full inclusion and participation in the community" about "the gendered consequences of the current policies where women are 'forced' to remain within the family as caregivers of their peers with disabilities instead of being employed in the labour market": the state was asked to make changes to prevent this.[28]

(iii) The value of equality in the context of slavery, servitude and forced labour and what it means

Nevertheless, art.27(2) is important because it gives some clarity as to the legal standard in play relating to the protection of persons with disabilities from trafficking. The need to protect persons with disabilities from slavery and servitude "on an equal basis with others" involves a phrase used repeatedly which captures the proposition that "equality and non-discrimination are at the heart of the Convention and evoked consistently throughout its substantive articles".[29] The CRPD Committee has noted that ongoing "brutal" discrimination occurs, including "mutilation and trafficking in body parts, particularly of persons with albinism".[30]

Securing equality is a key component of the UN human rights regime, a starting point for which is the indication in the opening right of the Universal Declaration of Human Rights 1948 (UDHR)[31] that "All human beings are born free and equal in

27 Committee on the Rights of Persons with Disabilities, Concluding Observations to Mexico, 27 October 2014, CRPD/C/MEX/CO/1, paras.51–52.

28 Committee on the Rights of Persons with Disabilities, Concluding Observations to Italy, 6 October 2016, CRPD/C/ITA/CO/1, paras.47–48.

29 Committee on the Rights of Persons with Disabilities, General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para.7.

30 Committee on the Rights of Persons with Disabilities, General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para.7. It is worth noting that one of the Special Procedures Mechanisms of the Human Rights Council of the UN, which is the second main stream of human rights activities, in addition to the Treaty Bodies, is the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, available at https://www.ohchr.org/en/issues/albinism/pages/iealbinism.aspx (visited 1 April 2021).

31 Resolution 217(III) of 10 December 1948; the text is available at http://www.un.org/en/universal-declaration-human-rights/index.html (visited 1 April 2021). The UN Charter of 26 June 1945, 1 UNTS XVI, entered into force on 24 October 1945, available at http://www.un.org/en/charter-united-nations/index.html (visited 1 April 2021) is also to be noted: its preamble refers to the desire "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. . ."—this need to reaffirm is also a textual indication of the purpose in place.

dignity and rights". Under art.2, the rights set out in the rest of the Declaration are to be enjoyed by all persons "without distinction of any kind" based on any form of status. Moreover, art.7 sets out the right to be "equal before the law" and as such "entitled without any discrimination to equal protection of the law"; it continues that "All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

The overarching Covenants by which the UDHR was translated into trea- ty-based rights, the ICESCR and ICCPR, which combine with the UDHR to form the International Bill of Rights, retain the centrality of equality rights. Common art.1 to both Covenants, reflecting the importance of de-colonisation, supports the self-determination of peoples. Article 2(2) of the ICESCR specifies that the rights it contains have to be guaranteed "without discrimination of any kind" arising from status; art.2(1) of the ICCPR is similar, though it is phrased by reference to avoiding any "distinction". In addition, art.26 of the ICCPR, building on art.7 of the UDHR, creates a free-standing right to non-discrimination, repeating the relevant standards of equality before the law and equal protection of the law and so prohibiting and protecting against "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

As a civil and political right in the ICCPR, non-discrimination as a substantive right is not subject to any resource constraints. This explains and is reinforced by the fact that, whilst art.2(1) of the ICESCR refers to its substantive rights being achieved in full "progressively" (though the duty on the state is to use "the maximum of its available resources"), the non-discrimination provision is not sub- ject to any resource provision (and so is similar in nature to the ICCPR right to non-discrimination).[32]

However, its entrenched nature has necessitated supplemental treaties to coun- ter discrimination against various parts of society: they also define what amounts to discrimination. Accordingly, the International Convention on the Elimination of Racial Discrimination 1965 (ICERD),[33] which aims to counter such discrimination, defines it as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of

32 The Committee on Economic, Social and Cultural Rights has noted that the progressive realisation obligation in the ICESCR "differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights": General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para.1, of the Covenant) E/1991/23 (1990) [9]. The progressive realisation standard operates as "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights". See also Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev1/Add 13 (2004) in which the Human Rights Committee expands upon the obligations as to implementing rights in the ICCPR.

33 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) (ICERD).

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms . . .” (whether “political, economic, social, cultural”).[34] Similarly, art.1 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)[35] defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

The inclusion in the two definitions of both the aim behind a provision and its effect makes it clear that regard must be had not just to the intention behind a provision but also its impact, such that a seemingly neutral provision might nevertheless be discriminatory because of its effect. The reversal of effect and purpose in the CEDAW definition serves to emphasise the importance of having a focus on the impact of apparently neutral provisions.

Under art.2 of the CRPD, “Discrimination on the basis of disability” is defined to cover “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”. Clearly, it remains important to look at apparently neutral provisions to determine their effect, which is one reason for art.31 of the CRPD, which requires statistics and data to be collected: states are obliged to inform themselves of evidence that suggests something has a discriminatory effect.

However, there is an important additional sentence proclaiming that “It includes all forms of discrimination, including denial of reasonable accommodation”. As such, the CRPD definition adds that a failure to make changes to meet the needs of persons with disabilities will also be discriminatory if they are within the definition of reasonable accommodation. This is defined in art.2 as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

Accordingly, the obligation arising is to make changes to accommodate the needs of people with disabilities unless that is overly problematic or expensive. Supplementing this is the concept, which must be promoted by reason of art.4, namely “Universal design”, also defined in art.2 as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”.

34 *Ibid*., art.1.

35 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

This means, for example, that processes whereby people are recognised as the victims of trafficking must be organised in such a way that they are usable by persons with different disabilities. To the extent that they are not suitable, the obligation to provide reasonable accommodation applies. Accordingly, universal design and reasonable accommodation are linked: the more successfully universal the design, the less need for supplements or modifications by reason of reasonable accommodation.

In sum, whilst this has not yet been given significant voice by express comments in the context of the modern-day slavery with which trafficking is associated, the non-discrimination standard whereby there must be an equal protection for persons with disabilities is important. Policy documents, training of officials (such as at ports and in anti-trafficking units), protective services and criminal justice services will all have to operate in a way that secures this outcome.

Importantly, given the primacy of impact from the ECHR in the United Kingdom, it is to be noted that the CRPD approach has been adopted by the European Court of Human Rights as the proper way to understand art.14 of the ECHR, the non-discrimination standard. For example in *Çam v Turkey*,[36] the failure to consider making reasonable accommodation to allow a vision-impaired young woman to attend the Turkish National Music Academy but instead to rely on the institution's inability to teach a student with those impairments was found to breach art.14 together with art.2 of Protocol 1, the right to education.[37]

Another important aspect of the non-discrimination standard that has been recognised by the CRPD Committee is the importance of intersectionality, as is set out next.

C. Intersectionality: Woman and girls (art.6)

(i) Article 6 and the CPRD Committee's General Comment

The text of art.6 of the CRPD recognises the "multiple discrimination" to which women and girls with disabilities are subject and requires appropriate measures to counter this. In its General Comment relating to this article, the CRPD Committee noted that trafficking raises issues under arts.14, 15 and 16, which set out, respectively, the right to liberty and security of person, to freedom from torture and cruel, inhuman and degrading treatment and to freedom from violence, exploitation and abuse: these are discussed later. Some of the problematic conduct affects women without disabilities as well, including forced marriage:[38] but disability may also lead to a particular susceptibility. For example reference is made to the marriage of girls with intellectual disabilities in order to provide security and financing:[39]

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36 Appn no 51500/08, Judgment of 23 February 2016 (ECtHR).

37 See also *Enver Şahin v Turkey*, Appn no 23065/12, Judgment of 30 January 2018 (ECtHR).

38 Committee on the Rights of Persons with Disabilities, General Comment No 3 (2016) on women and girls with disabilities, CRPD/C/GC/3, 25 November 2016, para.37.

39 *Ibid*., para.37.

such marriages might not be entered into freely and might involve trafficking of some sort. Similarly, it is noted that trafficking—expressly identified as within the art.16 prohibition on violence, exploitation and abuse[40]—may be linked to economic exploitation in the form of begging, because of the perception that there will be greater public sympathy.[41] Reference is also made, this time in the context of arts.14 and 15, to the fact that girls placed in care and special educational settings may be "exposed to the risk of sexual violence and trafficking".[42]

(ii) The CRPD Committee's Concluding Observations

The Committee has also considered intersectionality in several Concluding Observations, some of which have more detailed recommendations. In relation to Niger, there was concern about discriminatory laws, including in relation to forced and early marriages and the recommendation made that this be addressed.[43] Similarly, in relation to Morocco, it was recorded that the state should "eliminate all forms of violence against women and girls with disabilities in the public and private spheres, including trafficking and sexual and other forms of exploitation", and several specifics were mentioned—mainstreaming, awareness raising, ensuring a disability perspective in relation to gender-based violence so as to "address the . . . barriers to protection faced by women and girls with disabilities, in particular women with psychosocial and/or intellectual disabilities" and effective mechanisms of protection and equal access to "medical, psychological and legal services on an equal basis with others".[44]

In relation to Paraguay, it was noted that a national plan for equality, which was inclusive of women with disabilities, was deficient in several respects, including trafficking: the Committee urged that effective measures be taken, including accessible care centres for victims.[45] More specifics were mentioned when considering Ukraine: the Committee was "seriously concerned about the reports of the trafficking, sexual abuse and exploitation of women with disabilities in institutions" and recommended the taking of "all measures necessary to conduct prompt and

40 *Ibid*., para.31: "31. Examples of violence, exploitation and/or abuse against women with disabilities that violate article 16 include the following: . . . economic coercion; trafficking and deception; . . ."

41 *Ibid*., para.34: it is noted that this may lead to the risk of further violence. It is also noted at para.36 that girls with disabilities may be kept away from school and required to perform housework: while the comment is made in the context of girls in their family homes, it could no doubt also apply to girls being placed in other homes, which could be a form of trafficking.

42 *Ibid*., para.53. The Committee notes that perpetrators of sexual violence may escape punishment by overmedicating victims so that they cannot describe or recall what happened, and due to the limited access to judicial remedies or indeed to any forms of support.

43 Committee on the Rights of Persons with Disabilities, Concluding Observations to Niger, 1 May 2019, CRPD/C/NER/CO/1, paras.9–10.

44 Committee on the Rights of Persons with Disabilities, Concluding Observations to Morocco, 25 September 2017, CRPD/C/MAR/CO/1, paras.14–15.

45 Committee on the Rights of Persons with Disabilities, Concluding Observations to Paraguay, 15 May 2013, CRPD/C/PRY/CO/1, paras.17–18. More was said in relation to other articles, particularly art.16.

effective investigation into all reports of trafficking, sexual abuse and exploitation of women and girls with disabilities in institutions, and prosecute and adequately punish perpetrators, as well as take measures to provide remedies to victims of such crimes".[46]

(iii) The protective standards developed under CEDAW

The steps suggested by the CRPD Committee are consistent with what has been said by the Committee on the Elimination of Discrimination against Women. It has had a long-standing focus on matters linked to trafficking, and so has had the opportunity to develop more recommendations. Naturally, it is concerned with all women and girls, not just those with a disability: but its comments suggest matters that might also be relevant under the CRPD. In its first General Recommenda- tion relating to gendered violence, General Recommendation No 19, the CEDAW Committee noted the obligation under art.6 to suppress trafficking in women and exploitation of female prostitution and identified various scenarios that "put women at special risk of violence and abuse", namely poverty and unemployment (which "increase opportunities for trafficking in women" and also force many women into prostitution), sex tourism, domestic labour for developed countries being recruited from developing countries, organised marriages involving foreigners and women from developing countries and armed conflicts and occupation.[47] The Committee identified various steps that should be taken, involving legislation, the compilation of statistics, the training of relevant officials and more general education and public information programmes, support and complaint services, including remedies, adding that "(g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation".[48] One aspect of this, freedom of marriage—and hence the absence of forced marriages based on custom or religion—was also mentioned in General recommendation No. 21 on Equality in marriage and family relations.[49]

When the Committee updated its recommendations as to the problem of gendered violence in General Recommendation No. 35 of 2017, it reflected on the risks enhanced by intersectional factors, including working in prostitution or being

46 Committee on the Rights of Persons with Disabilities, Concluding Observations to Ukraine, 2 October 2015, CRPD/C/UKR/CO/1, paras.11–12. Again, more was said in relation to other articles.

47 Committee on the Elimination of Discrimination against Women, General Recommendation No 19: Violence against women, contained in document A/47/38, 11th session, 1992, paras.13–16. See also para.11, in which the Committee, relying on arts.2(f), 5 and 10(c) of CEDAW (abolishing discriminatory laws, policies and practices (2(f)), modifying conduct and beliefs based on idea that one gender is superior and also ensuring that child-rearing is a common obligation (5), removing stereotypes in education (10(c)), called for the removal of attitudes of subordination that perpetuate violence and coercion, including forced marriage.

48 *Ibid*., para.24.

49 Committee on the Elimination of Discrimination against Women, General recommendation No 21: Equality in marriage and family relations, 13th session, 1994, para.16.

trafficked, which might require different laws and policies.[50] It also recognised that some violent practices might amount to torture or cruel, inhuman or degrading treatment or international crimes.[51] The various recommendations included preventive steps, prosecutions and reparations, legislative steps such as criminalising all forms of violence and ensuring effective remedies for victims and repealing various laws (including customary and religious laws), including those allowing forced marriage and "restrictive immigration laws that discourage women, including migrant domestic workers, from reporting such violence".[52]

The Committee has also considered the right to health in art.12 of CEDAW, which requires non-discriminatory provision and special services relating to pregnancy. It commented as to the importance of the right in the contexts described above, noting that "special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as . . . women in prostitution . . .",[53] and also that such people may be particularly vulnerable to sexually transmitted diseases.[54]

In comments to the United Kingdom in 2008, the Committee found positives in the intention to ratify the Council of Europe Convention on Action against Trafficking in Human Beings, grants of visas to victims, statutory changes (Sexual Offences Act 2003, Asylum and Immigration (Treatment of Claimants) Act 2004), the UK Action Plan on Tackling Human Trafficking and some national police actions. But "the continuing prevalence and extent of this problem" required supplementing the criminal justice measures with more on "the protection and rehabilitation of victims of trafficking victims", "adequate support services to victims, including those who do not cooperate with the authorities" and considering granting victims indefinite rather than temporary visas and additional "international, regional and bilateral cooperation with countries of origin, transit and destination in order to prevent trafficking, to bring perpetrators to justice and to improve reintegration programmes to prevent victimization".[55]

By the time of the next review in 2013, the Council of Europe Convention had been ratified, which was welcomed.[56] However, there was concern about the lack of

50 Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on gender-based violence against women, updating General Recommendation No 19, CEDAW/C/GC/35, 26 July 2017, para.12.

51 *Ibid*., para.16. It recognised various matters, including sexual slavery and enforced prostitution in the categories of crimes against humanity and war crimes, as set out in Rome Statute of the International Criminal Court arts.7 and 8.

52 *Ibid*., para.29.

53 Committee on the Elimination of Discrimination against Women, General Recommendation No 24: art.12 of the Convention (women and health), contained in document A/54/38/Rev1, ch.I, 20th session, 1999, para.6.

54 *Ibid*., para.18.

55 Committee on the Elimination of Discrimination against Women, Concluding observations to the United Kingdom on its fifth and sixth periodic reports, Extract from A/63/38, 142, 41st session, 30 June–18 July 2008, paras.282–283.

56 Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the United Kingdom, CEDAW/C/GBR/CO/7, 30 July 2013, para.8.

a "comprehensive national framework on trafficking", which was needed "in view of the nature and complexity of this phenomenon and its prevalence", and about apparent "weaknesses in identifying victims of trafficking and the lack of adequate support provided to them".[57] The government was chastised for not following clear recommendations made by the Equality and Human Rights Commission in relation to Scotland (though without suggesting things were better in the rest of the United Kingdom)[58] and those by the Group of Experts on Action against Trafficking in Human Beings, which exists under the Council of Europe Convention.[59] The Committee urged a comprehensive national framework to combat trafficking in women and girls, improved identification of victims and improved criminal provisions relating to burdens of proof.[60] There was also a specific concern mentioned about the number of trafficked women in prison and the lack of aftercare for them

57 *Ibid*., para.38.

58 See the Report on Human Trafficking in Scotland, Equality and Human Rights Commission, November 2011, available at https://www.equalityhumanrights.com/en/our-work-scotland/human-rights-scotland/inquiry-human-trafficking-scotland (visited 28 February 2021), along with follow up reports: it called for a comprehensive strategy, improved public awareness of trafficking and its indicators (58–61), comprehensive legislation to replace ad hoc provisions (63–65), better police intelligence leading to more prosecutions (67–71), the use of various other legal tools, including steps to disrupt operations and profits (via asset recovery action), ensuring that various regulators embed human trafficking policies in their work (eg, regulators of employment agencies, environmental health and health and safety) and ensuring that private sector bodies whose services and products are involved in trafficking (such as the telecommunications industry) raise awareness of the problem and what they can do (73–79) and improve the care and recovery processes for victims and also the processes for identifying them (81–86).

59 In Recommendation CP(2012)10 on the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, 13 November 2012, GRETA praised various steps (including the establishment of structures, the UK Human Trafficking Centre to coordinate the improvement of action and the National Referral Mechanism to identify victims; of strategies, the UK Government's Strategy on Human Trafficking for 2011–2015; of coordination between different agencies to counter trafficking; of steps to assist victims, including safe houses and residence permits while people are working with authorities). However, it noted that more had to be done to identify victims, including child victims, to have a clear framework for returning victims that avoided re-victimisation, to tackle the drivers of trafficking (labour exploitation and domestic servitude, vulnerabilities caused by disadvantage) and to improve investigations and prosecutions. In Recommendation CP(2016)12 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, 4 November 2016, GRETA supported various developments (the Modern Slavery Act 2015, the creation of the Independent Anti-Slavery Commissioner, coordinating strategies, including through the Modern Slavery Strategy and Implementation Group, training of relevant professionals and steps to raise awareness and improve preventive measures in countries of origin; specific action in relation to labour exploitation, namely through the Gangmasters Licensing Authority (GLA) and the requirements of the 2015 Act relating to transparency in supply chains; the improvements of the National Referral Mechanism and the improvements in steps to identify victims at airports; and the publication of data). However, various improvements were suggested: better (and longer) support for victims, various steps to improve the identification and protection of child victims and to secure their best interests, providing victims a right to a recovery period together with suitable support, ensuring compensation and reparation and improving employment protection and proceedings.

60 Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the United Kingdom, CEDAW/C/GBR/CO/7, 30 July 2013, paras.39–41.

and hence a call to ensure that authorities could recognise them and secure their better integration.[61]

Most recently, in 2019, the Committee welcomed a court ruling that fees in employment cases were unlawful but was concerned about the reduced availability of legal aid in general and called for effective access to justice, especially for vulnerable groups, including victims of trafficking.[62] Under the heading of steps relating to trafficking and the exploitation of prostitution, the Committee welcomed new statutes relating to trafficking in the different jurisdictions of the United King- dom (Modern Slavery Act 2015, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and the Human Traf- ficking and Exploitation (Scotland) Act 2015), but it remained concerned about the definition of trafficking in the Modern Slavery Act being linked to travel, that many victims were not identified and that support was inadequate, creating the conditions for further exploitation.[63] It recommended that the internationally agreed definition be used (namely that set out in the Palermo Protocol), that the previous recommendation to have a comprehensive national strategy be implemented, and that further improvements be made to the National Referral Mechanism in relation to identifying and supporting victims.[64] Recommendations were also made to counter the growth of prostitution as a response to poverty, including supporting access to jobs, housing and social security to reduce the need for women to become prostitutes and also various steps to assist those who wish to exit from the role, but also decriminalising it and taking steps to reduce demand.[65] Also suggested were improvements in access to healthcare for various groups including trafficking victims[66] and that the lack of support for those seeking or granted refugee status be addressed because, inter alia, it produces risks of exploitation, including trafficking.[67]

(iv) Other treaty bodies and the protection of women and girls from trafficking

The Human Rights Committee, sitting under the ICCPR, has also recognised the role of discrimination against women, commenting that the need under art.3 of the ICCPR to ensure equality as between women and men had to be read together with the art.8 obligation to end slavery, meaning that states should provide infor- mation on measures taken "to eliminate trafficking of women and children, within

61 *Ibid*., paras.54–55.
62 Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/8, 14 March 2019, paras.23–24.
63 *Ibid*., para.33. The Scottish legislation was also welcomed at para.4.
64 *Ibid*., para.34.
65 *Ibid*., paras.35–36. There was a repeat of the recommendation made in the previous round to change burdens of proof in relation to cases involving children.
66 *Ibid*., paras.49–50.
67 *Ibid*., paras.55–56.

the country or across borders, and forced prostitution" and "to protect women and children, including foreign women and children, from slavery, disguised, inter alia, as domestic or other kinds of personal service"; the Committee also requested information on measures taken to "prevent the violation of women's and children's rights" by states in various categories, namely "where women and children are recruited, and from which they are taken, and . . . where they are received".[68]

In Concluding Observations to the United Kingdom in 2015, the Human Rights Committee expressly welcomed various steps, including the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the Modern Slavery Strategy adopted in November 2014, the criminalisation of forced marriage, the ratification of the CRPD and of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on 20 February 2009, including in relation to Jersey.[69]

The Committee on Economic, Social and Cultural Rights has recognised that the right to sexual and reproductive health might be breached particularly on account of intersectional factors, which required countering action. The groups mentioned included "Trafficked and sexually exploited women, girls and boys" who "are subject to violence, coercion and discrimination in their everyday lives . . . Also, women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through . . . sexual slavery".[70]

In addition, the Committee that sits under the International Convention on the Elimination of All Forms of Racial Discrimination has recommended that the effect of "[m]ultiple discrimination against women members of descent-based communities" be addressed by reflecting on their situation as "victims of multiple discrimination, sexual exploitation and forced prostitution".[71] Further, in its General Recommendation about the criminal justice system, the Committee noted that states should "pay the greatest attention to possible indicators of racial discrimination", including the "proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non integration

68 Human Rights Committee, General Comment No 28: art.3 (The equality of rights between men and women), 68th session, 2000, para.12.

69 Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 17 August 2015, paras.3 and 4.

70 Committee on Economic, Social and Cultural Rights: General Comment No 22 (2016) on the right to sexual and reproductive health (art.12 of the International Covenant on Economic, Social and Cultural Rights), E/C12/GC/22, 2 May 2016. The Committee has also noted that discrimination on grounds of nationality must be avoided: see General Comment No 20: Non-discrimination in economic, social and cultural rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights), E/C12/GC/20, 2 July 2009, at para.30, where the Committee notes the right to human rights protection of non-nationals, including the victims of trafficking, regardless of their legal status and documentation.

71 Committee on the Elimination of Racial Discrimination, General Recommendation XXIX on art.1, para.1, of the Convention (Descent), 1517th meeting, 19 March 2002, para.(k).

of such persons into society".[72] In short, the Committee made the important point that apparent criminality may be the tip of an iceberg of more serious criminality in the form of serious exploitation.

(v) Implications of this material in the context of challenges to trafficking laws and policies

This material indicates that those who use the human rights framework to respond to human trafficking should not limit themselves to the slavery/servitude provisions. Whilst that right is clearly breached by modern-day slavery in the form of people trafficking for sexual, labour or other purposes, so also might be the independent rights to protection of women in a non-discriminatory way. The CRPD Committee emphasises that a disability perspective should be added to the gender perspective in assessing the propriety of actions taken, since more or different steps may be required to prevent trafficking or deal with its consequences when the victims are female or disabled or both, and failure to take those different or additional steps may amount to discrimination, including by failing to incorporate reasonable accommodation.

D. Protecting children (art.7)

(i) Text of the CRPD and the CRPD Committee's Concluding Observations

The CRPD also provides in art.7 that the "necessary measures" should be taken to ensure that children with disabilities enjoy the same rights as other children. Girls are offered the additional protection of art.6, discussed before.

In a report to the General Assembly of the UN, the CRPD Committee men- tioned its concern of violence against children with disabilities exposed to begging and trafficking.[73] Comments on trafficking have featured in several Concluding Observations, some more specific than others. In relation to Lithuania, the concern was one of the "lack of data and initiatives on protection from and prevention of sexual abuse and trafficking specifically targeting children with disabilities", and the recommendation was the development of a plan of action to eliminate violence and abuse and collect data to assess its efficacy.[74]

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72 Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 65th session (2005), para.1(d).

73 Committee on the Rights of Persons with Disabilities, Report of the Committee on the Rights of Persons with Disabilities: 13th session (25 March–17 April 2015), 14th session (17 August–4 September 2015), 15th session (29 March–21 April 2016), 16th session (15 August–2 September 2016), General Assembly Official Records, 72nd session, Supplement No 55 (A/72/55), para.40.

74 Committee on the Rights of Persons with Disabilities, Concluding Observations to Lithuania, 11 May 2016, CRPD/C/LTU/CO/1, paras.17–18.

More specific comments are made in three other Concluding Observations. In relation to Ukraine, the Committee expressed concern about the levels of institutionalisation of children with disabilities, including as a result of abandonment in conflict areas, and of "reports of sexual abuse and exploitation of children with disabilities in institutions and their trafficking abroad"; it urged "prompt measures to investigate the reports of sexual abuse, exploitation and trafficking of boys and girls in institutions and prosecute and punish perpetrators" and supported deinstitutionalisation.[75] In relation to Niger, the concern was the number "engaged in forced child begging and child labour, including as guides to adults with disabilities", and the recommendation was "legislation and measures" so that rights are enjoyed and there is adequate protection for the children and sanctioning of perpetrators;[76] similar steps were recommended in relation to Senegal, the concern being "exploitation through forced begging".[77]

(ii) The Committee on the Rights of the Child and protecting children from trafficking

This approach is consistent with what has been said, in greater detail, by the Committee on the Rights of the Child, which sits under the Convention on the Rights of the Child:[78] this is another source of relevant standards, covering all children. The obligations include that under art.35 to take domestic and international measures to "prevent the abduction of, the sale of or traffic in children for any purpose or in any form", that under art.34 to protect against sexual exploitation and abuse and that under art.36 to protect against any other type of exploitation. See also its Optional Protocol relating to the sale of children and their involvement in prostitution,[79] under which states are required to take action in relation to various matters, including taking organs from children and involving children in forced labour.

The Committee has been alert to problems relating to trafficking, prostitution and forced labour involving children, covering the substantive rights and supporting procedural rights. On the latter, the Committee has made the relevant point that regional and international responses to trafficking (and various other matters, including child pornography and labour) are required, such that the official domestic

75 Committee on the Rights of Persons with Disabilities, Concluding Observations to Ukraine, 2 October 2015, CRPD/C/UKR/CO/1, paras.13–14.

76 Committee on the Rights of Persons with Disabilities, Concluding Observations to Niger, 1 May 2019, CRPD/C/NER/CO/1, paras.11–12.

77 Committee on the Rights of Persons with Disabilities, Concluding Observations to Senegal, 13 May 2019, CRPD/C/SEN/CO/1, paras.11–12.

78 Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

79 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2001). There is also an Optional Protocol to Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222 (opened for signature 25 May 2000, entered into force 12 February 2002).

watchdog body—the National Human Rights Institute in the language adopted—should engage in regional and international collaborations to learn good practice and cooperate in solving problems and also engage with UN human rights bodies, including the Special Rapporteur on the sale of children, child prostitution and child pornography.[80] Similarly, the Committee has recommended that countries rat- ify a variety of relevant international instruments, citing "the principles of indivis- ibility and interdependence of human rights".[81]

A brief reference to the need to avoid forced labour is made in the context of the criminal justice system: alternatives to incarceration should be attempted but must not amount to forced labour.[82] Discussion of trafficking has occurred in the context of health-related rights and intersectionality. In relation to HIV/AIDS, the Committee has noted that children affected, especially if orphaned, might be subjected to various forms of exploitation and so require protection, including from prostitution networks and trafficking, and support services if victimised.[83] Similarly, it has noted in relation to adolescent health that sexually exploited adolescents, including those involved in prostitution, face various health risks, including HIV/AIDS, and provided a reminder of the need to "enact and enforce laws to prohibit all forms of sexual exploitation and related trafficking; to collaborate with other States parties to eliminate intercountry trafficking; and to provide appropriate health and counselling services to adolescents who have been sexually exploited, making sure that they are treated as victims and not as offenders".[84] A separate General Comment in relation to younger children set out their vulnerabilities—from which protection was needed—as including harmful work (including being hired out for begging), sexual abuse and exploitation, and sale and trafficking (including for adoption).[85]

More detailed consideration of trafficking is set out by the Committee on the Rights of the Child's General Comment about unaccompanied minors, one reason

80 Committee on the Rights of the Child, General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, 31st session, 2002, paras.22 and 29. The Special Rapporteur is one of the Special Procedures of the UN Human Rights Council.

81 Committee on the Rights of the Child, General Comment No 5: General measures of implementation of the Convention on the Rights of the Child (arts.4, 42 and 44, para.6), CRC/GC/2003/5, 27 November 2003, para.17 and Annex. Listed in the Annex are UN and ILO conventions relating to various matters, including slavery and forced labour and trafficking.

82 Committee on the Rights of the Child, General Comment No 10: Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para.73: nor should they amount to torture or inhuman or degrading conduct or punishment.

83 Committee on the Rights of the Child, General Comment No 3: HIV/AIDS and the rights of the child, 32nd session, 2003, para.33. See also para.4, which emphasises the need to secure all relevant rights for minors with HIV/AIDS, including "the right to be protected from abduction, sale and trafficking as well as torture or other cruel inhuman or degrading treatment or punishment (arts 35 and 37)" and para.9 in which it is noted that the right set out in art.6 to survival, life and development may be compromised in relation to female children by harmful customs such as forced marriage, which create risks of HIV infection.

84 Committee on the Rights of the Child, General Comment No 4: Adolescent health and development in the context of the Convention on the Rights of the Child, 33rd session, 2003, para.33.

85 Committee on the Rights of the Child, General Comment No 7: Implementing child rights in early childhood, CRC/C/GC/7/Rev1, 20 September 2006, para.36.

for which might be trafficking.[86] The Committee recommended that states should ratify relevant international treaties[87] and collect data.[88] It also noted that the rights implicated include the right to life, survival and development (art.6)[89] and the rights to be free from the ill-treatment set out in arts.34–36.[90]

Importantly and neatly making the point as to the interoperability of the different treaties, the Committee has issued a General Comment on the position of children with disabilities in which it was noted that such children "are particularly vulnerable to different forms of economic exploitation, including the worst forms of child labour as well as begging", such that relevant International Labour Organization conventions should be ratified and implemented,[91] and that there was concern about the numbers of victims of child prostitution and child pornography, which was more likely to affect children with disabilities and which required particular attention and additional protection.[92] There was also reference to the particular position of street children, and children with disabilities were said to be particularly vulnerable to landing in this position: the needs identified included "protection from economic and sexual exploitation", particularly begging (and sometimes being rendered disabled for that purpose), which required "all necessary actions to prevent this form of exploitation", including criminalisation.[93]

(iii) Other UN Treaty Bodies and the protection of children from trafficking

The Human Rights Committee has also commented on this area, recognising that measures to protect children may have to include steps that are considered economic, social or cultural, examples being such steps "to prevent them from

86 Committee on the Rights of the Child, General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, para.2.

87 *Ibid*., para.15. The list included the Optional Protocols to the Convention on the Rights of the Child, Other Core Human Rights Treaties and Refugee Conventions, and Protocols to the Geneva Conventions.

88 *Ibid*., paras.98–100. The Committee is clear that a "detailed and integrated system" is required to inform policies (para.99) and that states "should consider collecting qualitative data that would allow them to analyse issues that remain insufficiently addressed, such as . . . the impact of trafficking" (para.100).

89 Committee on the Rights of the Child, General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, para.23. The Committee records the duty to protect and that risks arising for separated and unaccompanied children include "trafficking for purposes of sexual or other exploitation", which requires steps such as "priority procedures for child victims of trafficking". See also para.31 (need to assess vulnerabilities, including any "protection needs . . . deriving from . . . trafficking"); and para.52.

90 *Ibid*., paras.50–53 (including reference to the particular vulnerability of girls for trafficking, including for sexual exploitation, the need to consider refugee status, the need under art.20 for special protection of children outside the family environment). See also paras.59, 62 and 74 for refugee matters (including that illegal entry or presence should not be a criminal matter for victims of trafficking or exploitation).

91 Committee on the Rights of the Child, General Comment No 9 (2006): The rights of children with disabilities, CRC/C/GC/9, 27 February 2007, para.75.

92 *Ibid*., para.77.

93 *Ibid*., para.76.

being exploited by means of forced labour or prostitution"[94] and that the right to be registered at birth, set out in art.24(2) of the ICCPR, is an important protective provision, the main purpose of which "is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant".[95]

Comments from the Committee on Economic, Social and Cultural Rights have referred to the right to education (on which see arts.13 and 14 of the ICESCR), the value of this being that its work "has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations", including making them "particularly vulnerable to forced labour and other forms of exploitation".[96]

As with the material relating to the rights of women, what flows from this is that the human rights framework relating to action against trafficking goes beyond the slavery right and includes the framework relating to children and their protection.

E. Protecting life (art.10) in the trafficking context

The CRPD Committee has reported to the General Assembly of the UN that it was concerned about the right to life—which under art.10 must be enjoyed equally by persons with disabilities—being breached by trafficking of organs.[97] In Concluding Observations to Ukraine, concern was expressed about "reports that children with disabilities from institutions are at high risk of being targeted for trafficking of organs by organized crime groups", which led to the recommendation "to implement immediate protection measures for children with disabilities who remain institutionalized and take measures to eliminate any risk of organ trafficking involving children with disabilities" and "systematic monitoring of institutions for children with disabilities".[98]

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94 Human Rights Committee, General Comment No 17: Article 24 (Rights of the child): 34th session, 1989, para.3 (in which the Committee also notes that states should supply information on steps taken to prevent children being direct participants in armed conflicts).

95 *Ibid*., para.7. See also its actions in welcoming the ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on 20 February 2009, including in relation to Jersey: Human Rights Committee, Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 17 August 2015, para.4.

96 Committee on Economic, Social and Cultural Rights, General Comment No 11: Plans of action for primary education (art.14), 20th session, 1999, para.4. The Committee also noted that there was "a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages", which can also be a cause of trafficking.

97 Committee on the Rights of Persons with Disabilities, Report of the Committee on the Rights of Persons with Disabilities: 13th session (25 March–17 April 2015), 15th session (17 August–4 September 2015), 15th session (29 March–21 April 2016), 16th session (15 August–2 September 2016), General Assembly Official Records, 72nd session, Supplement No 55 (A/72/55), para.29. At para.30, the Committee called for this and other harmful practices to be eradicated and that there be equal protection of the right to life, and investigations, prosecutions and punishment of perpetrators.

98 Committee on the Rights of Persons with Disabilities, Concluding Observations to Ukraine, 2 October 2015, CRPD/C/UKR/CO/1, paras.20–21.

This is consistent with what the Human Rights Committee has identified. Article 6 of the ICCPR has a general standard that life should not be lost arbitrarily, supplemented by a requirement on the state to protect life. The Human Rights Committee has noted that "special measures of protection" are required for "persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence", which includes "victims of domestic and gender-based violence and human trafficking".[99]

This material supports what has arisen under the ECHR as illustrated by the leading case of *Rantsev v Cyprus and Russia*:[100] here, in addition to the confirma- tion that trafficking standards in relation to sex workers could give rise to liability under art.4 of the ECHR (at paras.281–282), the Court confirmed that the duty to protect regime was similar to that applicable to right to life (paras.286–288); and the factual situation was that the victim of trafficking had also died, hence art.2 of the ECHR was applicable (and on the facts was breached in relation to the proce- dural obligation to investigate death).

F. Protection from trafficking as protection from ill-treatment (arts.15 and 16)

(i) The text of the CRPD standards relating to ill-treatment

The majority of the trafficking-related comments in Concluding Observations from the CRPD Committee are in connection with the prohibitions on ill-treatment and hence the right to be protected from this: art.15 sets out that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", which should be prevented by "effective legislative, administrative, judicial or other measures" (so as to secure protection "on an equal basis with others"). This article (as well as art.16) was raised in the Concluding Observations to India. The concern was the "prevalence of inherent forms of violence and ill-treatment in institutions, particularly affecting children with disabilities, persons with intellectual or psychosocial disabilities and women with disabilities, including . . . forced labour".[101] Article 16 relates to "all forms of exploitation, violence and abuse, including their gender-based aspects", which should be prevented by "all appropriate leg- islative, administrative, social, educational and other measures". There are more specifics in relation to art.16, mention being made of the need for "gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers" (including through providing information and education), independent monitoring of relevant facilities and programmes, providing recovery and reintegration programmes and prosecutions.

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99 Human Rights Committee, General Comment No 36: Article 6: right to life, CCPR/C/GC/36, 3 September 2019, para.23.

100 (2010) 51 EHRR 1 (ECtHR).

101 Committee on the Rights of Persons with Disabilities, Concluding Observations to India, 29 October 2019, CRPD/C/IND/CO/1, para.32. General recommendations are made at para.33.

Concerns about the non-implementation in full of these treatment standards have featured in all but a handful of Concluding Observations. Matters relating more specifically to trafficking and related problems such as forced labour have featured in Concluding Observations relating to China,[102] Paraguay,[103] the Republic of Korea,[104] the Dominican Republic,[105] Lithuania,[106] Haiti,[107] the Philippines,[108] South Africa,[109] Senegal,[110] El Salvador[111] and India.[112] The concerns raised and the solutions suggested can be grouped as follows.[113]

(ii) The concerns raised in the CRPD Committee's Concluding Observations

The Committee referred to various types of victims, including naturally the victims of trafficking (Paraguay, Haiti, the Philippines, South Africa, Senegal, El Salvador and India),[114] and also slavery or forced labour or forced begging. Accordingly, for China, the expressed concern was the "abduction and forced labour of thousands of persons with intellectual disabilities, especially children", including examples classified as "slave labour" (para.29). In relation to Paraguay, it was people with disabilities made to beg by criminal gangs (para.43); and for the Dominican Republic, the concern was "the lack of information on trafficking in persons with disabilities, particularly children with disabilities, who are victims of exploitation through begging" (para.32). For South Korea, it was ongoing breaches of art.16 standards

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102 Committee on the Rights of Persons with Disabilities, Concluding Observations to China, 15 October 2012, CRPD/C/CHN/CO/1, paras.29–30.

103 Committee on the Rights of Persons with Disabilities, Concluding Observations to Paraguay, 15 May 2013, CRPD/C/PRY/CO/1, paras.41–44.

104 Committee on the Rights of Persons with Disabilities, Concluding Observations to the Republic of Korea, 29 October 2014, CRPD/C/KOR/CO/1, paras.31–32.

105 Committee on the Rights of Persons with Disabilities, Concluding Observations to the Dominican Republic, 8 May 2015, CRPD/C/DOM/CO/1, paras.32–33.

106 Committee on the Rights of Persons with Disabilities, Concluding Observations to Lithuania, 11 May 2016, CRPD/C/LTU/CO/1, paras.34–35.

107 Committee on the Rights of Persons with Disabilities, Concluding Observations to Haiti, 13 April 2018, CRPD/C/HTI/CO/1, paras.30–31.

108 Committee on the Rights of Persons with Disabilities, Concluding Observations to The Philippines, 16 October 2018, CRPD/C/PHL/CO/1, paras.30–31.

109 Committee on the Rights of Persons with Disabilities, Concluding Observations to South Africa, 23 October 2018, CRPD/C/ZAF/CO/1, paras.30–31.

110 Committee on the Rights of Persons with Disabilities, Concluding Observations to Senegal, 13 May 2019, CRPD/C/SEN/CO/1, paras.29–30.

111 Committee on the Rights of Persons with Disabilities, Concluding Observations to El Salvador, 1 October May 2019, CRPD/C/SVL/CO/2–3, paras.32–33.

112 Committee on the Rights of Persons with Disabilities, Concluding Observations to India, 29 October 2019, CRPD/C/IND/CO/1, paras.34–35.

113 All the comments cited are referenced in the footnotes listed immediately above: for reasons of space, additional footnote references are given only for additional material, and otherwise just the paragraph number of the relevant comment is given.

114 In relation to South Africa and Senegal, the concern arose from the need to implement anti-trafficking legislation; in relation to El Salvador, the concern was of both people and organ trafficking.

"including forced labour" (para.31), and for Haiti it was orphaned children working in domestic settings (para.30).

These concerns were raised under art.16 rather than the ban on forced labour in art.27(2), confirming the importance of considering such conduct as also abuse which, in the context of the ICCPR or ECHR, could amount to inhuman and degrading treatment and arguably torture.

The expressed acceptance of intersectional problems and hence the need to bring a focus on discrimination standards was a repeated feature. The concerns included the position of women, of children, of persons with psychosocial or intellectual impairments and sometimes other features. Most often, there was a concern about different groups or about people affected by a combination of features. Accordingly, there was a concern about women only in the case of the Philippines (with reference to the risk of women being trafficked (para.30)) and El Salvador (the reference being to the need for "gender-sensitive training" of relevant officials (para.33)[115]). More often, there were concerns about women, girls and also male children. Hence, in relation to the Dominican Republic, there was concern about begging/trafficking involving children and the lack of access to protective measures such as shelters for women and girls (para.32); for Lithuania, it was a matter of violence particularly affecting "women, boys and girls" (para.34); and similarly for India, it was both gender-based violence and violence against women, girls and boys (para.32). A series of concerns relating to Haiti also had a particular focus on women and children, the Committee noting that "particularly women and children" with disabilities "face intersectional discrimination, abuse, exploitation, trafficking and violence", that there were difficulties relating to the identification of abuse "particularly with respect to children with disabilities who are orphans and engaged in domestic work", that there was inadequate data about breaches of art.16 "particularly" in relation to "women and children" and that protective and sup- port measures were absent in relation to "victims of gender-based violence against women and girls with disabilities in all contexts" (para.30).

The concerns about people also affected by forms of mental disorder arose in relation to China, where there was the issue of forced labour of persons with intellectual disabilities and children in particular (para.28), and South Africa, in relation to whom the need for protection arose for "in particular women and girls with psychosocial or intellectual disabilities and children with disabilities" (para.31). This was also the case for Senegal, though with the addition of an additional group, those with albinism: hence, the Committee's concern was "[t]he lack of specific legislation, policies and programmes to protect persons with disabilities, particularly women and girls with intellectual or psychosocial disabilities, persons with

115 Although not mentioned in the specific context of trafficking but rather in the context of violence more generally, the groups of persons with disabilities particularly affected were listed as "women and girls with psychosocial or intellectual disabilities, . . . older persons . . ., persons of African descent . . ., and persons . . . living in conditions of hardship in rural or remote areas" (paras.32 and 33).

albinism and children with disabilities, from all forms of violence, abuse and economic exploitation" (para.29).

Lack of information was also a repeated feature. Hence, in relation to Paraguay, the Committee highlighted its failure to provide "information on the number of persons with disabilities who are neglected, and whether they are victims of exploitation, human trafficking or abuse" (para.41). For the Dominican Republic, it was the "lack of information on trafficking in persons with disabilities, particularly children with disabilities, who are victims of exploitation through begging" (para.32); for Lithuania, it was the "lack of statistical data on exploitation, violence, trafficking and abuse in homes, schools, institutions, hospitals and prisons disaggregated by, among others, sex, age and disability" (para.34) and for Haiti, it was the lack of "specific data, disaggregated by sex and age, on cases of violence and abuse against persons with disabilities, particularly women and children) (para.30). In relation to both South Africa and Senegal, the concern was the "lack of disaggregated data on the related reports, investigations and prosecutions in accordance with article 16(3)" (South Africa, para.30; Senegal, para.29). In the case of El Salvador, the Committee's concern was that data on various matters, including "complaints reported and cases decided on trafficking in persons with disabilities and in organs" was lacking (para.32); and in the case of India it was the "lack of disaggregated statistical data in the National Crime Records Bureau" relating to gendered violence (para.34).

Similarly, there was reference to the absence of monitoring, which might be a source of relevant data and is required by art.16(3): see Dominican Republic (para.32), Lithuania (para.34) and Haiti (para.30).

Collecting data is important in the planning of suitable policies, as is getting advice from expert monitors. Moreover, whether a legal standard of protection is being met may turn on information that is or should be available. For example where the duty to protect turns on what ought to have been known, a gap in knowledge arising from a failure to collect data should not provide a defence for the state. The Committee also identified various contributory features, ranging from structural deficiencies to inadequate implementation of what did exist. One of these was the absence of relevant legal frameworks or the implementation of them, which might be open to challenge in a human rights setting. For example the concern in relation to Haiti was the "absence of laws on protection from violence with a disability perspective" (para.30); for South Africa, it was the "lack of legislation, policies and programmes to protect all persons with disabilities, in particular women and girls with psychosocial or intellectual disabilities and children with disabilities, from all forms of violence and abuse" (para.30); in relation to Senegal, it was the "lack of specific legislation, policies and programmes to protect persons with disabilities" (para.29) and in relation to India it was the "lack of measures to identify, prevent and combat" violence including "the delay in enforcing legislative provisions to tackle such violence" (para.34).

Monitoring, the lack of which has been mentioned in relation to data, is also designed to be a protective mechanism. Others might be expected to offer protection

as part of their roles, but in relation to Haiti there was concern: "[i]nadequate training of the staff, carers and families of persons with disabilities, health personnel and law enforcement officials to recognize all forms of exploitation, violence and abuse, particularly with respect to children with disabilities who are orphans and engaged in domestic work" (para.30). A variety of other concerns arose in relation to protective information and mechanisms and places such as shelters. Accordingly, in the case of the Republic of Korea, the Committee noted "the absence of shelters for persons with disabilities other than those who are victims of sexual and domestic violence" (para.31); and in the case of the Dominican Republic, it noted that "women and girls with disabilities have little physical access to, or information and communication about, mechanisms for protection against all forms of physical, sexual, economic and other violence, including in shelters" (para.32). Turning to Lithuania, the concern was phrased as the absence of "targeted measures such as the provision of accessible victim support services, including shelters and complaints and reporting mechanisms" (para.34) and in relation to Haiti, it was "the inaccessibility of shelters" (para.30, in the context of domestic violence rather than trafficking). Similarly, in the case of India, the concern was the "limited availability of accessible shelters for women with disabilities who are victims of violence" (para.34). For El Salvador, in addition to the common concern of "ineffective complaint mechanisms" for victims of violence, there was a more specific problem of "a lack of protection against reprisals against persons with disabilities who are victims of violence and of human and organ trafficking which may arise from filing complaints against the perpetrators" and also "[i]neffective preventive measures taken against trafficking in persons with disabilities and in organs" (para.32).

Inadequate prosecutions were also identified, sometimes being a simple failure, as in the case of the Republic of Korea, mention being made of "failure of the State party to punish the perpetrators" of forced labour (para.31) and also in relation to the Philippines, the concern being "the absence of criminal prosecutions and convictions of the perpetrators " (para.30, relating to sexual violence). However, also identified in relation to South Africa and Senegal was the absence of a specialist process: hence, in the case of South Africa, the concern was the "lack of dedicated mechanisms for identifying, investigating and prosecuting instances of exploitation, violence and abuse against persons with disabilities" (para.30), and for Senegal it was "[t]he lack of mechanisms for identifying, investigating and prosecuting cases of exploitation, violence and abuse" (para.29).

Other concerns were from the perspective of victims, and related to redress, including compensation, and also recovery and rehabilitation. A variety of combinations was evident in the comments of the Committee. Hence, for the Republic of Korea, it was the state's "failure of the State party to provide reparation to the victims" of forced labour (para.31); for Haiti, it was the "lack of redress or compensation for victims" and "the insufficiency of health, psychosocial and legal services" (para.30) and for the Philippines, it was problems with "redress mechanisms for the victims" (para.30). In the case of South Africa, the concern was "a lack of accessible and age-friendly information on access to counselling and redress,

including compensation and rehabilitation" (para.30), and, not quite identically, in relation to Senegal, it was the "lack of accessible information on access to counselling and redress, including compensation and rehabilitation" (para.29). In the case of El Salvador, it was "ineffective complaint and redress mechanisms for persons with disabilities who are victims of violence" and "[i]nsufficient rehabilitation services" (para.32); and, for India, there was a concern about the "the lack of effective remedies and redress . . . including rehabilitation and compensation" (para.34).

This list of areas, covering the intersectional nature of the problem, the structural deficiencies that may contribute to it, including in relation to the response to the problem and also the failure to accommodate the needs of victims, provides a useful checklist for areas that could be investigated in assessing whether there is an adequate response to the obligations undertaken to secure the right not to be subject to trafficking and related scenarios. For example, a litigator wishing to draft a challenge to the approach of a government might look at matters such as the presence of an independent monitoring mechanism, the adequacy of shelters and the approach to prosecutions or redress.

(iii) Improvements suggested by the CRPD Committee

Having set out its concerns, the Committee was also keen both to offer general encouragement to improve the situation and also identify more specific solutions, which might be applicable to other states as well and also assist an assessment of the adequacy of what any particular government is doing.

One unsurprising but repeated recommendation was to ensure an independent monitoring mechanism existed as required by art.16(3). This was sometimes a bare reference to having independent monitoring of services and facilities (Lithuania, para.36; Haiti, para.31) or simply to implement art.16(3) (South Africa, para.31, Senegal, para.30). In other cases, the Committee set out the protective nature of the mechanism (though that is expressly stated in the CRPD text). Accordingly, in the case of the Dominican Republic, the recommendation was to "[a]ppoint an independent authority to promote the protection of persons with disabilities from exploitation, violence and abuse" as per art.16(3) (para.33); for the Philippines, it was to "[a]dopt mechanisms to monitor all the facilities and programmes designed to serve persons with disabilities with the aim of preventing violence, especially sexual violence against persons with disabilities, including children with disabilities" as per art.16(3) (para.31) and in the case of India, it was to "[e]nsure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities, in accordance with article 16(3) of the Convention, and that civil society organizations, including organizations of persons with disabilities, are involved in oversight activities" (para.35).

The protective nature of such a mechanism is from its oversight of vulnerable populations: but it will also provide advice. Informed advice requires data, and this was another area for recommendations. In the case of Lithuania, it was a very general recommendation to "collect disaggregated data" (para.36). But in other

cases, the recommendation related to more specific situations. Hence, in relation to China, the Committee wished to see "data collection on the prevalence of exploitation, abuse and violence against persons with disabilities" (para.30); in relation to Haiti, the recommendation was that the state "[c]ollect and publish data on intersectional discrimination, abuse, exploitation, trafficking and violence, including sexual violence against women and children with disabilities" and also "follow up with national anti-violence initiatives, in close collaboration with persons with disabilities and their organizations, in order to design appropriate policy responses" (para.31) and for El Salvador, it was to "[c]ollect data, disaggregated by age, sex, form of violence and disability, on the number of complaints reported and cases decided on trafficking in persons with disabilities and in organs" (para.33). Finally, in the case of India, the need to ensure that "the National Crime Records Bureau collects data disaggregated by gender, age, place of residence, relationship with perpetrator and disability" was mentioned (para.35).

Having monitoring and collating information may allow the state to uncover the nature and extent of the problem of trafficking. The Committee also set out matters relevant to the response required. In relation of three countries, it referred to the need for a strategy. Accordingly, Haiti was told to develop "a strategy with targeted time frames and adequate funding to provide security, health and safety for women and children with disabilities in post-earthquake camps" (para.31); the Philippines was invited to "[e]nsure that any strategies for the prevention of trafficking take into account and address the particular risks of women and girls with disabilities to different forms of trafficking and exploitation" (para.31) and it was suggested that India develop and put in place "national and state strategies to identify, prevent, combat and end all forms of violence against persons with disabilities, including against women, girls and boys with disabilities", which should involve representative organisations (para.35).

These comments indicate what is needed for an effective strategy, namely targets and time frames, an intersectional perspective (on which see more below) and the involvement of representative organisations. The latter is part of a wider trend: in the recommendations to India, it was suggested both that the process of developing and implementing strategies "should involve organizations of persons with disabilities, particularly of women with disabilities" and that the monitoring required to comply with art.16(3) should involve "civil society organizations, including organizations of persons with disabilities" (para.35). In addition, in the case of Haiti, it was recommended that data collection and its use in policy formulation, together with reviews of initiatives, were to be "in close collaboration with persons with disabilities and their organizations" (para.31). This reflects a general theme in relation to the CRPD: art.4(3) obliges states to "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations" in developing laws and policies to implement the CRPD. This is rights-promoting in at least two ways. Ensuring that rights are respected in a practical and effective way is more likely to be secured if those with lived experience of the ways in which rights are breached are involved

in explaining what is wrong and suggesting what might work for them. Moreover, avoiding any form of "othering" but instead involving persons with disabilities in the matters in which they have most interest because they are most affected respects relevant expertise and contributions, which in turn acknowledges dignity and humanity.

Another wider theme from two Concluding Observations is the value of taking account of the key human rights programme, the Sustainable Development Goals.[116] For Haiti, there was reference to SDG target 5.2, which is the elimination of violence against women and girls, including trafficking, as part of Goal 5, gender equality of empowering women and girls (para.31) and for El Salvador, it was target 16.2, ending "abuse, exploitation, trafficking and all forms of violence against and torture of children" in the context of Goal 16, the promotion of "just, peaceful and inclusive societies" (para.33).

Another general theme arising from the comments—to be expected, given that it was a major concern raised—is the need to take account of intersectionality. As in relation to the concerns expressed, there were several foci, including women, children and those with mental health impairments. Gender was the central fea- ture mentioned in relation to Lithuania, with the call for strengthened protection "particularly [for] women and girls" (para.35, citing Concluding Observations of the CEDAW Committee); for Haiti, involving recommendations for rehabilitative and reintegrative action in relation to "women and girls" and "measures to end . . . violence against women and girls with disabilities . . . including trafficking . . ." in accordance with General Comment No 3 (para.31); and the Philippines, in relation to which the recommendation was that "any strategies for the prevention of trafficking take into account and address the particular risks of women and girls with disabilities to different forms of trafficking and exploitation" (para.31). Children generally, including boys, were added in recommendations made to the Dominican Republic that it ensured that abandoned or begging children were the focus of investigation and rehabilitative steps and that protective measures were particularly taken for women and children (para.33); and in relation to India there were recommended strategies about violence "including against women, girls and boys with disabilities" (which were to be developed with "organizations of persons with disabilities, particularly of women with disabilities"), and it was suggested that the state implement remedies in statutes designed to protect woman and girls, and that data collection should include whether violence was gendered (para.35).

Additional groups also needing particular protection were identified in other recommendations (though they also covered women and children). Hence, in relation to South Africa, the need noted was to "[a]dopt and implement legislation, policies and programmes", including the Prevention and Combating of Trafficking in Persons Act 2013, in order "to protect all persons with disabilities, in particular

116 See UN, Sustainable Development Goals, available at https://www.un.org/sustainabledevelopment/ (visited 7 April 2021). They replaced the Millennium Development Goals.

women and girls with psychosocial or intellectual disabilities and children with disabilities"; it was also noted that "child victims" should "have access to child-friendly reporting channels and physical and psychological rehabilitation and health services, including mental health services" (para.31). For Senegal, there was a need for protective legislation, policies and programmes, particularly for "women and children with disabilities, persons with psychosocial or intellectual disabilities and persons with albinism" (para.29). In the case of El Salvador, a series of recommendations was made: act "in accordance with the Committee's general comment No 3 (2016) on women and girls with disabilities", improve protection to cover "particularly women and girls with disabilities, in the home and in institutions, older persons with disabilities, persons of African descent with disabilities, persons with psychosocial or intellectual disabilities, and persons with disabilities living in conditions of hardship in rural or remote areas" and train officials to counter trafficking in a "gender sensitive" way (para.33).

More specific points included bringing into effect specified legislation (South Africa, the Prevention and Combating of Trafficking in Persons Act 2013, which was "to protect all persons with disabilities, in particular women and girls with psychosocial or intellectual disabilities and children with disabilities" (para.31); and Senegal, the implementation of Act No 2005–02 of 25 April 2005 on trafficking in persons (para.30)). Other systemic steps included awareness raising and training. This featured in the recommendations to Lithuania, which was asked to "strengthen awareness-raising efforts and the training of police officers, health professionals and social workers, among others, with a view to supporting persons with disabilities who have been affected by violence" and "allocate sufficient funds to awareness-raising measures" (paras 35 and 36); to Haiti, which was asked to "[p]rovide continuous training for the families of persons with disabilities and for their carers, health professionals and law enforcement officers to enable them to recognize all forms of exploitation, violence and abuse, and better communicate and work with persons with disabilities who are victims of violence" (para.31); to the Philippines, which was asked to ensure that "information and awareness-raising concerning trafficking is provided in accessible formats and covers all urban and rural areas of the country" (para.31); and to El Salvador, which was asked to "provid[e] gen- dersensitive training on preventing and identifying trafficking in persons with disabilities and in organs to public officials, including the National Civil Police, the judiciary and health and social workers" (para.33).

A variety of protective mechanisms and processes for victims was suggested. In the case of Paraguay, it was "the creation of reception centres where victims of trafficking in persons can obtain psychosocial care and legal assistance" (para.42); for the Republic of Korea, the recommendation was "accessible shelters for persons with disabilities who are victims" (para.32); in relation to the Dominican Republic, it was "access to information and communication, to mechanisms for submitting complaints and recording such violations of their rights, and to shelters and measures for psychosocial recovery and reintegration into the community" (particularly for women and children) (para.33); Lithuania was requested to establish "inclusive

and accessible victim support services, including accessible hotlines, shelters and complaints and reporting mechanisms" (para.35); and in relation to Haiti the need identified was "accessible and inclusive support services", including "accessible shelters and other support services" (para.31).

One very specific recommendation to provide better protection to victims of trafficking forced to beg was for Paraguay to provide: "alternative housing for those who have been neglected or are making a living by begging" (para.42). A variety of complaints and enforcement processes was also recommended. Accordingly, in the case of Haiti, it was noted that "accessible and inclusive support services" should include "independent complaints mechanisms" (para.31). For the Philippines, "access to independent complaints mechanisms" was recommended (as part of offering extra protection against violence and abuse) (para.31). South Africa was asked to "ensure that child victims have access to child-friendly reporting channels" (para.31). El Salvador was said to need "effective complaint and redress mechanisms, including protection against reprisals arising from filing complaints against perpetrators, to persons with disabilities who are victims of violence and of human and organ trafficking" (para.33). Finally, for India, the identified gap to be filled was "accessible complaint mechanisms and access to justice" (para.35).

Naturally, complaints mechanisms could lead to criminal investigations and prosecutions: the need for more criminal investigations and prosecutions was a feature of several recommendations made, some more general and some more specific. Accordingly, more general recommendations were made in relation to Haiti, where the call was for "accessible and inclusive support services", including "police reporting" and that cases should be "appropriately investigated" and "perpetrators . . . prosecuted" (para.31); South Africa was asked to "[i]nvestigate promptly and effectively incidents of violence against persons with disabilities, prosecute suspects and duly sanction perpetrators" (para.31) and Senegal was asked to "[p]romptly conduct investigations into cases of exploitation, violence and abuse against persons with disabilities, prosecute suspects, duly sanction per- petrators . . ." (para.30). More specific points were made in relation to China and South Korea as responses to the identified problems of forced labour: China was asked to ensure ongoing investigations of incidents of abduction and forced labour and prosecutions of perpetrators (para.30), and the Republic of Korea was asked to investigate all cases, "in particular . . . strengthen . . . investigations into the incidents of forced labour of persons with disabilities" (para.32). In the case of Par- aguay, the recommendation was "a special investigation unit within the competent law-enforcement bodies to find out how . . . gangs operate" that are involved in forced begging and criminal proceedings against the perpetrators along with "the appropriate penalties" (para.44).

There were several recommendations as to remedies for victims, including mention of redress, reparation and compensation. Accordingly, in relation to China, the request for measures to prevent further abductions identified the need to include "remedies to the victims" (para.30); for the Republic of Korea, it was to ensure that "victims receive reparation" (para.32); for Haiti, it was to ensure

"victims are legally entitled to and provided with redress and adequate compensation" (para.31) and for the Philippines, the need identified was for "appropriate remedies for victims of abuse, such as redress and adequate compensation, including rehabilitation" (para.31). For both South Africa and Senegal, the recommendation was to provide "effective redress, including compensation and rehabilitation" (South Africa, para.31, Senegal, para.30). In relation to El Salvador, there was a more specific recommendation for "effective complaint and redress mechanisms, including protection against reprisals arising from filing complaints against perpetrators, to persons with disabilities who are victims of violence and of human and organ trafficking" (para.33). Finally, in the case of India, the recommendation was to implement legal remedies in various statutes relating to violence against women and girls, and ensure "remedies and access to justice" (para.35).

Longer-term programmes of rehabilitation were also identified as being required in relation to several jurisdictions. A general recommendation in relation to the Philippines was of remedies for victims "including rehabilitation" (para.31). For other states, the nature of the victim was part of what was set out. Hence, in the case of Paraguay, it was noted that victims of forced begging should have "rehabilitation programmes, with the required support and reasonable accommodation, so that they can exercise their labour rights", and reception centres should include psychological care (para.44). Similarly, for the Dominican Republic, the state had to ensure "rehabilitation, recovery and inclusion in family and community life" of those who appeared abandoned or who were begging, especially children (para.33). In the case of Haiti, the identified need was "medical care, psychological support and legal services to ensure their rehabilitation and reintegration" for female victims (para.31). For South Africa, there was a call for "effective redress, including compensation and rehabilitation", and, for child victims, the need was for "child-friendly physical and psychological rehabilitation and health services, including mental health services" (para.31); similarly for Senegal, the need was for effective redress for victims "including compensation and rehabilitation", and for child victims the need was "physical and psychological rehabilitation and health services, including mental health services" (para.30). Finally, in relation to El Salvador, it was necessary to "[p]rovide rehabilitation services, including emergency shelter and medical and psychological assistance", including to "victims of human and organ trafficking" (para.33).

(iv) The Committee Against Torture and its recommendations relating to trafficking

The Committee Against Torture has also considered trafficking matters in the context of its explanations of the implications of the Convention against Torture.[117] In

117 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

particular, in its General Comment No 2, it has noted the duty to protect in relation to the actions of non-state actors.[118] This applies where state officials "know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors" and requires the state "to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention". Failure is considered complicity or acquiescence, and allowing action "with impunity" amounts to "encouragement and/or de facto permission". The Committee noted that this principle applied to various settings relating to a "failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking".

It has also considered trafficking in relation to judicial proceedings and non-refoulement. Article 14 of the CAT is the right of victims to compensation and rehabilitation. In its General Comment No 3, the Committee noted the need for "gender-sensitive procedures" in this regard (including matters such as rules of evidence ensuring "equal weight" is attached to "the testimony of women and girls") and that "complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as . . . trafficking are able to come forward and seek and obtain redress".[119] Article 3 sets out the right to non-refoulment when there is a risk of torture in the receiving state. In General Comment No 4, the Committee set out various instances that might indicate that risk, including being a victim of "gender-based . . . violence, . . . enforced disappearance . . . slavery and forced labour or trafficking in human beings; . . ." [120]

III. Concluding Comments

In *VCL*, the European Court of Human Rights noted in passing that, in relation to child victims of trafficking, there might be a need to "protect them against acts of violence falling within the scope of Articles 3 and 8" and to take "both reasona- ble steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge, and effective deterrence against such serious breaches of personal integrity".[121] This makes the point that trafficking should not be reviewed simply through the lens of art.4 of the ECHR or other provisions relating to slavery.

In this context, it becomes important to examine other standards that might be relevant. The UN Treaty Bodies are a relevant source of such standards. The

118 Committee Against Torture, General Comment No 2, Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008, para.18.

119 Committee Against Torture, General Comment No 3 (2012): Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012, para.33.

120 Committee Against Torture, General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4, 4 September 2018, para.29.

121 Appn nos 77587/12 and 74603/12 (16 February 2021) (ECtHR), [161].

treaties include two of an overarching nature, the ICCPR and the ICESCR, several that apply these overarching standards to groups who have faced and still face discrimination and one, the Convention against Torture, that expands upon what is needed to counter ill-treatment. Importantly, the nature of the approach of the UN Treaty Bodies allows them to look at systemic factors behind any breach of rights.

This article has had a focus on the material from the CRPD Committee, but it has tried to put that material into the context of the views expressed by other UN Treaty Bodies, which have been in existence for a longer period and, in the case of the CEDAW Committee and the Committee on the Rights of the Child in particular, have had the opportunity to consider matters of trafficking in the context of groups who are over-represented as victims of trafficking. The CRPD Committee is also concerned with a vulnerable group, namely persons with disabilities: and quite often there is vulnerability also on the basis of gender or age, or some other feature, including ethnicity.

What this material demonstrates is two-fold. First, it is that many other rights may well be in play. Sometimes, this is likely to be so irrespective of the nature of the victim: accordingly, the focus of the CRPD Committee on trafficking and related conditions such as forced labour being examples of prohibited ill-treatment, which is consistent with the views expressed by the Committee Against Torture, is likely to apply in all situations. Accordingly, those who make use of frameworks such as the ECHR might wish to consider whether trafficking victims have also had their rights under art.3 of the ECHR breached.[122]

In other settings, however, it may be that the victim belongs to a group which has a vulnerable status, such that there might be issues of discrimination to consider. The human rights framework has its non-discrimination standards, including that arising under art.14 of the ECHR. But material from the core human rights treaties of the UN and the various Treaty Bodies is of assistance. It provides clarity as to what is meant by discrimination, including that neutrally phrased laws and policies that have a differential effect on groups with a relevant status can be discrimination; and the CRPD adds to this the clarity that a failure to provide reasonable accommodation is discrimination. Hence, it may be that a victim of trafficking who is also part of a vulnerable group might also be a victim of discrimination; and the person might belong to more than one vulnerable group and so be subject to intersectional discrimination, as is highlighted in numerous of the comments by the CRPD Committee—which has set out various comments relating to women and children with disabilities, but also mentions other groups. This may be important on the particular facts in a variety of situations: it may provide supplemental arguments by which to assess whether policies in relation to trafficking meet all human rights standards.

Second, the material analysed in this article illustrates the range of factors and evidence that might indicate that there has been a failure by the state to meet its

122 There might also be a question about whether those representing victims could apply to a different human rights body than the European Court of Human Rights: that is beyond the scope of this article.

obligations to the victims of trafficking. The concerns raised by the UN Treaty Bodies and the recommendations they make illustrate what features of laws, policies and practices might be implicated in failures to meet those obligations. As cases such as *VCL* illustrate, what is invariably in play is trafficking by private persons, and hence the review of state action is whether it has failed to meet a duty to protect. Such a duty requires protective laws (and also their enforcement), the taking of preventive steps when the state knows or ought to know of the need for them, and the ancillary investigative obligation. This in turn may require an assessment of what is needed as part of the relevant legislative framework or when the state ought to be taking preventive steps. By way of illustration, the features identified by the CRPD Committee in relation to ill-treatment and abuse—such as independent monitoring and data collection, a comprehensive strategy with suitable elements, the involvement of victim organisations, the incorporation of other standards such as the Sustainable Development Goals, an intersectionality perspective, training officials and raising awareness, having mechanisms to protect victims and provide them with redress and rehabilitation and having complaint and criminal processes—provide a checklist of areas that could be reviewed. Failings in one or several of these areas might indicate that a state has failed to meet its duty to protect.

Introduction to Chapter 5

The final article that is included in this thesis has been prepared for submission but not yet submitted. I should explain the reasons for that (though note that, as explained in chapter 1, the requirements for the PhD by Articles format at AUT is that "prepared for submission" is what is required as long as two pieces in the thesis have been submitted). This article seeks to explain what a CRPD-compliant mental health law would look like. Producing it has entailed reviewing all relevant material produced by the CRPD Committee prior to the end of 2022. The aim, explained in the introduction to the article, is to contribute to a crowded field in a meaningful way. It is a crowded field in that there has been significant writing which focuses on some key parts of the CRPD: there have been many who suggest that this requires the end of compulsion in psychiatry, many who suggest that this cannot conceivably be correct, and others who seek to plot a middle course by suggesting that there is a way of reading the CRPD in such a way as to allow compulsion in a limited range of circumstances: these positions are outlined briefly at the outset of the article. These authors have tended to focus on Articles 12 and 14 of the CRPD. What this chapter seeks to do is go beyond these provisions (important though they are), and instead to present a more comprehensive assessment of the reasons given by the CRPD Committee as to why compulsion in mental health law is problematic: this looks in particular at the rights to health, to inclusion in the community, to bodily integrity and to various other standards that can be seen as non-discrimination standards. The aim, therefore, is to contribute to the debate by seeking to ensure that the full picture is presented. It is also noted that this will be relevant to litigation that might occur, since the full panoply of rights set out in the CRPD will be relevant to ongoing challenges to the use of compulsion in a mental health setting (though it is also noted that there is a treaty-negotiation process ongoing within the Council of Europe that will have to consider the issue of what the CRPD requires).

This is in excess of 20,000 words and so is suitable for submission to many US journals: but many other English-speaking journals would baulk at such a length and would require a two-part article to be submitted. Alternatively, something of this length might

be more suited for reproduction in a slightly expanded form as a monograph. This is why this piece is prepared for submission (to a US journal) but has not been submitted because the final decision as to format is not yet made.

OUTLINING MENTAL HEALTH LEGISLATION THAT WOULD BE COMPLIANT WITH THE VIEWS OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

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Abstract: The Committee on the Rights of Persons with Disabilities considers that compulsion in mental health settings, in the form of detention or treatment without consent, breaches human rights standards, and that parties to the Convention on the Rights of Persons with Disabilities 2006 (CRPD) are obliged to reform mental health laws to remove anything other than treatment with consent. Others argue that the Committee is incorrect and that the CRPD as properly interpreted permits detention and treatment in some situations; or that states should withdraw from the CRPD in order to preserve mental health laws that allow compulsion because they are necessary. There has been a focus in the literature on Articles 12 and 14 of the CRPD, relating to capacity and detention respectively. This article seeks to add to the discussion by setting out a wider account of the Committee's views as to why mental health laws should be replaced and, in some instances, what the replacement should be: in particular, it looks at comments made under Article 25 (the right to health), Article 19 (the right to inclusion in the community), Articles 15-17 (aspects of the right to bodily integrity) and the non-discrimination standards that permeate the CRPD. From these, the components of a mental health law that would be compliant with the Committee's views are identified, to assist the dialogue by presenting a fuller picture.

I. INTRODUCTION

The Convention on the Rights of Persons with Disabilities 2006 (CRPD),[344] or more specifically the interpretation of some key provisions by its expert body, the Committee on the Rights of Persons with Disabilities ("the Committee"),[345] has led to significant

[344] Convention on the Rights of Persons with Disabilities 2006 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

[345] Established under Article 34 of the CRPD, it considers reports from states as to progress in implementing the CRPD (Articles 35 and 36), reports to the UN and make suggestions and

medico-legal writing on the propriety of mental health law and/or the Committee's views on mental health law. Articles 12 and 14 of the CRPD, have been central: although the main focus of this article is other relevant provisions – indeed, most articles of the CRPD are considered - to allow a more holistic debate, these provide an important opening context.

A. *The CRPD Committee's View on Articles 12 and 14*

The Committee has suggested that Articles 12 and 14 of the CRPD require the end of compulsion in psychiatry, leaving mental health law based on the dominant model in health law, namely treatment with consent only,[346] even when the person's mental capacity to consent is constrained. It has issued several documents that set out and justify this view.

Article 14(1) requires that states "ensure … on an equal basis … the right to liberty and security of person", supplemented by (i) the need to prevent unlawful or arbitrary deprivation of liberty and (ii) the requirement that "the existence of a disability shall in no case justify a deprivation of liberty".[347] In an initial statement on the meaning of

recommendations (Article 39), and, for states that have also ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006 (2518 UNTS 283 (opened for signature 13 December 2006, entered into force 3 May 2008), considers complaints or undertakes inquiries.

[346] The Code of Health and Disability Services Consumers' Rights, published by the Health and Disability Commissioner in New Zealand (available at https://www.hdc.org.nz/your-rights/about-the-code/code-of-health-and-disability-services-consumers-rights/), summarises the position familiar in common law jurisdictions at Right 7(1): "(1) Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise". The Code then sets out exceptions based on capacity, and also references advance directives, but this summary sets out the starting point. See also Articles 5-9 of the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ETS No 164 (opened for signature 4 April 1997, entered into force 1 December 1999) – which features below in the text: it provides a general rule of interventions only with free and informed consent, with exceptions for emergency situations, mental disorder, minors and provisions relating to people without capacity, but also protections for previously expressed wishes.

[347] Article 14(2) requires that where there is a loss of liberty, there is equal application of the guarantees arising in international human rights law and compliance with CRPD requirements, including reasonable accommodation. This incorporates the guarantees found in Article 9 of the International Covenant on Civil and Political Rights 1966 (999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), including the provision of reasons, access to courts to review detention, and compensation for wrongful detention.

this, adopted in September/October 2014,[348] the Committee notes that all people enjoy the right, "especially persons with mental disabilities or psychosocial disabilities"; and that the "absolute prohibition of detention on the basis of disability" includes detention arising from "actual or perceived disability" combined with other reasons, "including that they are dangerous to themselves or to others".

More detailed Guidelines issued in September 2015[349] reaffirm that a "disability plus" model, namely a focus on problematic behaviour not just the impairment, is not permitted. This has (i) a textual reason: a proposal that Article 14 have qualifying words that detention could not be ""solely" or "exclusively"" on the grounds of an impairment (together with a compulsory review process) was rejected, and so could not be added by interpretation.[350] There is also (ii) a purposive rationale: Article 14 is "in essence, a non-discrimination provision", part of ensuring equality in the enjoyment of rights and "respect of their inherent dignity".[351] The Committee also suggests (iii) a link to the right to make decisions, set out in Article 12, such that:

> Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.[352]

In addition, in its guidelines on the content of regular reports to it, the Committee asks states for information on:[353]

> (i) action to repeal laws or practices involving loss of liberty "on the basis of an actual or perceived impairment or on actual or perceived mental capacity, alone or in combination with

[348] Report of the Committee on the Rights of Persons with Disabilities on its twelfth session (15 September–3 October 2014), UN Doc CRPD/C/12/2 (5 November 2014), Annex IV, pp 14-15.
[349] Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, held in September 2015, available from the home page of the Committee, https://www.ohchr.org/en/treaty-bodies/crpd or at https://www.ohchr.org/en/documents/reports/a7255-report-committee-rights-persons-disabilities-13th-through-16th-sessions.
[350] Guidelines, para 7.
[351] Guidelines, para 4; at para 5, the link with the right to non-discrimination in Article 5 is noted.
[352] Guidelines, para 10.
[353] Committee on the Rights of Persons with Disabilities, 'Guidelines on treaty-specific document to be submitted by states parties', CRPD/C/3, 17 November 2016, pp9-10, para 16. In the 2009 guidelines, the information sought was on action to prevent institutionalisation of persons with disabilities and so phrased more generally.

any other criteria, including presumed dangerousness to oneself or others or need for care or treatment", including "mental health laws, legal capacity and family laws", and also laws relating to unfitness to stand trial/plead or being exempt from criminal responsibility (and also diversion involving involuntary treatment);

(ii) steps to preclude "involuntary or forced institutionalization, forced treatment, the imposition of restrictions or the seclusion of persons with disabilities, in particular those persons with psychosocial disabilities", and as a corollary steps towards a legislative "requirement of free and informed consent by the person concerned as the governing standard for mental health services, both inpatient and outpatient, including the choice between receiving inpatient and outpatient services"; and

(iii) steps relating to deinstitutionalisation, particularly for those with psychosocial disabilities.

The Committee does not deny that some of those with a mental health impairment may pose a risk to themselves or to others, but notes that the "duty to do no harm" is enforced by "criminal and other laws",[354] and that the right to make choices "includes the freedom to take risks and make mistakes".[355]

Article 12, "Equal recognition before the law", reaffirms the "right to recognition everywhere as persons before the law" (Article 12(1)), contains the equal right to have property (Article 12(5)), and requires supported decision-making for those who may need it. This arises from three obligations:

(i) to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (Article 12(2)),

(ii) to put in place "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" (Article 12(3)), and

(iii) to have "appropriate and effective safeguards to prevent abuse in accordance with international human rights law" so as to ensure respect for "the rights, will and preferences of the person" and protection from "conflict of interest and undue influence" (Article 12(4)).

In its first General Comment, the CRPD Committee explained its understanding of Article 12. The context was that "persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making

[354] Guidelines, para 14.
[355] Guidelines, para 15. This is noted to be part of article 12 as well.

regimes and denial of legal capacity"[356]. It sets out that the right to make a decision (legal capacity)[357] cannot be lost by impaired ability to make a decision (mental capacity)[358] because the response to the latter must be to offer support[359] (albeit that the person need not accept this offer). This is so whether loss of legal capacity arises "simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach)", or where a person's decision-making skills are considered to be deficient (functional approach)".[360] The functional approach, even though it does not focus on the impairment or the end result, but rests on the ability to make a decision, is "flawed" because of its discriminatory application and its claimed ability to "accurately assess the inner-workings of the human mind" and its removal of the right to equal recognition.[361] The Committee has referred to a paradigm shift in approach: "the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making".[362] It has also noted positives in this regard, such as commending Croatia for legislation to "abolish

[356] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 9; it added that "[a]ll practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others".

[357] See Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 8: "The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others". The Committee then notes that a failure to recognise this has led to, inter alia, loss of the right to liberty and to give consent to medical treatment; and at para 9 notes that this particularly affects those with "cognitive or psychosocial disabilities". At paras 13 and 14, it notes that legal capacity consists of legal standing and legal agency.

[358] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 13.

[359] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 15.

[360] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 15.

[361] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 15.

[362] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 3; at para 4, it was noted that this was supported by the general principles set out on Article 3, including dignity, autonomy, independence and non-discrimination. At para 17, it is noted that such support "must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making". See also para 28, where the Committee notes that substitute decision-making systems have to be abolished and supported decision-making systems developed.

plenary guardianship and enable persons with disabilities to be recognized as persons before the law on an equal basis with others".[363]

There is some academic support for the position of the Committee, most obviously from Tina Minkowitz, who has argued that "mental health laws violate the CRPD and may facilitate torture and ill-treatment. They cannot be reformed and should be abolished, to be replaced by non-coercive practices".[364] Article 12 plays a central role, her view being that there is a need to "support a person in a mental health crisis to come to his or her own way out … The key is support: this is not abandonment in a cruel world, but caring engagement …".[365]

B. *The Counter View*

The riposte to the Committee's construction is that it is an extreme and unrealistic position which cannot be a correct interpretation because it will harm both those who are currently treated without consent in many legal systems and put others at risk. There is heat in the debate. Gosney, for example, in arguing that the CRPD needs to be amended to allow treatment without consent, failing which the UK should withdraw from it and at most re-engage with an express reservation to maintain compulsion in psychiatry, commented that the views of the Committee are "so extreme" (or "absolutist") that they are "irrelevant to … UK psychiatrists" and only "relevant to a coterie of human rights lawyers with no or little clinical experience, and a minority of patients".[366]

[363] Croatia, 15 May 2015, CRPD/C/HRV/CO/1, para 4.
[364] T Minkowitz, 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities' in B McSherry and P Weller (eds) *Rethinking Rights-Based Mental Health Laws* (Oxford, Hart Publishing, 2010, at p177. In this chapter, Minkowitz focuses on Articles 12 and 14 of the CRPD, but also mentions briefly that Article 19 supplements Article 14 and offers support, and that Article 25 and the various provisions against ill-treatment are also relevant. These provisions are discussed in greater detail below. (See also T Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to Freedom from Nonconsensual Psychiatric Interventions', (2007) 34 Syracuse Journal of International Law and Commerce 405.)
[365] T Minkowitz, 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities' in B McSherry and P Weller (eds) *Rethinking Rights-Based Mental Health Laws* (Oxford, Hart Publishing, 2010, at p163.
[366] P Gosney and P Bartlett, 'In Debate: The UK Government should withdraw from the Convention on the Rights of Persons with Disabilities' (2020) 14 The British Journal of Psychiatry 296, 299.

Dawson, commenting on the Committee's view that Article 12 of the CRPD always requires that a person be entitled to make decisions, suggests that they are "exaggerating" when contending that losing the right to make a decision fails to recognise personhood,[367] and make use of a "flawed" conception of discrimination,[368] as part of an unbalanced conclusion. Szmukler suggests that the "absolutist position of the CRPD Committee, so dramatically at odds with centuries of legal acceptance of involuntary detention and treatment" not surprisingly receives "harsh criticism".[369]

Nilsson provides a worthy summary of the main parts of the debate[370] before developing her own thesis that seeks a middle ground, suggesting that there is no unlawful discrimination if the relevant "[s]ystems … pursue legitimate aims, contribute to their aims and are reasonable in light of their aims".[371] She sets out that the aims of mental health law, clearly legitimate, are promoting life, health and public safety; that their contribution to these aims is a matter for evidence as to the positive and negative outcomes of compulsion and therefore its efficacy; and that reasonableness involves a balance. Her central point is that formalised proportionality analysis should be used as the balance, with weight attached to the benefits and disbenefits of compulsion (including the harm to equal treatment). The traditional models will be

[367] J Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD', (2015) 40 International Journal of Law and Psychiatry 70, 72-73.
[368] J Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD', (2015) 40 International Journal of Law and Psychiatry 70, 73.
[369] G Szmukler, '"Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities', (2019) 18(1) World Psychiatry 34-41, 36: he also summarises critiques.
[370] A Nilsson, Compulsory Mental Health Interventions and the CRPD: Minding Equality (Hart, Oxford, 2021), pp12-30.
[371] A Nilsson, Compulsory Mental Health Interventions and the CRPD: Minding Equality (Hart, Oxford, 2021), p152, summarising what is developed in detail and pp45-67. Another book that rejects abolition but also supports a reduced use of compulsion is K Wilson *Mental Health Law: Abolish or Reform?* (Oxford, OUP, 2021): in summary she contends (at p 33) that "mental health law should … be reformed by decreasing coercion and increasing social support for persons with mental impairments", which rests on a "holistic approach to interpretation" resting on "inherent dignity (including autonomy), equality, and participation", which in her view leads to a conclusion that mental health law should rest on mental capacity plus support. The full argument is set out in ch 8 of the book: she rejects a proportionality model but argues that a proper understanding of the need to maximise dignity, equality and participation leads to a need for reduced coercion but not its abolition because "dignity may override autonomy with respect to serious self-destructive and degrading acts especially where there is good reason to believe that a person's autonomy may be compromised and those acts may be irreversible" (p 204).

valid if "states … demonstrate that their benefits" (ie mental health regimes involving compulsion) "are at least on par with the harm … caused by these regimes".[372] Dawson also suggests that the balance favours compulsion, since it ensures that positive rights (to life and health) are met and others are not exposed to "unnecessary danger", which he suggests is not discriminatory if it rests on impaired decision-making capacity (from whatever cause) because that can mean a person is not "similarly situated to others", allows "a line to be drawn between" improper interference and neglect not to intervene.[373]

C. *The Aims and Structure of This Article*

Clearly, there is a debate. Rather than seeking to provide extra weight to one or other side, this article seeks to provide a fuller understanding of how the elements of the CRPD fit together with regard to the issue of compulsion in the mental health field. This is done by analysing what the Committee has said in more than a hundred Concluding Observations to states, plus its General Comments and other statements, about what a mental health law should contain to be CRPD-compliant. The aim is to inform the ongoing debate by setting out a fuller understanding of what the CRPD Committee actually wants. The context is that there are two venues in which the debate may be brought to a head, one a negotiation and the other in the form of strategic litigation before one of the main human rights bodies,[374] both of which will be assisted by this fuller understanding.

The negotiation is in the Council of Europe, which is considering an Additional Protocol to the Oviedo Convention. In draft, this accepts mental health detention so long as

[372] A Nilsson, Compulsory Mental Health Interventions and the CRPD: Minding Equality (Hart, Oxford, 2021), p159; her argument is developed in detail and pp69-148 and summarised at 152-162.
[373] J Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD', (2015) 40 International Journal of Law and Psychiatry 70, 73-74. He suggests limits: support and reasonable accommodation have been tried and found wanting, there must be consideration of any advance directives, and compulsion has to be proportionate, namely to "prevent a serious threat of harm to that person or others, and no less restrictive approach could avert that harm" (p74).
[374] See M Ramsden and K Gledhill, Defining Strategic Litigation, (2019) 38(4) Civil Justice Quarterly 407-426, in which there was an effort to define strategic litigation, one element of which was the willingness to use international fora.

there are safeguards: the Committee has called on states to oppose it[375] (and North Macedonia's opposition was praised).[376] As for litigation, Article 9 of the ICCPR[377] precludes "arbitrary" detention, and the Human Rights Committee has included psychiatric detention as non-arbitrary, but it adopts a living instrument approach, allowing it to update its conclusions.[378] The European Court of Human Rights (ECtHR) also has a strong "living instrument" approach,[379] though in its case it will have to interpret Article 5(1)(e) of the European Convention on Human Rights (ECHR),[380] which expressly mentions "persons of unsound mind" as a group that can be detained, though only if that is "lawful".[381] The ECtHR accepts the permissibility of psychiatric detention. In *Rooman v Belgium*, the Grand Chamber commented that:

> 205. … Art 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities.

[375] The Oviedo Convention is the shorthand name for the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ETS No 164 (opened for signature 4 April 1997, entered into force 1 December 1999); the CRPD Committee statement in opposition was adopted in its 20th Session (27 August 2018-21 September 2018) and can be found at https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations. The Committee of Ministers of the Council of Europe, by decision CM/Del/Dec(2022)1434/4.2 of 11 May 2022 has deferred consideration of the draft Additional Protocol until work has been done on the availability of community measures for mental health and the case law of the European Court of Human Rights, to be done by the end of 2024.
[376] Macedonia (North Macedonia), 29 October 2018, CRPD/C/MKD/CO/1, para 4.
[377] See fn 4 above.
[378] For example, whilst Article 6 of the ICCPR expressly permits the death penalty, the Committee determined in *Judge v Canada* Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998, 5 August 2003 that a state which has abolished the death penalty cannot extradite a person to face the death penalty, reversing an earlier conclusion in *Kindler v Canada* Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, 30 July 1993, that extradition was permissible.
[379] For example, given that the death penalty was common when the ECHR was drafted and was expressly an exception to the right to life, it could not have been considered inhuman and degrading then: but it has been held that the "evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the member States of the Council of Europe" means that the reference to the death penalty in Article 2(1) is no longer "a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty": *Al-Saadoon and Mufdhi v UK*, App no 61498/08, ECtHR (4th Section), 2 March 2010, (2010) 51 EHRR 9, paras 116 and 120; see also *Al Nashiri v Poland*, App no 28761/11, ECtHR (4th Section), 24 July 2014, in which it was determined that Article 2 required no transfer to a state where there was a substantial risk of the death penalty (on the facts, the USA), and also breached Article 3: paras 576-577.
[380] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950: CETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953).
[381] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950: CETS No 5 (opened for signature 4 November 1950, entered into force 3 September 1953).

However, in *Rooman*, the Grand Chamber updated the requirements of Article 5 to recognise that psychiatric detention required the provision of treatment, a feature it had previously rejected.[382] In short, the very case that rejects the proposition that the ECHR "as currently interpreted" does not prohibit non-consensual detention and treatment reversed another proposition that had a long history. This provides room for proponents of the CRPD Committee's view to argue that the ratification of the CRPD by so many states supports a consensus against psychiatric detention - if the Committee's interpretation is correct - that should be taken into account.

Turning to that interpretation, Part II of this article briefly sets out the Committee's recognition that psychiatric treatment is valid, before Part III sets out in more detail that there is a right to such treatment by virtue of the right to health under Article 25 of the CRPD, though with a supporting role played by other rights (including the rights aimed at intersectional discrimination, Articles 6 and 7) and the right of access to services (Article 9). Part IV moves the complementary right to inclusion in the community and hence service provision there, set out in Article 19 of the CRPD. Part V turns to the arguments against the current approach to mental health treatment by reason of the risks posed of harm to those in institutions. Part VI then outlines the non-discrimination right that encompasses many components of the CRPD. Then, in Part VII, there is an effort to bring together the various elements.

II. CONFIRMING THAT THE CRPD ACCEPTS THE VALIDITY OF PSYCHIATRY

The CRPD Committee is clear that mental health services are needed,[383] and that there are some acute problems, including disproportionate suicide numbers. It noted to

[382] *Rooman v Belgium*, App no 18052/11, ECtHR (Grand Chamber), 31 January 2019, [2020] MHLR 1, para 205. In *Winterwerp v Netherlands* App no 6301/73, 24 October 1979, (1979-80) 2 EHRR 387, para 51, the Court determined that "a mental patient's right to treatment appropriate to his condition cannot as such be derived from Art 5(1)(e)".

[383] There are various comments under Articles 19 and 25, discussed below; and it recommended to Iraq under Article 11, the right to protection in situations of risk, that "mental health services" be provided to those made disabled by armed conflict: Iraq, 23 October 2019, CRPD/C/IRQ/CO/1, paras 21-22. Similarly, Colombia was asked to take steps for "persons who have developed psychosocial disabilities as a consequence of the armed conflict" as part of its reparations policies: Colombia, 30 September 2016, CRPD/C/COL/CO/1, paras 28-29. Note also that in General comment No. 4 (2016) on the right to inclusive education, CRPD/C/GC/4, 25 November 2016, para 32, explaining the implications

Hong Kong under Article 10, the right to life, that, as 35% of suicides involved people with intellectual or psycho-social disabilities, this "heightened suicide risk" required regular risk assessments and "the necessary psychological treatment based on free and informed consent of the person and counselling".[384] Similarly, there was concern about the levels of "suicidal ideation, particularly within Aboriginal and Torres Strait Islander communities", which required Australia to make targeted and culturally appropriate steps, developed with those communities, and training of relevant professionals.[385] For France, concerns included the high rate among those with autism and those with psychosocial disabilities, which required a national strategy and targeted measures, in which disabled persons' organisations (DPOs) would be involved;[386] similar points were made to the Republic of Korea.[387] Under Article 25, the right to health, the UK was also asked to "[a]ddress the high suicide rate among persons with disabilities, especially persons with intellectual and/or psychosocial disabilities".[388]

This immediately reveals a tension: suicidal ideation may lead to detention under mental health legislation. Indeed, human rights cases have found breaches of the right to life where inadequate steps have been taken to prevent suicide by those subject to mental health supervision.[389] There are other relevant powers: for example, section

of the Article 24 right to inclusive education, the Committee noted that psychologists were amongst the staff that should be available in schools.

[384] China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 63 and 64. See also Sweden, 12 May 2014, CRPD/C/SWE/CO/1, paras 29 and 30: here the concern was suicide rates without any specification of the nature of the disability.

[385] Australia, 15 October 2019, CRPD/C/AUS/CO/2-3, paras 19 and 20. There were also concerns about and needs to address the lower life expectancy of persons with disabilities, particularly those with intellectual disabilities and those from Aboriginal and Torres Strait Islander communities, and high death rates in care settings.

[386] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 21 and 22.

[387] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 21-22; there was also concern about murder-suicides by parents of children with disabilities.

[388] UK, 3 October 2017, CRPD/C/GBR/CO/1, paras 54 and 55; Northern Ireland was mentioned as a place of particular concern in relation to suicide.

[389] See, for example, *Renolde v France* Appn 5608/05, ECtHR (5th Section), 16 October 2008, [2008] Inquest LR 159, [2008] MHLR 331, (2009) 48 EHRR 42 (prisoner receiving psychiatric treatment but not swallowing medication committed suicide: inadequate checks as doctors prioritised building trusting relationship found inadequately protective of the right to life). However, see now *Fernandes De Oliveira v Portugal*, ECtHR (Grand Chamber), App no 78103/14, 31 January 2019, [2019] MHLR 358 (as trusting patients appropriate in modern practice, suicide by patient allowed leave not necessarily breach Article 2).

41 of the Crimes Act 1961 in New Zealand allows reasonable force to be used to prevent a suicide:[390] although this is not tied to a disability,[391] there may still be tension if an apparently neutral power is used more against persons with disabilities and has the effect of reducing the enjoyment of a right.[392] Nevertheless, the Committee accepts the value of interventions to counter suicide: since that is primarily viewed as a health matter, this leads to discussion of the right to health.

III. POSITIONING MENTAL HEALTH LAW WITHIN THE RIGHT TO HEALTH

Article 25 of the CRPD is the right to the "highest attainable standard of health" without disability discrimination, of which examples include "services needed … specifically because of their disabilities, including early identification and intervention as appropriate, services designed to minimize and prevent further disabilities", localised provision, including in rural areas, and "care of the same quality…, including on the basis of free and informed consent", and training of staff as to rights standards. Article 26 is the right to habilitation and rehabilitation, with the purpose of securing "maximum independence … and full inclusion and participation in all aspects of life", but also requiring voluntariness and expressly endorsing "peer support". These two rights apply to health, habilitation and rehabilitation needs of persons with disabilities whether linked to their impairments or not so linked.

Supplementing this language, in guidelines to states on what to include in reports,[393] in relation to Article 25, one area to be covered is measures to ensure equal access to "affordable, accessible, quality and culturally sensitive health services, including

[390] This is unless the person is taking action under the End of Life Choice Act 2019 (NZ).
[391] Contrast the power under section 136 of the Mental Health Act 1983 (UK) in England and Wales to detain someone in immediate need of care and control; sections 24 and 24A of the Police and Criminal Evidence Act 1984 (UK) allow arrests where there are risks of self-harm but there has to be a link to an offence. However, the common law power to arrest to prevent a breach of the peace, and s17(1)(e) of the 1984 Act allows police to enter premises without warrant to save "life or limb", which suggests that there is a common law power to arrest.
[392] Whether there is a right to commit (or attempt) suicide is beyond the scope of this article.
[393] The first guidelines were issued in 2009: Committee on the Rights of Persons with Disabilities, 'Guidelines on treaty-specific document to be submitted by states parties', CRPD/C/2/3, 18 November 2009. They were updated in 2016: 'Guidelines on treaty-specific document to be submitted by states parties', CRPD/C/3, 17 November 2016.

assistive and adaptive technology, in private and public settings, including in the areas of … mental health and psychosocial support".[394]

Concluding Observations to Japan provide a detailed illustration of Article 25's interplay with psychiatric impairments. Concerns of barriers to access, including relating to "information, lack of reasonable accommodation, and prejudices … held by professionals across the health sector" led to the recommendation for "the implementation of accessibility standards and the provision of reasonable accommodation" in the health sector, accessible information, including in Easy Read, and training health professionals in the "human rights model of disability …, emphasizing … the right to free and informed consent for any medical and surgical treatment". Another concern was "[t]he segregation of psychiatric care from general medical care" in the relevant statute, which should be dismantled. A third was "the lack of sufficient community-based health services and support", for which the recommendation was, with the involvement of DPOs representing those with psychosocial disabilities, to "[d]evelop … non-coercive, community-based mental health support".[395] These recommendations have the following elements:

> (i) Mental health care should not have a distinct statutory or policy regime, but should be integrated with other medical services.
> (ii) Accessibility is important, and has several elements, including information on services in accessible formats, reasonable accommodation in provision, addressing attitudinal factors – so needing regulatory standards and staff training.
> (iii) Community-based mental health support and services are needed.
> (iv) A human rights model of disability should be prominent, and part of staff training.
> (v) Free and informed consent is applicable to all aspects of medical care, including community mental health services.
> (vi) DPOs have to be involved.

These are discussed in turn.

[394] Committee on the Rights of Persons with Disabilities, 'Guidelines on treaty-specific document to be submitted by states parties', CRPD/C/3, 17 November 2016, p17, para 27.
[395] Japan, 7 October 2022, CRPD/C/JPN/CO/1, paras 53-54.

A. *An Integrated Framework*

The Committee does not explain what an integrated statutory and policy framework would entail. This is not a criticism, since national officials should design what is suitable in the domestic context. Various approaches could be suitable. Integration has obvious advantages: for example, specialist areas within medicine require specialist services with different staffing and facilities, such that a birthing unit and an oncology department are distinct – but integration will allow persons giving birth whilst receiving oncology treatment to receive overlapping care. Similarly, in the mental health context, a single framework will encourage approaching a person as a whole, holistically, and meeting all their health needs.

Many Concluding Observations have stressed that those with psychosocial or intellectual impairments need better access to general medical care. For example, concern that the life expectancy of those with psychosocial disabilities was 15-20 years lower than others was the context for the call for Denmark to secure "equal access to the highest attainable standard of health";[396] and Iraq was asked to counter "insufficient access to health care services, facilities and medical equipment" for various groups, including those with intellectual or psychosocial disabilities, leading to the recommendation for improved "community-based health-care services to provide services for persons with disabilities, in particular persons with intellectual or psychosocial disabilities" and other groups (as well as training of personnel).[397]

[396] Denmark, 30 October 2014, CRPD/C/DNK/CO/1, paras 56 and 57; mention was also made of the need for staff training and for everything to be consensual. The importance of training is mentioned in numerous settings: note also that Article 8 of the CRPD requires awareness raising campaigns to combat stereotypes, including where they are based on a model of disability other than the human rights model, discussed below. For example, for Venezuela, concerns included the ongoing use of the welfare model of disability and the call was for campaigns against prejudices and harmful practices, particularly involving certain groups, including those with psychosocial or intellectual impairments: Venezuela, 20 May 2022, CRPD/C/VEN/CO/1, paras 14-15. Similarly, El Salvador was asked to have "an intensive awareness-raising strategy" (including "training programmes and media campaigns"), using "the human rights model of disability" and aimed at "judges, lawmakers, law enforcement officials and health and education personnel, in order to eliminate prejudices, stereotypes and harmful practices against persons with disabilities, especially persons with psychosocial or intellectual disabilities, and to promote recognition of their rights in society: El Salvador, 1 October 2019, CRPD/C/SVL/CO/2-3, paras 16-17.
[397] Iraq, 23 October 2019, CRPD/C/IRQ/CO/1, paras 45 and 46.

Some calls for better access related to women and girls, whose needs for protection from intersectional discrimination are raised through Article 6 of the CRPD as well as Article 25. An example of a more general concern was, in the case of Gabon, "that persons with psychosocial or intellectual disabilities, especially women and girls with disabilities, do not have equal access to the highest attainable standard of health" (and are not allowed to exercise the right to consent), which required suitable action, including training on "reasonable accommodation in all health-care settings".[398] A more specific matter, repeated in various cases, is shown from the concern to Vanuatu that women with intellectual or psychosocial disabilities lacked access to services relating to sexual and reproductive health, leading to recommendations that included providing such access (and also training of professionals on rights).[399] Similarly, for El Salvador, there was a recommendation, reflecting a corresponding concern, that national programmes, including those relating to sexual and reproductive health, covered various groups, including those with psychosocial or intellectual disabilities (and also training for health staff on rights).[400] One concern for India was discrimination in national schemes, "particularly affecting … women and girls with intellectual or psychosocial disabilities", leading to the recommendation to ensure non-discrimination.[401] Similarly, for Estonia, the Committee recommended access to sexual and reproductive health care for women and girls with "supported decision-making for women with intellectual or psychosocial disabilities so that they can reaffirm their sexual and reproductive autonomy and self-determination".[402]

Mention was also made of the needs of children: for example, recommendations to the Cook Islands included that the state "Provide mental health services for children and adolescents with disabilities across the islands", the context being concern about "the lack of early identification, family interventions and informed support of children with disabilities, which puts at risk their full development and ability to express their

[398] Gabon, 2 October 2015, CRPD/C/GAB/CO/1, paras 56 and 57.
[399] Vanuatu, 13 May 2019, CRPD/C/VUT/CO/1, paras 42 and 43. Women with other impairments also experienced this. Other examples include El Salvador, 1 October 2019, CRPD/C/SVL/CO/2-3, paras 48 and 49, and Estonia, 5 May 2021, CRPD/C/EST/CO/1, paras 48 and 49.
[400] El Salvador, 1 October 2019, CRPD/C/SVL/CO/2-3, paras 48 and 49.
[401] India, 29 October 2019, CRPD/C/IND/CO/1, paras 52 and 53.
[402] Estonia, 5 May 2021, CRPD/C/EST/CO/1, paras 48 and 49.

views; and by the lack of available resources and coordinated public administration in the social, health and education services, among others".[403] Article 7 of the CRPD, relating to the rights of children with disabilities, complements Article 23 of the Convention on the Rights of the Child 1989,[404] which provides the right to a "full and decent life, … dignity", including "self-reliance and … active participation in the community" for children with mental or physical disabilities, including "special care", which shall be "free of charge, whenever possible" and "ensure … effective access to … health care services, rehabilitation services …".

A joint statement issued by the CRPD Committee and the Committee on the Rights of the Child on 18 March 2022[405] includes a call for deinstitutionalisation strategies to assist the right to family life, with time frames and adequate budgets. It was noted that "[s]pecific attention should be paid to children with intellectual or psychosocial disabilities and children requiring high levels of support, who are usually at a higher risk of institutionalization".[406] It was also noted that "mental health … institutions" were a place where there was a need to eliminate violence, abuse and exploitation (for which Article 17 of the CRPD is the most relevant article: see Part IV below).[407]

Various other recommendations to states under Article 7 link with Article 25 and the need for health services. For example, the CRPD Committee was concerned in relation to Sweden that "rates of mental health and psychosocial issues and disorders are high among young people; that school health services are under-resourced; and that access to school psychologists and the psychosocial support system involves a long wait": the recommendation was to "increase the resources available for school health services to ensure that children have access to and receive appropriate psychosocial and mental-health support and psychiatric health care in a timely manner."[408] This

[403] Cook Islands, 15 May 2015, CRPD/C/COK/CO/1, paras 45 and 46.
[404] Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
[405] Available from https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations (last accessed 17 July 2023).
[406] Joint statement, para 10.
[407] Joint statement, para 7. Article 25 of the CRC provides a right to a period review of treatment provided to children "placed" for mental health treatment: this recognises placements, though does not endorse their validity.
[408] Sweden, 12 May 2014, CRPD/C/SWE/CO/1, paras 17-18.

links to Part II above, and the acceptance of the need for service provision. Non-institutional care was also emphasised: for example, there was concern to Denmark that "children who are hospitalized in psychiatric hospitals can be subject to forced treatment", leading to the call to "abolish forced hospitalization and treatment of children in psychiatric hospitals".[409]

The potential of better access to all health services, with account taken of needs arising from intersectional considerations, might be a benefit of a single framework. Another potential outcome would be the need to justify any differences in the method of provision, most obviously the role for compulsion, and in particular whether there could be a non-discriminatory framework for intervention. As was noted above, there can be powers to stop all suicide attempts, and many legal systems allow the detention of intoxicated persons because of the risks of self-harm or harm to others or indeed of persons with infectious diseases: these feature also in Article 5(1)(e) of the ECHR.[410] Might this support a principled basis for short-term intervention for people in a crisis situation, including one linked to mental health, that is not discriminatory?

B. *Accessibility*

The accessibility points made to Japan, including its application to various aspects, are replicated. For example, the second review of Australia involved the concern that persons with disabilities, including those with intellectual or psychosocial disabilities, had "significantly poorer health and … less access to information …"; the recommendations included providing access to "information on an equal basis with others …", as well as service provision.[411] Similarly, for Algeria, the recommendations made in response to various concerns included accessible information (including in

[409] Denmark, 30 October 2014, CRPD/C/DNK/CO/1, paras 20-21. At para 68, the Committee asked for information on the steps taken within 12 months, emphasising the urgency of the situation. See also the call for Serbia to do more to deinstitutionalise and provide community services, affecting "in particular those with intellectual and/or psychosocial disabilities": Serbia, 23 May 2016, CRPD/C/SRB/CO/1, paras 13-14. See also similar comments to Moldova and Bulgaria: Moldova, 18 May 2017, CRPD/C/MDA/CO/1, paras 16-17; Bulgaria, 22 October 2018, CRPD/C/BGR/CO/1, paras 19-20.
[410] In *Witold Litwa v Poland*, App no 26629/95, 4 April 2000, [2000] MHLR 226, (2001) 33 EHRR 53, it was held that the reference to "alcoholics" should be understood as a reference to intoxicated persons, not those addicted to alcohol.
[411] Australia, 15 October 2019, CRPD/C/AUS/CO/2-3, paras 47 and 48.

Easy Read) on various matters including "psychosocial support services".[412] The need for access to care in other areas is illustrated by the recommendation that Chile ensure accessible information services relating to sexual and reproductive health, the concern being that it was lacking particularly for persons with psychosocial or intellectual disabilities.[413]

The importance of accessibility in the CRPD framework is evident from the Article 9 right to accessibility, the purpose of which is "[t]o enable persons with disabilities to live independently and participate fully in all aspects of life" (Article 9(1)). It covers the physical environment and also information and services, and specific obligations set out in Article 9(2) include developing, promulgating and monitoring "minimum standards and guidelines for the accessibility of facilities and services open or provided to the public". In additional guidance in its General Comment 2, the Committee noted barriers in accessing information "owing to a lack of easy-to-read formats and augmentative and alternative modes of communication" and in accessing services "due to prejudices and a lack of adequate training of the staff providing those services."[414]

The width of the obligation has been reiterated. For example, the complaint to Belgium was that "government action has focused primarily on accessibility for persons with physical disabilities", essentially ignoring others, including those with intellectual or psychosocial disabilities (and some others): this was the context for a call to promote "all aspects of accessibility", involving "a legal framework with specific, binding benchmarks for accessibility", provision "for the monitoring of accessibility and … a detailed time frame for monitoring and evaluating the incremental changes made to

[412] Algeria, 27 June 2019, CRPD/C/DZA/CO/1, paras 42 and 43.
[413] Chile, 13 April 2016, CRPD/C/CHL/CO/1, paras 51 and 52.
[414] Committee on the Rights of Persons with Disabilities, General comment No 2 (2014): Article 9: Accessibility, CRPD/C/GC/2, 22 May 2014, para 7. The Committee referenced research from the World Health Organization and World Bank as to the extent of the problem: World Health Organization and World Bank, World Report on Disability: Summary, 2011 (available at https://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability); this notes (at p8) difficulties in accessing work because of prejudices, and its recommendations include (at p19) awareness-raising campaigns.

infrastructure" and "[d]issuasive penalties for non-compliance".[415] In short, the Committee provides a reminder that accessibility is not limited to what might immediately spring to mind (eg wheelchair ramps): and that taking it seriously requires plans with measurable outcomes, monitoring and enforcement.

The Committee has also given specific examples of what should be covered. The review of Kuwait raised concern about several areas: "lack of accessibility of public transport and public and private infrastructure and services provided or open to the public, including for … persons with intellectual disabilities"; a recommendation was to ensure full accessibility for all of transport, infrastructure and services, including "those relating to education, health, employment, banking, leisure and cultural and mainstream sporting activities", the Committee also indicating that the plan should be "adequately resourced … with time frames and monitoring and evaluation criteria".[416]

Article 21, the right to freedom of expression and information, is also to be noted here.[417] The Committee made various references to ensuring that persons with intellectual or psychosocial impairments have access, through suitable communication methods such as easy read, to public information,[418] and media and websites;[419] and to the need to train relevant professionals.[420] In the case of Malta, a positive finding was "[c]ontinuing efforts to make material available in Easy Read".[421]

[415] Belgium, 28 October 2014, CRPD/C/BEL/CO/1, paras 21-22. Lack of progress featured in various other comments: eg, South Africa, 23 October 2018, CRPD/C/ZAF/CO/1, paras 16-17, Niger, 1 May 2019, CRPD/C/NER/CO/1, paras 15-16, Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 16-17.
[416] Kuwait, 18 October 2019, CRPD/C/KWT/CO/1, paras 18-19. Health facilities are also mentioned expressly in relation to Ukraine: Ukraine, 2 October 2015, CRPD/C/UKR/CO/1, paras 17-19.
[417] Equal freedom of expression includes access to information and websites: for example, the Lao PDR was asked to "[e]nsure that information provided to the general public is available to persons with disabilities in accessible formats, such as … Easy Read, … and ensure that websites are accessible and comply with the standards developed by the Web Accessibility Initiative of the World Wide Web Consortium"; and "[g]uarantee a pool of qualified relevant professionals trained in the use of … Easy Read formats, in consultation with organizations of persons with disabilities": Lao PDR, 30 September 2022, CRPD/C/LAO/CO/1, paras 38-39.
[418] For example, see El Salvador, 8 October 2013, CRPD/C/SLV/CO/1*, paras 45-46.
[419] For example, see Armenia, 8 May 2017, CRPD/C/ARM/CO/1, paras 35-36; Lao PDR, 30 September 2022, CRPD/C/LAO/CO/1, paras 38-39.
[420] Myanmar, 22 October 2019, CRPD/C/MMR/CO/1, paras 41-42; this was to be done with DPO involvement.
[421] Malta, 17 October 2018, CRPD/C/MLT/CO/1, para 4.

C. *Community Provision*

The third feature in the comments to Japan is the importance of community-based mental health support and services. Whilst community-based care is common, it is not universal: for example, a concern about Guatemala was that "the Federico Mora National Mental Health Hospital is the only mental health care solution provided", leading to the recommendation to "[d]evelop community mental health services, adopting a human rights approach".[422] In other settings, inadequate community provision leaves insufficient alternatives to hospital care. For example, among the concerns addressed to Poland was the "implementation of the National Mental Health Programme, which fails to address the services required by persons with psychosocial disabilities"; the recommendations included improvements to "[e]nsure that the implementation of the National Mental Health Programme results in increasing access to community-based health services for persons with psychosocial disabilities, and provide adequate resources to these services" (and also training on rights).[423] In the case of Switzerland, there was concern under Article 25 about "[t]he lack of sufficient community-based, non-coercive mental health services and support, and the fact that 400 new places are being established in mental health institutions", for which the recommendation was to consult with DPOs representing those with psychosocial disabilities and "[d]evelop … non-coercive, community-based mental health support" compliant with the CRPD.[424] These illustrate the link between Articles 25 and 19, which is the focus of Part IV below.

D. *The Human Rights Model of Disability*

Reference to Japan adopting (and training staff on) the human rights model of disability reflects a core and overarching principle of the CRPD. Its starting point is the partial definition of disability in Article 1: those with "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may

[422] Guatemala, 30 September 2016, CRPD/C/GTM/CO/1, paras 61 and 62.
[423] Poland, 29 October 2018, CRPD/C/POL/CO/1, paras 43 and 44.
[424] Switzerland, 13 April 2022, CRPD/C/CHE/CO/1, paras 49-50.

hinder their full and effective participation in society on an equal basis with others" are covered, though this is not phrased as a limiting and exclusive definition. Importantly, the impairment is not key: rather, it is the interaction between the impairment and barriers. This is supplemented by the indication in the preamble that:

> *(e) …* 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, …

As such, disability is not a medical matter resting on the impairment alone, but a social matter, resting on how barriers are created within society in response. This modelling of disability has featured in several Concluding Observations. For example, China was asked to

> "develop a wide range of community-based services and supports that respond to needs expressed by persons with disabilities, and respect the person's autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health".[425]

Supplementing the reference to peer support, advance directives have also been mentioned: concern as to "the lack of community mental health services" was the context for recommendations to Mexico including ensuring "that appropriate community health services are available to persons with disabilities, based on the right to free and informed consent", and also ensuring informed consent for all medical treatment, "including the possibility of advance directives".[426]

[425] China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 37 and 38. Along similar lines, the Committee's concerns in relation to Article 26 included the lack of "informed consent" and instead the "imposition of rehabilitation and habilitation measures on persons with disabilities, especially persons with psychosocial or intellectual disabilities", leading to the recommendation to ensure such informed consent and respect for the "autonomy, integrity, will and preference", using a "rights-based approach to rehabilitation and habilitation": China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 39 and 40. Other calls to avoid the medical model were made: see, for example, Kenya, 30 September 2015, CRPD/C/KEN/CO/1, paras 45 and 46; Costa Rica, 12 May 2014, CRPD/C/CRI/CO/1, paras 51 and 52.
[426] Mexico, 27 October 2014, CRPD/C/MEX/CO/1, paras 49 and 50.

The Committee has come to explain its approach by naming it the "human rights model of disability". The Dominican Republic was criticised for using the "medical model of disability", and asked to "[s]trengthen mental health services, taking a human-rights-based approach";[427] and for Chile the concern was that "mental health policy adopts a medical approach to disability", which needed to be replaced by "a rights-based policy on mental health with the participation of organizations of persons with disabilities, in particular psychosocial disabilities" (and training health professionals on rights).[428] The need for a "rights-based approach to rehabilitation and habilitation", under Article 26, involving informed consent and respect for the "autonomy, integrity, will and preference", was also mentioned in the case of China, in the context of concerns about the "imposition of rehabilitation and habilitation measures on persons with disabilities, especially persons with psychosocial or intellectual disabilities".[429]

E. *Free and Informed Consent*

The importance of training professionals on the human rights model of disability is invariably linked to references to free and informed consent, and sometimes with additional features. For example, Senegal was asked to ensure that training emphasised how provision of services should be "respectful and dignified" and based on "free, prior and informed consent".[430]

As Article 25 makes express reference to the importance of healthcare provision based on consent, it is unsurprising that the Committee has indicated that this applies to mental health treatment.[431] An early example was that China was asked to repeal laws

[427] Dominican Republic, 8 May 2015, CRPD/C/DOM/CO/1, paras 46 and 47; see also the comments to Guatemala in Part III C above.
[428] Chile, 13 April 2016, CRPD/C/CHL/CO/1, paras 53 and 54.
[429] China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 39 and 40.
[430] Senegal, 13 May 2019, CRPD/C/SEN/CO/1, paras 43 and 44.
[431] See also Report of the Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health, 28 March 2017, A/HRC/35/21, in which Dainius Puras (then the Special Rapporteur) makes various recommendations for moving towards mental health laws compliant with the CRPD and notes, having set out the core role of informed consent in the right to health, that "[c]oercion in psychiatry perpetuates power imbalances in care relationships, causes mistrust, exacerbates stigma and discrimination and had made many turn away, fearful of seeking help"

allowing detention and treatment without consent, including on the basis of third-party decisions, so as to ensure that "all health care and services provided to persons with disabilities, including all mental health care and services, is based on the free and informed consent of the individual concerned".[432] The link between mental health treatment and consent was clear in one of the several recommendations made to Montenegro, which was asked to ensure (through "all necessary legislative and policy measures and action plans, and … adequate resources to their implementation") that:[433]

> All health care and services provided to persons with disabilities, including all mental health care and services, are based on the free and informed consent of the individual concerned, that third party consent is explicitly prohibited, and that any failure to act in line with the free and informed consent of the patient is punished.

See also comments to Colombia raising concern at "[t]he low level of compliance with Act No. 1616 on mental health, in relation to informed consent for invasive surgical procedures and psychiatric treatment", which required action to ensure such consent, including in relation to "psychiatric services and interventions".[434] Similarly, there was concern expressed to Argentina that the National Mental Health Act (Act No 26.657) had not been implemented, to which was added regret about "the lack of clear-cut mechanisms for ensuring that persons with disabilities give their free and informed consent for any type of medical treatment before it is administered"; the Committee recommended that Argentina implement the Act speedily and "strengthen the network of community mental health services and … improve coordination between these services and inclusive employment, education and housing mechanisms in order to guarantee the effective implementation of the National Mental Health Act" and also to "adopt protocols for ensuring that all persons with disabilities give their free and

(para 65); reforms that are acknowledged will take time are supported, including the development of non-coercive tools (para 66). This seems consistent with the inevitable conclusion that the various steps suggested by the CRPD Committee will take time to implement.

[432] China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 37 and 38.

[433] Montenegro, 22 September 2017, CRPD/C/MNE/CO/1, paras 46 and 47. See also Mongolia, 13 May 2015, CRPD/C/MNG/CO/1, paras 38 and 39; Gabon, 2 October 2015, CRPD/C/GAB/CO/1, paras 56 and 57; Qatar, 2 October 2015, CRPD/C/QAT/CO/1, paras 45 and 46; Guatemala, 30 September 2016, CRPD/C/GTM/CO/1, paras 61 and 62; UAE, 3 October 2016, CRPD/C/ARE/CO/1, paras 45 and 46; Bulgaria, 22 October 2018, CRPD/C/BGR/CO/1, paras 51 and 52

[434] Colombia, 30 September 2016, CRPD/C/COL/CO/1, paras 56 and 57.

informed consent for any type of medical treatment before it is administered".[435] This seems clearly to draw the link between Articles 25 and 19, since the comment could have been made under Article 19, discussed further in Part IV below.

F. *Involving DPOs*

The final element of the comments to Japan was the need to involve DPOs in the needed changes. Again, this is to be expected, as Article 4(3) requires that states "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations" in all matters affecting them, including in "the development and implementation of legislation and policies" required by the CRPD. In addition, as part of the obligation to coordinate implementation and monitor this, Article 33(3) requires that "[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process".

Further guidance is provided by the Committee in its General Comment 7,[436] including the need for supported decision-making, as envisaged in Article 12, to "to enable participation in policymaking and consultations that respect a person's autonomy, will and preferences", including for those with intellectual impairments, autism or "actual or perceived psychosocial impairment".[437] Reference is also made to the link with monitoring processes required by Article 16(3), the Committee noting that, given

[435] Argentina, 8 October 2012, CRPD/C/ARG/CO/1, paras 41 and 42.
[436] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November 2018. It notes at para 12 that self-advocacy organisations have been an important form of DPO for those with intellectual disabilities, who often lose legal capacity; and also that DPOs involving family members are important, though care should be taken to ensure that they follow processes of supported decision-making to ensure that the person with disabilities has the central position.
[437] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November 2018, para 80.

ongoing violations of the right to integrity in places "such as psychiatric and/or residential institutions", DPOs should be involved in that monitoring.[438]

G. *Summary*

In sum, the comments made by the Committee under Article 25,[439] most comprehensively to Japan but with elements repeated in comments to other countries, are linked to other articles of the CRPD. Together, they add to the argument that states that have ratified the CRPD have agreed to provisions that are not compatible with compulsion in mental health settings, such that it is not just a matter of contestable interpretations of Articles 12 and 14 of the CRPD. Also important is Article 19, which is considered next.

IV. ARTICLE 19 AND SUPPORTED COMMUNITY PROVISION

Various comments in Part III emphasise service provision in the community. Article 19 of the CRPD sets out "the equal right of all persons with disabilities to live in the community, with choices equal to others" and the corresponding obligation on states to "take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community". Specific instances of what this involves are set out: (a) the equal opportunity to choose living arrangements and the consequent lack of an obligation to live in a particular setting, (b) "access to a range of in-home, residential and other community support

[438] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November 2018, para 82.

[439] Note also Article 22, the equal right to privacy, including of "health and rehabilitation information". For example, concerns to Spain, requiring effective changes, included breaches in "institutions and mental health facilities, including through the deprivation of personal belongings and an inflexible and minimal regime of visits and contact with persons outside the facilities", and also "reports of video surveillance cameras placed in the rooms of patients and leaks of confidential information on patients across the mental health-care sector": Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 41-42. See also concern that the Republic of Korea used "tracking devices … issued to autistic persons and persons with psychosocial disabilities and/or intellectual disabilities without their free and informed consent", which should cease, with the aim behind the scheme, namely preventing disappearances, being secured "in line with the … human rights model of disability": Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 45-46.

services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community", and (c) equal access to "Community services and facilities", which must be "responsive" to the needs of persons with disabilities. Segregation must be absent; and, to avoid disability discrimination, including from a failure to provide reasonable accommodation, positive steps to make inclusion practical are required. Accordingly, the references in Articles 19(b) and (c) to "community support services" and "community services and facilities" mean those necessary to allow a person with disabilities to live in the community.

A. *Explaining Article 19*

In its General Comment 5, the CRPD Committee has set out that Article 19 covers "all persons with disabilities, regardless of their level of intellectual capacity, self-functioning or support requirements", such that concluding that institutions are the "only solution" for those "assessed as requiring a high level of personal service", including on the basis that "personal services are considered to be "too costly" or the person with disabilities is considered to be "unable" to live outside an institutional setting", breaches Article 19.[440]

As with Article 25, a comprehensive account of Article 19's implications for those with psychosocial and intellectual impairments was set out in the case of Japan. Concerns, reflecting systemic failings of approach and policy, included the perpetuation and indeed promotion of institutionalisation, including for adults and children with intellectual or psychosocial impairments, with particular reference being made to "the continuance of indefinite hospitalizations of persons with psychosocial disabilities"; this

[440] Committee on the Rights of Persons with Disabilities, General comment No. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, 27 October 2017, para 21; the Committee references specifically the treatment of those with intellectual disabilities, but its language is apt to cover others. See also para 33, in which it is noted that closing institutions is "in itself … not enough" and must be accompanied by "comprehensive service and community development programmes"; and para 36, in which it is noted that a package of combined residential and support services, entailing shared assistance, can only be proper if the person supported chooses that (which is also noted at para 60). See also paras 57 and 58, which emphasise the need for deinstitutionalisation plans and a strategy to comply with Article 19.

in turn meant there was no "strategy and legal framework" for deinstitutionalisation so as to secure the equal right to independent living and inclusion in the community.[441] The flip side of this was deficient community provision or opportunities for persons with disabilities to make choices in living arrangements. Specific reference was made to "insufficient support arrangements for persons with disabilities for living independently in the community, including accessible and affordable housing, in-home services, personal assistance and access to services in the community" and the use of the "medical model of disability" in the processes whereby support was offered.[442] Opening with a reference to General Comment 5, the recommended steps were:[443]

> (i) "expedited measures to end … institutionalization … by redirecting … budget allocations from the placement of persons with disabilities in residential institutions towards arrangements and supports for persons with disabilities for living independently in the community on an equal basis with others"; this would involve "a legal framework and national strategy with time-bound benchmarks, and human, technical and financial resources, aimed at the effective transition of persons with disabilities from institutions into independent living in the community on an equal basis with others, with recognition of their right to autonomy and full social inclusion, and obligations on prefectures to ensure its implementation", which was to be done "in consultation with organizations of persons with disabilities";
>
> (ii) "[s]trengthen support arrangements for persons with disabilities to live independently in the community, including independent, accessible and affordable housing outside any type of congregated premises, personal assistance, user-led budgets, and access to services in the community", and "[r]evise existing assessment schemes for granting support and services in the community to ensure that they are based on the human rights model of disability, including the assessments of the barriers in society for persons with disabilities and of the support for their social participation and inclusion";
>
> (iii) allow "persons with disabilities … to choose their place of residence and where and with whom they live in the community", so that they are "not obliged to live in a particular living arrangement, including group homes" but instead "enable persons with disabilities to exercise choice and control over their lives";

[441] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 41.
[442] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 41.
[443] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 42; there was also a reference made to the Committee's Guidelines on Deinstitutionalization, 10 October 2022, CRPD/C/5 (available at https://www.ohchr.org/en/treaty-bodies/crpd/activities).

(iv) "[r]eview all cases of persons with disabilities who are hospitalized in psychiatric hospitals to cease any indefinite hospitalization, ensure their informed consent and foster their independent living, along with the required mental health support in the community".

The broader elements of this are, first, involving DPOs in creating appropriate solutions. As already noted above, this is a key feature of the CRPD. It reflects the expertise of those most obviously affected as to what needs have to be met to secure equitable outcomes. It was referenced under Article 19 in numerous other Concluding Observations. For example, slow progress in deinstitutionalisation in Armenia required an expedited action play with "timelines for closing all remaining institutions", "sufficient resources for … support services", and the involvement of DPOs in "all stages of the deinstitutionalization process (planning, implementation, evaluation and monitoring)".[444] The United Kingdom was asked to put in place "a comprehensive plan, developed in close collaboration with" DPOs to secure deinstitutionalisation and provide community supports, the context being concern that cost factors led to too much institutionalisation.[445]

Secondly, there is the adoption of the human rights model; again, as previously noted, this is a standard feature of the Committee's recommendations. Thirdly, there is the shift from institutionalisation to service provision in the community, which should render institutionalisation unnecessary. More detail is given as to what this shift should entail, combined with a realisation that it will not happen overnight but is a process. The process requires a legal framework and strategy, resources, expedition, benchmarks and legal obligations on local government areas; and there is a specific need to review the situation of those in psychiatric hospitals. The end result is to allow people to choose their living arrangements (which in turn requires the provision of suitable housing), control their budgets, have personal assistance, and otherwise access the community.

[444] Armenia, 8 May 2017, CRPD/C/ARM/CO/1, paras 31-32.
[445] UK, 3 October 2017, CRPD/C/GBR/CO/1, paras 44-45; specific reference was made to personal assistance schemes.

Various other Concluding Observations contain calls for community provision of mental health services using a rights-based model. For example, Paraguay was asked "to gradually deinstitutionalize persons with disabilities, with clear time frames and benchmarks", including "setting up … community services, including rights-based mental health services", the context being concern that "no significant progress" was evident on a policy to move people out of psychiatric hospitals.[446] Montenegro was asked, in the context of concerns about the ongoing prominence of institutionalisation, to "[c]ommit to not building new institutions or other forms of segregated settings, and instead develop a wide range of community-based services … that respond to the needs of persons with disabilities and respect their autonomy, choices, dignity and privacy and that include peer support and other alternatives to the medical model of mental health".[447] One concern to Turkey was the "medical approach to support, which is linked to institutions or followed for screening, diagnostic, intervention and rehabilitation purposes, in particular with respect to autistic persons"; recommendations included that the state "ensure that human rights-based mental health is available for all persons with disabilities in all provinces".[448]

The Committee has also recognised positive developments. Peru was congratulated for its "pilot programme on psychosocial integration of persons with disabilities in the region of Tumbes".[449] Similarly, Turkmenistan was praised for "[t]he special services created to provide hostels for persons with psychosocial disabilities who have lost their social ties", which is a good example of a practical step.[450] Further, the Committee was pleased at various steps in Portugal, including "[t]he National Plan for Mental Health 2007-2016, which seeks to expand the National Network for Integrated Continuous Care;…"[451] Deinstitutionalisation was also welcomed in various comments: for example, Haiti was congratulated for "the mental health component in the 2014

[446] Paraguay, 15 May 2013, CRPD/C/PRY/CO/1, paras 47-48. See also the request that Costa Rica include a "comprehensive, human rights-centred mental health strategy" as part of its – at present absent - deinstitutionalisation process: Costa Rica, 12 May 2014, CRPD/C/CRI/CO/1, paras 39-40.
[447] Montenegro, 22 September 2017, CRPD/C/MNE/CO/1, paras 36-37.
[448] Turkey, 1 October 2019, CRPD/C/TUR/CO/1, paras 42-43.
[449] Peru, 16 May 2012, CRPD/C/PER/CO/1, para 5.
[450] Turkmenistan, 13 May 2015, CRPD/C/TKM/CO/1, para 4.
[451] Portugal, 20 May 2016, CRPD/C/PRT/CO/1, para 6.

National Health Policy aimed at promoting deinstitutionalization",[452] and a positive aspect in the second review of the Republic of Korea was "[t]he adoption of the Road Map to Support Independent Living of Deinstitutionalized Persons with Disabilities, in 2021".[453]

B. *Support in the Community*

Read in conjunction with Articles 25 and 26, Article 19 assists in determining the structure of mental health provision. The Committee envisages the development of comprehensive care in a community setting. However, this has to be consensual: the Committee also indicated that the rationale for Article 19 is the need to recognise "[l]egal personality and legal agency", such that there is a link with Article 12[454] and its new paradigm of supported decision-making.[455]

On the important question of the nature of the support, the Committee has emphasised the breadth of what might be CRPD-compliant: ""Support" is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity".[456] Illustrative examples include the person choosing "one or more trusted support persons … for certain types of decisions", "peer support, advocacy (including self-advocacy support), or assistance with communication" and developing new methods of communication, especially for those who do not verbalise, "measures relating to universal design and accessibility" (such as understandable information in contractual settings), advance planning documents or mechanisms (though to be

[452] Haiti, 13 April 2018, CRPD/C/HTI/CO/1, para 3.
[453] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, para 4.
[454] Committee on the Rights of Persons with Disabilities, General comment No. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, 27 October 2017, para 27 (which is reiterated at para 80).
[455] In General comment No 4 (2016) on the right to inclusive education, CRPD/C/GC/4, 25 November 2016, para 50, the Committee noted that one of the values of inclusive education, required under Article 24 of the CRPD, was to allow people to express their will and preference and build confidence, reducing the need for support.
[456] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 17; at para 18, it notes that the diversity of people means that the "type and intensity of support to be provided will vary significantly from one person to another", reflecting the principle of respect for difference set out in Article 3(d) of the CRPD.

triggered or to cease to have effect when the person states in the text, not on the basis of an assessment of a lack of mental capacity).

The essential components of a supported decision-making regime, whatever format it takes, are noted, along with a caveat that it "should not overregulate the lives of persons with disabilities":[457]

> (i) no exclusions based on needs being high or communication problems;
> (ii) "new, non-discriminatory indicators of support needs" rather than assessments of mental capacity;
> (iii) control by the person – such that they can refuse, change or terminate the support;
> (iv) avoid perceived "objective best interests" and instead rest on "the will and preference of the person", with suitable safeguards, including a process to "challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned";
> (v) accessibility via nominal or no cost; and
> (vi) ensure that it is not used to limit rights, "especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty".

Does this cover all settings? The Committee records that "At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected":[458] but there is a back-stop, in that if "significant efforts" do not reveal the person's will and preferences, then, rather than assessing their best interests, people should act on "the "best interpretation of will and preferences"".[459] The motif of the CRPD is that people's choices, even if arguably

[457] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 29.
[458] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 18.
[459] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 21. Szmukler suggested that an important failure by the Committee is to define what is meant by "will and preferences", particularly "will", which might have various connotations and might conflict with a preference: G Szmukler, '"Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities', (2019) 18(1) World Psychiatry 34-41, 38; see also T Carney et al, 'Realising 'will, preferences and rights': reconciling differences on best practice support for decision-making?', (2019) 28(4) Griffith Law Review 357-379, which explores different potential meanings from different professional perspectives, which supports the view that the Committee should address what is meant.

unwise, should be respected, though, of course, subject to police powers to protect others (and sometimes the person). This motif also applies when it is not clear what the person wants: here, it requires standing in the shoes of the person to decide what to do rather than to decide paternalistically. The outcome might well be the same, but the process differs and is consistent with what the approach when a person does not have an impaired ability to make decisions. Of course, a question will arise as to how flexible is this back-stop: for example, is a person in a psychotic crisis refusing to accept sensible medication from a relevant clinician because of non-acceptance of their demonstrable illness expressing their will and preference? If that is not truly the decision of the person, is there a basis for determining that the true will and preference of the person is acceptance of treatment?[460]

Dawson suggests that substitute decision-making should be allowed if a person with compromised mental capacity cannot express their will and preference after support, with consideration of any advance directive, and provided that any compulsion is proportionate.[461] He would no doubt argue that it is more honest simply to allow substitute decision-making in certain circumstances. Of course, it can be suggested that in a system resting on lack of capacity, doctors may well diagnose a lack of capacity so as to conclude that treatment should be given without consent so as to assist that person and protect others.

The CRPD Committee would respond that reliance on will and preference in all situations, even with some malleability in the assessment process when necessary, respects the core principle of autonomous choices about medical treatment, that police

[460] In this example, it is assumed that medication is an appropriate response: reviews of the Soteria approach of providing a safe space without medication (or limited medication) suggest it also has value, and so the question then would be the response of the person to being taken to such a place if they do not express the wish to go there in their state. (See, for example, T Calton et al, A Systemic Review of the Soteria Paradigm for the Treatment of People Diagnosed with Schizophrenia, (2008) 34(1) Schizophrenia Bulletin 181-192 (which confirms that other studies have shown there is no harm from the Soteria approach, such that it should be explored further); T Wolf et al, From Wish to Reality: Soteria in Regular Care – Proof of Effectiveness of the Implementation of Soteria Elements in Acute Psychiatry, in CL Mulder et al (eds) Coercion in Psychiatry: Epidemiology, Effects and Prevention (Frontiers in Psychiatry, September 2022), pp16-24 (available at https://www.frontiersin.org/research-topics/18333/coercion-in-psychiatry-epidemiology-effects-and-prevention#articles).

[461] J Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD', (2015) 40 International Journal of Law and Psychiatry 70, 73-74.

powers exist to protect others, and that there is a suite of obligations under Article 19 of the CRPD - suitable housing, personal assistance and so on – that support people with psychosocial and intellectual impairments to maintain their stability in a community setting. Hence, in General Comment 1, the Committee noted that "segregation … in institutions continues to be a pervasive and insidious problem", which is "exacerbated by the widespread denial of legal capacity", allowing people to be placed in institutions, where their lives are often controlled: the call was for deinstitutionalisation and restoration of legal capacity.[462] In addition, it was recognised that supported decision making "should be provided through a community-based approach", and that "communities are assets" in this regard, as "social networks and naturally occurring community support (including friends, family and schools)" are "key to supported decision-making".[463]

The emphasis on equal treatment in Article 19 is also worth recalling: it cannot mean the end of in-patient treatment for intellectual or psychosocial impairments since some treatments may not be possible on an outpatient basis, as is so for some physical health treatments. But there has to be equivalence in both the need for consensual treatment (largely in light of Article 25) and the offering of out-patient treatment unless precluded by medical necessity if that is the approach adopted for physical health conditions. It is already well-established that detention has to be necessary:[464] this will turn in part on what else is provided, such that additional services provided to comply with Article 19 should impact whether detention is truly necessary. The corollary must be that detention is arbitrary (and so outside Article 9 of the ICCPR) if the failure to offer community services leaves no option but treatment in an institutional setting.

[462] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 46; see also para 44.
[463] Committee on the Rights of Persons with Disabilities, General comment No 1 (2014): Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para 45.
[464] *Winterwerp v Netherlands* App no 6301/73, 24 October 1979, (1979-80) 2 EHRR 387, para 39: there are three criteria for detention - "objective medical expertise" is required to demonstrate that there is a "true mental disorder", that "the mental disorder must be of a kind or degree warranting compulsory confinement" and that "the validity of continued confinement depends upon the persistence of such a disorder".

V. ACKNOWLEDGING THE RISKS OF INSTITUTIONALISATION TO SUPPORT THE IMPERATIVE OF COMMUNITY PROVISION

A. *The Right to Life*

The CRPD Committee supplements its position against compulsory institutionalisation by noting its risks. The Article 10 CRPD right to life is implicated, as illustrated by several Concluding Observations. Its concern in the case of Cyprus was "the lack of preventative measures and disaggregated data on, inter alia, the causes and numbers of deaths of persons with disabilities residing in psychiatric facilities, institutions, group homes or other places of living", leading to the recommendation to "adapt, monitor and enforce all possible measures to identify causes of death, including suicide, and take all prevention measures necessary to address the situations of risk of death among persons with disabilities".[465] Whilst self-harm was implicated in this case, mistreatment and negligence was the focus in others:

> (i) Montenegro: reports of "death through suffocation in psychiatric hospitals" needed "specific safeguards to avoid accidents such as suffocation", but there was a wider need to have "anonymous and accessible complaint mechanisms in all hospitals, particularly psychiatric hospitals and departments, and in institutions", "develop an obligatory protocol" when there are allegations of abuse, and require autopsies when deaths occur in hospitals and institutions.[466]
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> (ii) Spain: concerns about deaths of persons with psychosocial disabilities caused by "involuntary restraint and improper medical treatment in psychiatric hospitals", and deaths from "insufficient professional assistance and support", which required "mandatory and regular training on the prevention and detection of violence and abuse against persons with disabilities" for "law enforcement officials, members of the judiciary and health and social workers".[467]
>
> (iii) Japan: deaths from "[p]hysical and chemical restraints in cases of involuntary hospitalization on the basis of impairment", and also the lack of statistics and of "independent

[465] Cyprus, 8 May 2017, CRPD/C/CYP/CO/1, paras 29-30.
[466] Montenegro, 22 September 2017, CRPD/C/MNE/CO/1, paras 20-21. See also the call for prosecutions in Bulgaria: Bulgaria, 22 October 2018, CRPD/C/BGR/CO/1, paras 25-26 (with concerns also raised of neglect, overmedication and refusing access to health care).
[467] Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 18-19; there were also concerns about the need to offer protection to women with psychosocial disabilities from intimate partner violence. Deaths from restraints and improper treatment in psychiatric hospitals also featured in the case of Mexico: Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3, paras 29-30.

> investigations";[468] the recommendations were to end involuntary hospitalisation, "ensure the necessary support for persons with disabilities in community-based services", and "thorough and independent investigations into the causes and circumstances of the cases of deaths in psychiatric hospitals".[469]

These comments are relevant to whether to allow compulsion in mental health care in that institutions are places where, however good the intention behind placements, significant risks arise. This supports taking an alternative approach. The Covid19 pandemic has provided a further illustration. Concerns expressed to France included the high level of deaths in the pandemic, which led to the recommendation to work with DPOs and independent monitoring mechanisms to "initiate emergency deinstitutionalization of persons with disabilities, to ensure safe and independent living in the community and to protect the right to life in critical health situations".[470]

B. *Articles 15, 16 and 17 – Integrity Rights*

Articles 15, 16 and 17 of the CRPD provide rights, respectively, to freedom from torture or cruel, inhuman or degrading treatment or punishment;[471] freedom from exploitation, violence and abuse (including through independent monitoring of relevant "facilities and programmes", investigating and prosecuting breaches, and providing recovery and rehabilitation for victims); and protection of physical and mental integrity.[472]

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[468] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 23; there was also a concern about deaths resulting from a "[l]ack of safeguards of the right to life of persons with disabilities, including lack of consideration of their will and preferences as regards not starting and/or not continuing their medical treatment, including in palliative care", which required remedy.

[469] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 24.

[470] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 21-22. This was also raised in the case of the Republic of Korea: Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 21-22.

[471] Article 15(1) of the CRPD replicates Article 7 of the ICCPR; both also expressly preclude non-consensual medical or scientific experimentation.

[472] Note also that Article 14 protects both liberty and the security of the person: the language follows Article 9 of the ICCPR, and in *General Comment No 35: Article 9 (Liberty and Security of Person)* CCPR/C/GC/35 (2014) at [9], the Human Rights Committee noted that it "protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained". The ECtHR has used the right to respect for privacy in Article 8 of the ECHR as the basis for protecting integrity outside detention: see, for example, *MS v Croatia*, App no 36337/10, ECtHR (1st Section), 25 April 2013, [2015] MHLR 226.

These also featured in the case of France. Under Article 15, the concern was "[t]he lack of mechanisms to ensure free and informed consent of persons with psychosocial disabilities, especially those under guardianship", "inhuman and degrading conditions … and the use of solitary confinement, seclusion, chemical and mechanical restraints", including in mental health settings; "forced medication and so-called intensive treatment … overmedication and electroconvulsive therapy" in units for "difficult patients" and also overmedication and the use of medical therapies on children with autism or psychosocial impairments.[473] The recommendations made included "human right-based standards in mental health legislation", the ending of intensive treatment, protection from overmedication, monitoring of institutions and judicial review.[474] Under Article 16, concerns included violence in psychiatric (and other) settings, and the inadequacy of protective processes – complaints mechanisms were too complex, reprisals were feared, complaints were rejected at too high a level and there were no redress and remedy measures: remedial steps were recommended.[475] Under Article 17, concerns included ending the use of "normalizing treatments for autistic children" and the use of "packing", plus providing reparations and compensation for those subject to this.[476] The concerns mentioned have all featured in comments to other states: examples are given under various headings, but the many overlaps should be noted.

1. *Non-consensual treatment and conditions*

Examples include that Indonesia was asked under Article 17 to prohibit "forced psychiatric interventions" and other examples of non-consensual treatment;[477] and a concern to Tunisia was inadequate clarity in legislation offering protection against treatment without free and informed consent, "including forced treatment in mental health services", which required legislative clarification, which should also comply with

[473] France, 4 October 2021, CRPD/C/FRA/CO/1, para 32.
[474] France, 4 October 2021, CRPD/C/FRA/CO/1, para 33.
[475] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 34-35.
[476] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 36-37.
[477] Indonesia, 12 October 2022, CRPD/C/IDN/CO/1, paras 40-41.

Articles 23 and 25, the rights to home life and healthcare.[478] This has also been raised under Article 15: Jamaica was asked to review legislation, the Committee being concerned under Article 15 that there was still "forced confinement and treatment", in particular of those with psycho-social impairments, and also that the relevant mechanism for complaints had not concluded that forced treatment was torture.[479]

A comprehensive statement of the problem and recommendations featured in relation to Peru. Concerns under Article 15 included "consistent reports of the use of continuous forcible medication, including neuroleptics, and poor material conditions in psychiatric institutions, such as the hospital Larco Herrera, where some persons have been institutionalized for more than ten years without appropriate rehabilitation services", and the corresponding recommendation was threefold:

> (i) "to promptly investigate the allegations of cruel, inhuman or degrading treatment, or punishment in psychiatric institutions",
> (ii) "to thoroughly review the legality of the placement of patients in these institutions", and
> (iii) "to establish voluntary mental health treatment services, in order to allow the persons with disabilities to be included in the community and release them from the institutions".[480]

One particular repeated concern, usually raised under Article 17, was sterilisation: for example, Venezuela was asked to repeal the legislation allowing "the persistence of involuntary confinement and treatment and non-consensual medical practices in respect of persons with disabilities, including the forced sterilization of women and girls with psychosocial or intellectual disabilities".[481]

2. *Problematic Treatments, including ECT, and Restraints and Seclusion*

[478] Tunisia, 13 May 2011, CRPD/C/TUN/CO/1, paras 28-29. See also Germany, 13 May 2015, CRPD/C/DEU/CO/1, paras 37-38.
[479] Jamaica, 20 May 2022, CRPD/C/JAM/CO/1, paras 30-31.
[480] Peru, 16 May 2012, CRPD/C/PER/CO/1, paras 30-31.
[481] Venezuela, 20 May 2022, CRPD/C/VEN/CO/1, paras 32-33. See also Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3, paras 45-47; Lao PDR, 30 September 2022, CRPD/C/LAO/CO/1, paras 30-31; and Hungary, 20 May 2022, CRPD/C/HUN/CO/2-3, paras 35-36, where the Committee added the need to "accessible information and services concerning their sexual and reproductive health rights". Since there was often a gendered bias here, this could also have featured under Article 6, the rights of women and girls. Furthermore, under Article 23, Peru was asked to end non-consensual sterilisation "as a method of contraception" for those viewed as lacking competence: Peru, 16 May 2012, CRPD/C/PER/CO/1, paras 34-35.

Examples include that, under Article 15, concern was expressed to Mexico about "coercive measures … such as restraints, isolation, shackling, forced medication and sterilization, electroconvulsive therapy and other medical interventions without the informed consent of the person concerned", being used in institutions, particularly against certain groups, including those with intellectual or psychosocial impairments; these needed to be expressly prohibited.[482] There was concern also under Article 15 that, in Austria, "psychiatric hospitals and institutions where people with intellectual, mental and psychosocial disabilities are confined" continued to use "net beds and other forms of non-consensual practices", which should be abolished, along with training health workers on the requirements of Article 15.[483] Similarly, a significant concern to Denmark was "the number of cases of coercive treatment of persons admitted to psychiatric institutions, and at the methods used in the coercive and involuntary treatment of persons with disabilities in psychiatric institutions, in particular the use of straps or belts for more than 48 hours, the use of chemical restraints, or the reportedly frequent application of involuntary electroconvulsive therapy", which required amending legislation and training of staff.[484]

The particular concern raised to France as to autistic children also featured: Switzerland was also asked, under Article 17, to make sure that all cantons precluded ""packing" … applied to autistic children, whereby the child is wrapped in cold, wet sheets".[485]

3. *Violence and Protective Mechanisms*

The Article 16 concerns to Venezuela were gaps in legislation, monitoring, redress and data relating to problematic conduct, "particularly in respect of women and girls with intellectual or psychosocial disabilities, who are often exposed to harassment, abuse

[482] Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3, paras 41-42; the Committee noted that this needed to be monitored properly, in accordance with Article 16(3), with results published and DPOs involved, and also having accessible and effective complaints processes.
[483] Austria, 30 September 2013, CRPD/C/AUT/CO/1, paras 32-33.
[484] Denmark, 30 October 2014, CRPD/C/DNK/CO/1, paras 38-39.
[485] Switzerland, 13 April 2022, CRPD/C/CHE/CO/1, paras 35-36.

and acts of sexual and other types of violence": various remedial steps were sought, and it was noted that "reform of mental health legislation is essential in this connection".[486] Recommendations to the Republic of Korea included having a "comprehensive strategy" to prevent breaches of the article, especially for those with intellectual or psychosocial impairments or those in institutions.[487]

C. *Deinstitutionalisation as the Best Response*

Given these fundamental problems, existing in a range of countries across continents and levels of development, the Committee is staunch in its view that various steps are mandated. In October 2022, in "Guidelines on deinstitutionalization, including in emergencies",[488] it reiterated that institutionalisation is fundamentally flawed. It is harmful and poses risks, including of significant ill-treatment.[489] It is not protective,[490] nor a proper response to an individual crisis,[491] but breaches rights: it is "a form of violence against persons with disabilities", exposing those affected to "forced medical intervention with psychotropic medications, such as sedatives, mood stabilizers,

[486] Venezuela, 20 May 2022, CRPD/C/VEN/CO/1, paras 30-31. The particular risks to women and girls featured in others: see, for example, Jamaica, 20 May 2022, CRPD/C/JAM/CO/1, paras 32-33, where the concern was the inadequate provision of shelters.

[487] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 35-36. Specifics mentioned included providing "information about how to avoid, recognize and report cases", "access to independent complaint mechanisms and appropriate remedies, such as redress and adequate compensation, including rehabilitation", training on recognising and responding to relevant ill-treatment, including communication with victims, for various groups, including families, caregivers, health professionals and law enforcement. There was also a need for relevant accommodation for women and girl victims of violence, including those with psychosocial or intellectual impairments.

[488] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022. At paras 107-114, there is guidance on what should be done in a disaster situation, which requires that deinstitutionalisation be speeded up because of the risks faced. At para 3, the Committee notes the extensive consultation process for the Guidelines. Note also that in various Concluding Observations, concerns were raised under Article 11, the right to protection in situations of risk, that people in psychiatric institutions were disproportionately affected by Covid19 and should have cared for better: see Estonia, 5 May 2021, CRPD/C/EST/CO/1, paras 21-22; Hungary, 20 May 2022, CRPD/C/HUN/CO/2-3, paras 22-23.

[489] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 2: "violence, neglect, abuse, ill-treatment and torture, including chemical, mechanical and physical restraints", based on the experience of persons affected, as revealed both before and during the Covid-19 pandemic.

[490] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 8.

[491] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 10: "Individual crisis should not be treated as a medical problem requiring treatment or as a social problem requiring State intervention, forced medication or forced treatment".

electro-convulsive treatment, and conversion therapy, infringing articles 15, 16 and 17", as well as involving medical interventions "without their free, prior and informed consent, in violation of articles 15 and 25", and "contradicts the right of persons with disabilities to live independently and be included in the community", which breaches article 19.[492]

Ill-effects are inevitable as the "certain defining elements of an institution" lead to a disempowering loss of agency: "obligatory sharing of assistants with others", "no or limited influence as to who provides the assistance", "isolation and segregation from independent life in the community", "lack of control over day-to-day decisions", "lack of choice" as to sharing living accommodation and supervision, routines that are rigid and do not reflect "personal will and preferences" and involve "identical activities in the same place for a group of individuals under a certain authority", "paternalistic … service provision", and "a disproportionate number of persons with disabilities in the same environment".[493]

Consequently, all forms of institutionalisation, public and private, should be abolished;[494] there should be no new placements;[495] those in institutions should be able to leave;[496] there should be no building of new institutions or refurbishing of

[492] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, paras 6-7; the Committee also references Article 5 (discrimination), Article 12 (denial of legal capacity), and Article 14 (detention on the basis of impairment). At para 8, the Committee also notes that Art 19 is not disapplied in a situation of emergency, including a public health one.
[493] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 14. At para 16, the Committee notes that removing some elements of institutionalisation does not mean that there is compliance with the CRPD, giving the example of using small group homes which still involve routines set by others, loss of autonomy, shared assistants, substituted decision making or compulsory treatment, or packaging housing and support together – that remains problematic.
[494] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, paras 8 and 11. At para 17, the Committee is clear that "an institution" – whatever its size, features, or duration for which it holds people – "can never be regarded as compliant with the Convention".
[495] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, paras 8 and 13.
[496] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 13.

existing ones.[497] Immediate action is required, with it being impermissible to delay on the basis of lack of community services, stigma, the use of pilot projects or the need for planning or law reform.[498]

But what of the fact that people may be comfortable in their setting? The CRPD Committee recognises that this might be the case, given that "[f]or many, the institution may be the only living environment that they know": but, dignity needs to be restored, and states "should be held accountable for limiting the personal development of institutionalized people" and rather than assessing capacities for independent living (with the risk of creating barriers by classifying people as vulnerable or weak), which is discriminatory, states "should shift to assessment of individualized requirements and barriers to independent living in the community". [499] Mental health law is clearly relevant here, the Committee noting that "[i]nstitutionalization of persons with disabilities refers to any detention based on disability alone or in conjunction with other grounds such as "care" or "treatment"", which occurs in settings such as "psychiatric institutions, … forensic psychiatric settings…", and adding that "[m]ental health settings where a person can be deprived of their liberty for purposes such as

[497] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, paras 8 and 13, with further details at paras 29-31. The "no refurbishment" policy is somewhat purist in that the Committee will no doubt suggest that any funds should be expended on the provision of community services; however, it may be that the time-scale to introduce relevant community provision (which may include the recruiting and training of relevant staff and the building of relevant facilities) is such that it will take time to implement, and since poor conditions of detention can amount to inhuman and degrading treatment, which breaches Art 15 of the CRPD and other international standards, including Art 7 of the ICCPR, it cannot be objectionable – and indeed is mandatory – to refurbish settings so as to improve conditions.

[498] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 9. The "no refurbishment" policy is somewhat purist: the Committee's view is clearly that any funds should be expended on the provision of community services; however, it may be that the time-scale to introduce relevant community provision (which may include the recruiting and training of relevant staff and the building of relevant facilities) is such that it will take time to implement, and since poor conditions of detention can amount to inhuman and degrading treatment, which breaches Art 15 of the CRPD and other international standards, including Art 7 of the ICCPR, it cannot be objectionable – and indeed is mandatory – to refurbish settings so as to improve conditions. Indeed, at paras 67-68, it is noted that the process must involve "a high-quality and structured plan " with "a detailed action plan with timelines, benchmarks and an overview of the necessary and allocated human, technical and financial resources" (and involving "maximum use of … available resources without delay", with high level political involvement and full consultation with DPOs, all of which will necessarily take time to do properly; and at para 65 it is accepted that there should be pilot projects.

[499] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 37.

observation, care or treatment and/or preventive detention are a form of institutionalization".[500] As a result, the Committee calls for states to "revoke any detention authorized by legislative provisions that are not in compliance with article 14 of the Convention, whether under mental health acts or otherwise, and prohibit involuntary detention based on disability".[501]

VI. THE NON-DISCRIMINATION IMPERATIVE

In the sections above, the importance of equal treatment is emphasised. This reflects that the CRPD exists to counter discrimination: paragraph (k) of its preamble notes that, despite existing human rights standards, "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", and Article 1 sets its purpose as ensuring "equal enjoyment of all human rights and fundamental freedoms".

Article 5 of the CRPD, the first substantive right, imposes three obligations on states, namely (i) to recognise the equality of all before the law, and equal protection and benefit, (ii) to prohibit and protect against disability-based discrimination, and (iii) to secure reasonable accommodation. In addition, and inevitably so, given that reasonable accommodation involves people being treated differentially by more being done to meet their needs with a view to securing equal outcomes, Article 5(4) makes it express that "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".

A. *General Comment No 6*

[500] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 15.
[501] Committee on the Rights of Persons with Disabilities, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 10 October 2022, para 13.

Expanding on Article 5 in its General Comment No 6,[502] the CRPD Committee has noted that discrimination can be direct or indirect, arise from denial of reasonable accommodation or amount to harassment.[503] The latter is "unwanted conduct … with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment", including from "actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities", which is "more likely to occur" (and go unpunished because it is "invisible") in "segregated places, such as residential institutions, special schools or psychiatric hospitals".[504] This provides a clear link to the matters discussed in Part V above.

In addition, implementing Article 5 entails changing problematic laws and practices, including "guardianship laws and other rules infringing upon the right to legal capacity" and "mental health laws that legitimize forced institutionalization and forced treatment, which are discriminatory and must be abolished".[505] Further, protection must be provided against various phenomena, including "the forced treatment of persons with disabilities inside and outside of mental health facilities".[506] The Committee expressly makes links here with Articles 14 (liberty) and 15-17 (integrity), which are breached as a consequence of discriminatory institutionalisation.

What is proposed by the Committee is a "disability-inclusive" anti-discrimination law, coverage of which would include "disability-specific discrimination, such as … institutionalization, denial or restriction of legal capacity, forced mental health treatment, … and denial of … alternative and augmentative modes, means and formats

[502] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018.
[503] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 18; 'direct' is when someone is treated less favourably in]light of their personal status (though this does not require a "motive or intention" by the discriminating party), 'indirect' is where apparently neutral criteria exclude people in practice, an example being a school failing to provide Easy-Read books, such that those with intellectual disabilities cannot attend (though this seems more easily classifiable as a denial of reasonable accommodation).
[504] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 18.
[505] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 30.
[506] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 56.

of communication".[507] This would use a human rights model to replace the medical model, as the latter results people being equated to their impairments and so "not recognized as rights holders", with "discriminatory or differential treatment against and the exclusion of persons with disabilities" being "seen as the norm and … legitimized".[508] The human rights model of "inclusive equality" has the following elements:

> (i) "disability is a social construct";[509]
>
> (ii) "impairments must not be taken as a legitimate ground for the denial or restriction of human rights";[510]
>
> (iii) it recognises that formal equality, namely securing equal opportunities, is not sufficient to tackle "structural and indirect discrimination", nor to deal with "power relations";[511]
>
> (iv) it involves substantive equality, the dimensions of which are "(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as

[507] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 73: it would "outlaw and prevent a discriminatory act rather than target a defined protected group", though it would have to reflect the Art 1 definition and so cover "those who have long-term physical, including psychosocial, intellectual … impairments", and also "past, present, future and presumed disabilities, as well as persons associated with persons with disabilities". Reference is also made to the need for accessibility of refugee or migrant reception procedures, including for those with intellectual or psychosocial impairments.

[508] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 8; the Committee notes that early international laws and policies with equality and non-discrimination provisions, including the "Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975)", used the medical model, given that "impairment was seen as a legitimate ground for restricting or denying rights", as well as "inappropriate or obsolete" language; the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) were cited as a step forward, as they "proclaimed "equality of opportunities" a fundamental concept of disability policy and law".

[509] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 9, reflecting the social model of disability; see also the reference in the preamble, para (e) of which references that the "evolving concept" of 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".

[510] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 9.

[511] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 10: the Committee notes that, whilst equality of opportunity is a general principle endorsed by the CRPD (it can be found in Article 3(e), the "formal model of equality" counters "direct discrimination by treating persons in a similar situation similarly" and may also "help to combat negative stereotyping and prejudices". But clearly more is needed, including from the need to "consider and embrace differences among human beings", which may involve "both ignoring and acknowledging differences among human beings in order to achieve equality", the so-called "dilemma of difference", which formal equality alone cannot do.

members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity".[512]

(v) It also "acknowledges that disability is one of several layers of identity", so requiring relevant laws and policies to "take the diversity of persons with disabilities into account".[513]

Article 19 is also important, since:[514]

> "[i]nstitutionalization is discriminatory as it demonstrates a failure to create support and services in the community for persons with disabilities, who are forced to relinquish their participation in community life to receive treatment. The institutionalization of persons with disabilities as a condition to receive public sector mental health services constitutes differential treatment on the basis of disability and, as such, is discriminatory".

B. *Concluding Observations on Article 5 and Linked Rights*

The importance of Article 5 in the mental health context has been recognised in various themes in Concluding Observations.

1. *Ensuring that intellectual and psychosocial impairments are covered*

Australia was asked to improve its statutory regime by expressly covering certain groups, including those with psychosocial disabilities;[515] Uganda was asked to provide better legislation in light of "persisting discrimination against persons with disabilities,

[512] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 11.

[513] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 9.

[514] General comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 58. At para 59, it sets out the need for "[e]ligibility criteria and procedures for … access to support services" to be "non-discriminatory", turning on the needs of the person, not the impairment, using a "human rights-based approach" and involving support that is "person-centred, age- and gender-sensitive and culturally appropriate"; there is a specific comment at para 60 as to housing, including that there should be no disadvantage in the housing or rental markets. Reference is also made at para 71 to the need that data collection for policy development (required by Article 31) should include those living in "institutions or psychiatric hospitals", since they are "often overlooked by research and studies collecting data".

[515] Australia, 21 October 2013, CRPD/C/AUS/CO/1, paras 14-15. See also the need to reform the position in Spain that not all mental health conditions were considered to be disabilities: Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 8-9.

including in particular … persons with intellectual and/or psychosocial disabilities …".[516]

There were also some more discrete problems:

> (i) Jamaica was asked to provide comprehensive protection, the context being the concern that anti-discrimination legislation "excludes persons with psychosocial disabilities from political participation";[517]
> (ii) the Republic of Korea was asked to revise the fact that its welfare regime "excludes persons with psychosocial disabilities";[518] and
> (iii) concern that the complaints process under Australia's was inaccessible led to the recommendation to "Support persons with disabilities in making their own decisions, taking action and filing complaints, especially persons with high support requirements and persons with intellectual or psychosocial disabilities".[519]

In contrast, Canada was congratulated for using a "human rights-based definition of disability", and prohibiting discrimination on various grounds, including "mental or physical disability".[520]

2. *Covering Denial of Reasonable Accommodation*

In relation to South Africa, concerns as to the ongoing widespread discrimination against those with intellectual and psychosocial disabilities included the point that inadequate understanding of reasonable accommodation meant that it was "not adequately applied to persons with disabilities, especially persons with psychosocial or intellectual disabilities": accordingly, understanding of it had to be promoted.[521] For Honduras, the concern was that reasonable accommodation – denial of which

[516] Uganda, 12 May 2016, CRPD/C/UGA/CO/1, paras 8-9; express mention was also made of incorporating reasonable accommodation and covering multiple and intersectional discrimination, though not in the context of intellectual or psychosocial impairments. See also Iraq, 23 October 2019, CRPD/C/IRQ/CO/1, paras 11-12; and Latvia, 10 October 2017, CRPD/C/LVA/CO/1, paras 8-9.
[517] Jamaica, 20 May 2022, CRPD/C/JAM/CO/1, paras 10-11; see also Article 29, noted below.
[518] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 11-12; see also Article 28, noted below.
[519] Australia, 15 October 2019, CRPD/C/AUS/CO/2-3, paras 9-10; see also Article 9, discussed above.
[520] Canada, 8 May 2017, CRPD/C/CAN/CO/1, para 4; it was also noted that the "compounded effects" of discrimination on various grounds was covered, which links to intersectionality, noted below.
[521] South Africa, 23 October 2018, CRPD/C/ZAF/CO/1, paras 8-9.

particularly affected those with intellectual and psychosocial disabilities – was only required in employment.[522]

3. *Intersectionality*

The Committee made many references to the need to counter multiple and/or intersectional discrimination involving those with intellectual or psychosocial impairments. For example, concerns to Iran included "[m]ultiple and intersectional discrimination against persons with disabilities, in particular persons with psychosocial and/or intellectual disabilities …", and the recommendations made included "[w]ithdraw legislation that restricts rights of persons with psychosocial and/or intellectual disabilities, …, by prohibiting forced medical treatment and providing appropriate remedies and redress".[523] Senegal was asked to counter such discrimination and also the problem of inadequate individualised reasonable accommodation, including that affecting persons with psychosocial or intellectual disabilities.[524]

Intersectional problems for women and girls (so providing a link to Article 6) or indigenous people were mentioned. The call for El-Salvador to prohibit all forms of discrimination was in the context of a failure to "include or consider the perspective of women and girls with disabilities, especially those with psychosocial or intellectual disabilities" in various pieces of legislation;[525] and a recommendation to Canada was to "[e]nsure that services for indigenous persons with disabilities in First Nation communities are equitable and appropriate, including health services aimed at preventing suicide among indigenous young persons with disabilities".[526]

C. *Other Non-Discrimination Standards*

[522] Honduras, 4 May 2017, CRPD/C/HND/CO/1, paras 13-14; there was also concern about not recognising multiple and intersectional discrimination. Turkey was asked to have "appropriate sanctions" for denial of reasonable accommodation, including when those with intellectual disabilitie were affected: Turkey, 1 October 2019, CRPD/C/TUR/CO/1, paras 11-12.
[523] Iran, 10 May 2017, CRPD/C/IRN/CO/1, paras 12-13.
[524] Senegal, 13 Ma'y 2019, CRPD/C/SEN/CO/1, paras 7-8.
[525] El Salvador, 1 October 2019, CRPD/C/SVL/CO/2-3, paras 8-9.
[526] Canada, 8 May 2017, CRPD/C/CAN/CO/1, para 14.

Other Articles of the CRPD mention the need for equal treatment in a particular area; and the Committee has regularly raised the needs of those with intellectual or psychosocial impairments in these areas.

1. *Article 11 – Protection in Emergencies*

Linked to the right to life is the Article 11 right to protection in emergency situations: the Republic of Korea was asked to ensure that its "disaster risk reduction plans … are inclusive … and accessible to all persons with disabilities, in particular … persons with psychosocial disabilities and/or intellectual disabilities …".[527]

2. *Article 13 – Access to Justice*

There have been various suggestions in relation to the Article 13 right to equal access to justice, including through procedural accommodations and staff training. These have included the need in the UK for "a decision-making regime with guidelines and appropriate resources, focusing on respecting the will and preferences of persons with disabilities, particularly persons with intellectual and/or psychosocial disabilities, in court proceedings".[528] In addition, differential processes should be removed in both civil and criminal contexts:

> (i) Poland was asked to change provisions whereby "persons with psychosocial or intellectual disabilities deprived of their legal capacity are denied the right to take part in litigation and to stand as witnesses in procedures before civil courts";[529]

[527] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 23-24.
[528] UK, 3 October 2017, CRPD/C/GBR/CO/1, paras 32-33.
[529] Poland, 29 October 2018, CRPD/C/POL/CO/1, paras 21-22. There were also concerns about barriers to justice, leading to calls to use of accessible means of communication in legal proceedings, accessible mechanisms to report violence, "access to justice" for "children with intellectual disabilities" and "those living in institutions", and "universal and free legal assistance for persons with disabilities, particularly those with a low income, and legal assistance and procedural accommodation for persons with psychosocial disabilities".

(ii) Australia was asked to stop using the fitness to plead process in criminal cases but instead to provide suitable support,[530] and to avoid diverting people to mental health detention or requiring mental health treatment rather than allowing free and informed consent.[531]

3. *Article 18 – Freedom of Movement*

Article 18 is the right to freedom of movement, including travel. Concerns here have included matters such as guardians having to approve travel for those with intellectual or psychosocial impairments,[532] or denying entry as a visitor,[533] or making it conditional on having an assistant.[534]

4. *Article 23 – Family Life*

The Committee made several comments under the Article 23 equal right to family life that there should not be restrictions on marriage[535] – or requirements to obtain judicial authorisation[536] or health reports;[537] children should not be taken away from "unfit mothers",[538] support should be offered,[539] and laws precluding those with "mental … conditions" from adopting children should be repealed.[540]

5. *Article 24 – Inclusive Education*

The right to inclusive education under Article 24 led to multiple comments as to it not being implemented properly for those with psychosocial and/or intellectual

[530] Australia, 15 October 2019, CRPD/C/AUS/CO/2-3, paras 25-26. There were also calls to provide support more generally in the legal system and so avoid using substituted decision-making on the basis that people could not "navigate the legal system by themselves".
[531] Australia, 21 October 2013, CRPD/C/AUS/CO/1, paras 29-30.
[532] Sudan, 10 April 2018, CRPD/C/SUD/CO/1, paras 37-38; Turkey, 1 October 2019, CRPD/C/TUR/CO/1, paras 40-41.
[533] Japan, 7 October 2022, CRPD/C/JPN/CO/1, paras 39-40.
[534] Republic of Korea, 29 October 2014, CRPD/C/KOR/CO/1, paras 35-36; and Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 39-40.
[535] Chile, 13 April 2016, CRPD/C/CHL/CO/1, para 47-48.
[536] Jordan, 15 May 2017, CRPD/C/JOR/CO/1, paras 43-44.
[537] Turkey, 1 October 2019, CRPD/C/TUR/CO/1, paras 46-47.
[538] Serbia, 23 May 2016, CRPD/C/SRB/CO/1, paras 45-46.
[539] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 48-49; reference was made to autistic parents and those with intellectual or psychosocial impairments.
[540] India, 29 October 2019, CRPD/C/IND/CO/1, paras 48-49.

impairments[541] or autism.[542] Reasonably detailed recommendations included, for Lithuania, a "coherent strategy", involving "reasonable accommodation, accessible and adapted materials and curricula, and the compulsory pre-service and in-service training of all teachers on inclusive education", and also "clear timelines, targets, baselines and indicators to secure time-bound and measurable progress" and "effective and adequate financial, material and adequately trained human resources".[543] Positive developments have also been noted by the Committee, such as the congratulations to Denmark for its "amendment to the Upper Secondary School Act, designed to integrate persons with autism, in 2013".[544]

6. *Article 27 – Right to Work*

The right to work under Article 27 requires "a labour market and work environment that is open, inclusive and accessible", involving such matters as the prohibition of disability discrimination in employment context,[545] including reasonable accommodation and encouraging affirmative action, and equal protection as to conditions (including remuneration, protection from harassment and responding to grievances). Article 27(2) deals with the other side of the coin by requiring protection against slavery, servitude and forced or compulsory labour. In General Comment 8, the Committee noted that "[m]eaningful work and employment are essential to a

[541] Examples include El Salvador, 8 October 2013, CRPD/C/SLV/CO/1*, paras 49-50; and Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3, paras 54-55.
[542] An example is Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 45-47 (in which there was also concern about the use of a "medical impairment-based approach").
[543] Lithuania, 11 May 2016, CRPD/C/LTU/CO/1*, paras 45-46. See also UAE, 3 October 2016, CRPD/C/ARE/CO/1, paras 43-44 (need for "reasonable accommodation, assistive devices, support and accessible curricula, materials and environments"); Switzerland, 13 April 2022, CRPD/C/CHE/CO/1, paras 47-48 (reasonable accommodation, a constitutional right to inclusive education, and a strategy with "specific targets, time frames, budgets, the transfer of resources from special schools, and inclusive education curricula and teaching qualifications"; Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 49-50 (replace the "medical impairment-based approach" leading to segregation but have "strategies" for inclusion "including individualized human rights-based assessments" of needs and accommodations, training of personnel and use of accessible formats for materials; Japan, 7 October 2022, CRPD/C/JPN/CO/1, paras 51-52 (recognise the right to inclusive education, have a plan including reasonable accommodation and with "specific targets, time frames and a sufficient budget", and guarantee alternative communication including Easy Read).
[544] Denmark, 30 October 2014, CRPD/C/DNK/CO/1, paras 4 and 5; see also its plan of action, noted above.
[545] This includes "conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions".

person's … mental health …",[546] and recorded that awareness-raising campaigns to combat prejudice (as required by Article 8) "should include awareness-raising to combat stereotypes based on assumptions that some persons with disabilities – such as autistic persons, … persons with psychosocial disabilities and others – are unlikely to interact with their work colleagues or to be distracted in the workplace …".[547]

The Committee has covered various issues in Concluding Observations, including the low employment rate for those with intellectual or psychosocial impairments, leading to a variety of suggestions: "providing training for member States on reasonable accommodation and accessibility in the context of employment";[548] taking steps aimed at "supported employment of persons with intellectual and psychosocial disabilities in the open labour market";[549] "[a]nalyse and modify legislation, regulations and policies to promote the employment of persons with disabilities in the public and private sectors", with particular emphasis on women with disabilities …";[550] "[r]edouble … efforts …, including through entrepreneurship, appropriate vocational training, the facilitation of loans and the provision of specific incentives for employers to hire persons with disabilities".[551] These various suggestions provide a suitable check-list of practical steps that might be required if a state has a low employment rate.

[546] General comment No. 8 (2022) on the right of persons with disabilities to work and employment*, CRPD/C/GC/8, 7 October 2022, para 3. The Committee goes on to note that "ableism" leads to the "medical and charity models of disability", including prejudice, discrimination and such things as segregation in work, such as in "sheltered workshops", and "involuntary participation in the informal economy".
[547] General comment No. 8 (2022) on the right of persons with disabilities to work and employment*, CRPD/C/GC/8, 7 October 2022, para 69.
[548] EU, 2 October 2015, CRPD/C/EU/CO/1, paras 64-65, the concern being the "comparatively "high unemployment rates for persons with disabilities, especially … persons with intellectual and/or psychosocial disabilities". Similarly, Vanuatu was asked to ensure that there was no denial of reasonable accommodation in the workplace, particularly for those with intellectual or psychosocial impairments, the context being concern about the "lack of individualized support": Vanuatu, 13 May 2019, CRPD/C/VUT/CO/1, paras 44-45.
[549] Ukraine, 2 October 2015, CRPD/C/UKR/CO/1, paras 50-51. Similarly, Latvia required "support for the employment of all persons with disabilities in the open labour market in inclusive employment settings on an equal basis with others": Latvia, 10 October 2017, CRPD/C/LVA/CO/1, paras 46-47
[550] Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 50-51, with a particular emphasis on women; the concern was phrased as one about the lack of progress on the recommendation from the first review to "increase the low employment rate of persons with disabilities in the open labour market, which especially affects women with intellectual or psychosocial disabilities …" (albeit that the first review - Spain, 19 October 2011, CRPD/C/ESP/CO/1, para 46 – did not specifically mention persons with intellectual or psychosocial impairments).
[551] Iraq, 23 October 2019, CRPD/C/IRQ/CO/1, paras 49-50.

Other concerns have included underpayment, and the ongoing use of sheltered workshops instead of engagement in the workforce: for example, there was concern in the case of the Republic of Korea that, as minimum wage laws did not apply to those without capacity to work, "many persons with disabilities who work, especially those with psychosocial disabilities, receive compensation below the minimum wage," and people were placed in "sheltered workshops that do not aim to prepare them for entry into the open labour market continues"; this required steps to "introduce a supplementary wage system to compensate those persons with disabilities who are excluded from the benefit of the minimum wage", "eliminate sheltered workshops" and "promote the employment of persons with disabilities in close consultation with organizations of persons with disabilities".[552]

The concerns remained at the second review, leading to the call to "[r]epeal all discriminatory legislation that excludes or limits the participation of persons with disabilities in the open labour market and adopt effective measures to ensure the right of all persons with disabilities to work, as well as measures to combat discrimination, in particular in relation to advertisements, recruitment processes, reasonable accommodation, retraining, promotion and other rights related to work and employment"; there was also concern about the "ongoing segregation of persons with disabilities in sheltered workshops and the lack of concrete plans to gradually move workers with disabilities from these workshops to the open labour market", which required stronger measures "to ensure that persons with disabilities, including persons with disabilities taking part in deinstitutionalization processes, … and persons with psychosocial disabilities and/or intellectual disabilities, have access to work and employment in the open labour market and to inclusive work environments" and that the state "[i]mplement measures to enable persons with disabilities to transition from sheltered employment into open, inclusive and accessible employment".[553]

[552] Republic of Korea, 29 October 2014, CRPD/C/KOR/CO/1, paras 49-50. As to the first recommendation, it might have been easier just to amend the minimum wage law.
[553] Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 55-56. Detailed recommendations are also made to Japan: Japan, 7 October 2022, CRPD/C/JPN/CO/1, paras 57-58.

In contrast, Japan was congratulated for a 2013 amendment to the "Act for the Promotion of Employment of Persons with Disabilities (Act No 123 of 1960) …, expanding the coverage of the statutory employment obligation for persons with disabilities to include persons with psychosocial disabilities in addition to persons with intellectual and physical disabilities and obligating the provision of reasonable accommodation".[554]

7. *Article 28 – Adequate Living Standards*

Article 28(1) of the CRPD provides the right to "an adequate standard of living", combined with "the continuous improvement of living conditions", and Article 28(2) provides the equal right to "social protection", elements of which include the necessary assistive devices and services required for the impairment, poverty reduction programmes, public housing and retirement benefits. It can be seen that this links to Article 19, given the living in the community will entail meeting living expenses, including additional costs arising from an impairment. This has been reflected in Concluding Observations. A concern about "the lack of State subsidies for persons with psychosocial or intellectual disabilities" required Niger to formulate a budget "to guarantee an adequate standard of living for persons with disabilities, particularly those with psychosocial or intellectual disabilities …, and provide them with allowances to meet their disability-related expenses".[555] For France, one concern was the "increased risk of homelessness" post institutionalisation, "including persons with psychosocial disabilities who have undergone compulsory psychiatric treatment", which required "accessible housing and … human rights-based support schemes … to cover disability-related expenses and" allow "access to an adequate standard of living".[556]

[554] Japan, 7 October 2022, CRPD/C/JPN/CO/1, para 5.
[555] Niger, 1 May 2019, CRPD/C/NER/CO/1, paras 45-46. See also Slovenia, 16 April 2018, CRPD/C/SVN/CO/1, paras 47-48 (need for effective poverty reduction) and UK, 3 October 2017, CRPD/C/GBR/CO/1, paras 58-59 (problems as to austerity measures, including causing mental health problems).
[556] France, 4 October 2021, CRPD/C/FRA/CO/1, paras 56-57. There was also reference made to provision of accessible-format information about rights, including in Easy Read. See also Canada, 8 May 2017, CRPD/C/CAN/CO/1, paras 49-50, as to homelessness.

8. *Article 29 – Political and Public Participation*

Article 29 of the CRPD requires equal participation in voting, standing for public office, and consequent accessibility standards. It has featured heavily in Concluding Observations, and so this summary gives only a flavour. Positive developments have been noted: for example, the first review of Spain involved the criticism that those with intellectual or psychosocial disabilities who had either been deprived of their capacity or institutionalised could have their right to vote restricted by a judge:[557] although this did not breach the ECHR, Spain was commended in the second review for amending its law "as a first step to guaranteeing the right of all persons with disabilities to vote without discrimination".[558] This meant that countries which did not provide the right to vote were called on to do so, joined by calls to allow all people to run for office;[559] this could also be consequent on another order, such as placement under guardianship,[560] or a judicial decision of the sort removed in Spain.[561] In the case of Poland, the problems extended to the fact that, in addition to a Constitution preclusion of the right to vote for those deprived of capacity, other legislation "does not allow persons deprived of legal capacity to found an association, to be a member of one, or to organize public assemblies", all of which needed to be repealed.[562]

[557] Spain, 19 October 2011, CRPD/C/ESP/CO/1, paras 47-48; there was also a recommendation that "all persons with disabilities who are elected to a public position are provided with all required support, including personal assistants".
[558] Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, para 4. In *Caamaño Valle v Spain*, ECtHR, Appn 43564/17, 11 May 2021, [2022] MHLR 100, the ECtHR found that the previous legislation did not breach the right to vote in Article 3 of Protocol 1 to the ECHR, which suggests that compliance with the CRPD drove the legislative reform. Various other congratulatory comments are made: for example, Austria, 30 September 2013, CRPD/C/AUT/CO/1, para 5, Sweden, 12 May 2014, CRPD/C/SWE/CO/1, para 4, New Zealand, 31 October 2014, CRPD/C/NZL/CO/1, para 4, and France, 4 October 2021, CRPD/C/FRA/CO/1, para 4.
[559] Of the multiple examples, see China (including Hong Kong and Macau), 15 October 2012, CRPD/C/CHN/CO/1, paras 45-46; Mexico, 27 October 2014, CRPD/C/MEX/CO/1, paras 55-56 and Mexico, 20 April 2022, CRPD/C/MEX/CO/2-3, paras 64-65 (by which time the Supreme Court of Justice had called for legislation to be amended); El Salvador, 8 October 2013, CRPD/C/SLV/CO/1*, paras 59-60 and El Salvador, 1 October 2019, CRPD/C/SVL/CO/2-3, paras 54-55 (which seemed to relate to running for office only)
[560] Again, there are multiple examples: see Denmark, 30 October 2014, CRPD/C/DNK/CO/1, paras 60-61; Bolivia, 4 November 2016, CRPD/C/BOL/CO/1, paras 65-66.
[561] See Hungary, 22 October 2012, CRPD/C/HUN/CO/1, paras 45-46, which was unamended by the second review: Hungary, 20 May 2022, CRPD/C/HUN/CO/2-3, paras 56-57.
[562] Poland, 29 October 2018, CRPD/C/POL/CO/1, paras 51-52.

It was also necessary to ensure procedural accommodations to allow people to participate. This involved repeated calls for accessible election materials and voting processes: one of many examples is that the concern to Slovenia was "the lack of accessible voting materials for persons with intellectual disabilities", for which the recommendation was "supported decision-making, including accessible voting materials for all persons with disabilities, regardless of their impairment".[563]

The concerns and recommendations to Jamaica reflect a comprehensive account:

> (i) concerns included "discriminatory provisions excluding persons with psychosocial disabilities from appointment as members of the Senate, from election as members of the House of Representatives and from voting", and further legislation "which prevents them from participation in civil society and from establishing their own organizations", all of which should be repealed;
> (ii) an additional concern was "[t]he lack of measures taken to ensure the participation in political and public life of persons with disabilities, including … persons with intellectual disabilities, persons with psychosocial disabilities, … who are underrepresented", which required the introduction of "specific measures to ensure equality and participation of" such "underrepresented groups";
> (iii) a further concern was "[t]he lack of accessibility to polling stations, voting procedures, facilities and materials, as well as to information about elections, including public electoral debates, electoral programmes, and online or printed election materials, all of which limits the effective political participation of … persons with intellectual disabilities", which required guarantees of accessibility of those matters "in plain language and Easy Read, thereby facilitating their use by all persons with disabilities".[564]

9. *Article 30 – Culture and Sport*

Article 30 of the CRPD requires the accessibility of culture, recreation and sport. It has featured in a small number of concluding observations, referencing the need for access

[563] Slovenia, 16 April 2018, CRPD/C/SVN/CO/1, paras 49-50.
[564] Jamaica, 20 May 2022, CRPD/C/JAM/CO/1, paras 52-53; see also Republic of Korea, 6 October 2022, CRPD/C/KOR/CO/2-3, paras 59-60.

to those for psychosocial and intellectual impairments to libraries[565] and sporting and recreation facilities.[566]

10. *Implementation of the CRPD*

Articles 31 and 33 of the CRPD have also featured: these create obligations on states respectively to collect data to assist policy development and to have focal points in government and monitoring. A concern raised under Article 31 for Spain was the lack of data on "human rights violations, including … forced treatment, involuntary commitment, mechanical restraints and other forms of coercion, in mental health-care facilities", leading to the recommendation to "[e]stablish a mandatory register for any forced treatment, including involuntary commitment, mechanical restraints, forced medication and electroconvulsive therapy, that occurs in mental health-care facilities".[567] Japan was asked to ensure that surveys included those in institutions and psychiatric hospitals, who were often overlooked.[568] Calls for data collection could be made under other articles: see, for example, the recommendation to the Philippines under Article 28 to collect data on those who received social protection, particularly those with intellectual or psychosocial disabilities.[569]

The concerns under Article 33 were invariably that Disabled Persons Organisations representing those with intellectual or psychosocial impairments should be involved in monitoring processes,[570] or that there should a suitable representative in a national coordination mechanism.[571]

VII. ELEMENTS OF A CRPD-COMPLIANT MENTAL HEALTH LAW AND CONCLUDING COMMENTS

[565] See Brazil, 29 September 2015, CRPD/C/BRA/CO/1, paras 54-55, and Slovakia, 17 May 2016, CRPD/C/SVK/CO/1, paras 81-82
[566] See, as an example, Estonia, 5 May 2021, CRPD/C/EST/CO/1, paras 58-59.
[567] Spain, 13 May 2019, CRPD/C/ESP/CO/2-3, paras 58-59.
[568] Japan, 7 October 2022, CRPD/C/JPN/CO/1, paras 65-66.
[569] The Philippines, 16 October 2018, CRPD/C/PHL/CO/1, paras 48-49; see also Nepal, 16 April 2018, CRPD/C/NPL/CO/1, paras 41-42.
[570] For example, Lao PDR, 30 September 2022, CRPD/C/LAO/CO/1, paras 62-63.
[571] Iraq, 23 October 2019, CRPD/C/IRQ/CO/1, paras 63-64.

A. *Summarising Parts II-VI*

The account given in Parts I to VI has referenced most substantive articles in the CRPD; and illustrations to illuminate the view of the Committee have sought to show that states with different traditions and stages of development have been encouraged in the same way. The following table provides a summary:

Articles 1-4 – General Principles and Obligations (including definitions)	Supports the human rights model of disability (see Part III.D) and the involvement of DPOs (see Part III.F)
Article 5 - Equality and Non-Discrimination	Further supports the human rights model of disability, requires substantive equality, and supports the end to removing legal capacity and compulsion in mental health law (see Part VI.A and B), with links made to Arts 12 and 14, 15-17 and 19
Articles 6 and 7 – Rights of Women, Girls and Children with Disabilities	Supplement Article 5 with express recognition of intersectionality (see Part VI); used in connection with Article 25 (see Part III), and also risks to integrity under Arts 15-17 (in particular sterilisation - see Part V.B.1)
Article 8 – Awareness-raising	Supports training as to human rights model in care settings and countering prejudices in such settings as work (see Part VI C 6)
Article 9 – Accessibility	Linked to Article 25 provision of services (see Part III.B), and also Articles 19 and 21
Article 10 – Life	Requires action as to accepted problems of suicide (see Part II), but also supports end of institutionalisation because of risks arising (see Part V.A)
Article 11 – Disaster Protection	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.1)
Article 12 – Supported decision-making	Requires new paradigm to support consent in mental health law (see Part I.A and B), and links with Articles 14 (Part I) and 25 (Part III), and most particularly Article 19 (Part IV)
Article 13 – Justice	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.2)
Article 14 – Liberty	Requires the removal of compulsion in mental health law (Part I.A)
Articles 15-17 – Integrity	Together with Article 10, requires an end to institutionalisation because of the risks of harm arising (Part V.B and C)
Article 18 – Freedom of movement	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.3)
Article 19 – Community inclusion	Requires service provision and support in the community in place of institutionalisation (see Part IV), and so links with Articles 9, 12, 25 and 26
Article 21 – Expression and information	Requires accessible medical information (see Part III.B) and so links with Articles 9, 25 and 26

Article 22 – Privacy	Links with medical information and so Articles 25 and 26 (see Part III.G)
Article 23 – Family	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.4)
Article 24 – Inclusive education	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.5); builds confidence as to decision-making and so links to Article 12
Articles 25 and 26 – Health, habilitation and rehabilitation	Expressly requires consent in all medical settings, including mental health (see Part III); links to the human rights model (Articles 1-4, 5), accessibility (Article 9), life (Article 10), and need for community inclusion (Article 19)
Article 27 – Work	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.6)
Article 28 – Adequate living standards	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.7)
Article 29 – Political participation	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.8), and where there should be accessibility (Article 9) and support (Article 12)
Article 30 – sports and culture	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.9)
Articles 31 and 33 - Processes for implementing the CRPD	An area where a disability perspective is needed to secure equal treatment (see Part VI.C.10)

B. *Elements of a CRPD-Compliant Mental Health Law*

Hopefully, the CRPD Committee will soon provide a comprehensive account of its view of what mental health law should look like in light of its interpretation of the CRPD. This article suggests the shape of such a law based on the Committee's existing publications; it has also sought to show the need to consider various rights, not just to focus on Articles 12 and 14, because of the relationship between them all. As noted in Part VI.A above, and reflecting the status of the CRPD as an anti-discrimination treaty, there should be an anti-discrimination statute that outlaws the various problems identified.[572] Such a statute should:

> (i) Require provision for mental health care services of the same level as that for other forms of ill-health (to avoid disability discrimination and comply with Articles 25 and 26); this will include not just "ambulance at the bottom of the cliff" crisis interventions but also early intervention and

[572] This rested on General Comment No 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para 73, which referenced the need to outlaw various things, including "institutionalization, denial or restriction of legal capacity, forced mental health treatment, … and denial of … alternative and augmentative modes, means and formats of communication".

habilitation services; the needs of women, girls and children will have to be taken into account (Articles 6 and 7) (see Part III.A above); accessibility will have to be secured (Article 9 and also Article 21) (see Part III.B above).

(ii) Require integration between service provision for physical and mental health so that physical health needs are met at the same level and to avoid views that special rules apply to mental health treatment (see Part III.A above).

(iii) Require community-based services for mental health matters that equate to community-based services for other health matters; this includes medical treatment being offered on an outpatient basis and support services relevant to the disability – including such matters as suitable housing and personal assistance – being offered to the same extent as is done for other disabilities (Articles 19, 25 and 26) (and with support so as to avoid poverty (Article 28) and also integration into educational and work opportunities (Articles 24 and 27)). This does not preclude situations in which treatment can only be provided in hospital so long as there is an equivalence of the situations in which hospital treatment is required (eg based on the level of nursing or medical supervision needed) as between mental and physical health. (See Parts III.C, IV and VI above.)

(iv) Be express that free and informed consent is required for all medical treatment affecting adults, and more generally involves the human rights model of disability. (See Parts III.D and E and VI above.)

(v) Be express that the response to differential abilities to exercise the legal right to make a choice should be the provision of support rather than the removal of the right (Articles 12 and 25); regulation is needed here to provide relevant protections (Article 12) but also to cover the steps to be taken when it is difficult to secure a supported decision so as to reach a decision that rests on standing in the shoes of the person. (See Parts I and IV.B above.)

(vi) Be express that institutionalisation is improper (and creates too many risks), that funds should be diverted from institutional care to community care and require a planned deinstitutionalisation process with time frames and monitoring (Articles 12, 14 and 19), and suitable safeguard for those in institutions until the process is complete, with an express requirement for processes to protect rights to life and integrity (Articles 10 and 15 to 17). (See Parts I, IV and V above.)

(vii) Be express as to all other rights and the need for equal treatment and equal protection. (See Part VI above.)

(viii) Be express that DPOs representing those with psychosocial and intellectual disabilities should be involved in all aspects of policy design, implementing and monitoring (Articles 4 and 33; Parts III.F and VI.10 above).

Does this mean that people currently receiving care in a hospital setting must be immediately decamped? This would be inconsistent with the need for treatment; and various rights in the CRPD, including to health and community inclusion, are economic, social and cultural rights, which, under Article 4(2) of the CRPD are to be achieved "progressively" through taking "measures to the maximum of … available resources": in short, time can be taken to make sure that there is proper provision. But this should mean that there are adequately-resourced community health and support services (which should reduce the situations in which hospitalisation can be thought necessary or advisable). Nor does this mean that hospital provision of mental health services will end, since some aspects of care will be practicable only in such a setting and those in need of services may prefer in-patient treatment. But that will have to be negotiated with the person.

This process of negotiation will not take place in a vacuum. First, if the person poses a risk to others, police powers will exist. The criminal law, it is to be recalled, already has significant inchoate and precursor offences (such as the law of attempts, the carrying of an offensive weapon) and powers of arrest based on risks posed to others: these will remain in place (and there might be extensions which would not be objectionable if they are neutral and not applied disproportionately to those with a disability), and any places of detention would have to meet the needs of the person (Article 13), including any health needs. What is proscribed is a separate set of police powers exercised by mental health professionals and only applicable to those with a disability.

Secondly, if the person poses a risk to themselves, there are two points to note: (i) protective powers that apply generally, such as powers to detain those intoxicated or to prevent breaches of the peace or suicide, already exist and can no doubt be extended so long as they are neutral and do not apply disproportionately to those with a disability), and (ii) the process of supported decision-making has been accepted by

the Committee to require an element of flexibility in difficult cases, with the search being for a true decision from the person's perspective. Thus, a refusal to accept treatment that is driven by a psychosis is not necessarily the end of the decision-making process if that is not the true decision of the person.

As I sought to make clear in Part I, I am not taking a position in the ongoing debate between those who think there must be a back-stop of compulsion and those who take the contrary position. Rather, my proposition is that the debate should proceed on the basis of what CRPD-compliant service provision would involve, which requires a full understanding of the ambit of the CRPD. Accordingly, the questions to be answered are along the following lines: are police powers, including any supplemental ones that apply in a non-discriminatory fashion, inadequate to deal with the risks posed to others? If there is adequate community provision, support, and resourcing, will that keep people as safe as they are in a compelled hospital setting? Cannot health professionals negotiate to secure good outcomes with mental health patients and their supporters without the back-stop (or threat) of compulsion (and is that back-stop just a familiar matter, perhaps cheaper and less time-consuming than negotiation)? If there are some people who simply will not accept treatment they need for mental disorder, is this any different from a Jehovah's Witness who dies from refusing to have blood or a person with an extreme phobia of needles who will not take a life-saving injection?

These questions may feature in the negotiations on the additional protocol to the Oviedo Convention, or in litigation before the European Court of Human Rights that argues that the time has come – under the living instrument approach – for the Court to find that detention on the basis of unsoundness of mind can no longer be considered lawful. It is suggested that, with a fuller understanding of what the CRPD requires, the discussion should focus on what is the evidence to answer these questions.

Chapter 6 – Conclusion: Research Agenda

The aim of this thesis by articles has been to explore the interplay between the ECHR and the CRPD; one of the reasons underlying this is to demonstrate that those who litigate human rights cases, particularly those who do so before a leading tribunal such as the ECtHR, should be familiar with the full range of standards that form part of international human rights law. The first article, reviewing the ECtHR's rules of interpretation, makes clear that the ECtHR authorises this, even though there might be instances where the text of the ECHR does not allow it to be interpreted in a way that is consistent with another standard.

The second article, in the field of education, reveals an instance where full consistency has been secured de jure: but material from the CRPD Committee shows that there is not yet de facto realisation of those standards. However, one aspect of the strategic litigation that featured in this article was success by applicants in making use of factual material originating with other human rights bodies about the extent to which rights are secured in practice, particularly in terms of meeting or transferring burdens of proof.[573] As such, this second article then collates and analyses factual material from the CRPD Committee that could be used in further enforcement litigation which might proceed to the ECtHR if it does not succeed domestically (which has to be tried first, given the need to exhaust domestic remedies as an admissibility requirement).

The third article covers a different area, protection from human trafficking, and seeks to demonstrate how the process followed in the second article, namely of equating standards developed under the CRPD to standards arising under the ECHR, could be successful in building arguments before the ECtHR. And the fourth article lays the groundwork for a similar process in the area of mental health detention and compelled treatment by setting out a detailed analysis of material emanating from the CRPD Committee that explains why it adopts the position that such detention and compulsion

[573] Litigation will often be about applying existing law to the facts: and indeed developing the substantive law usually only be key if the facts do not produce a favourable outcome under the existing law. But "the facts" are often matters that have to be constructed from evidence, inference and presumptions, and the procedural/evidential law about this process is also key.

breaches human rights. The context is that this is clearly not yet accepted as the de jure position under the ECHR: but the ECHR's living instrument approach means that this is not necessarily fixed for all times.[574]

The four articles form a whole in that the first explores the basis for integrating standards, the second illustrates where there has been de jure integration and explores how these joint standards can be implemented via the ECtHR, the third illustrates where de jure integration has not yet occurred in the context of it not having been raised in argument, and the fourth deals with a situation where there has been resistance to de jure integration and explores how the argument should develop.

[574] It is noted in footnote discussions in Part I.C of chapter 5 that the ECtHR has determined that the death penalty is not permitted by the ECHR (because it is inhuman and degrading and in breach of Article 3) despite being expressly permitted as an exception to the right to life: this is because it has become unacceptable. A matter that is closer to the question of mental health detention is detention on the basis of vagrancy: this is of long-standing and was clearly acceptable in 1950 when the ECHR was drafted, but is it acceptable almost 75 years later when it is accepted within European states that basic levels of benefits should be provided (as is required by Article 25(1) of the UDHR). However, in *Lacatus v Switzerland* App no 14065/15, 19 January 2021, the ECtHR ruled that the criminalisation of begging by someone not provided with benefits breached Article 8 of the ECHR. One article I wish to explore in the future is to examine the extent to which it can be suggested that vagrancy cannot be a "lawful" basis for detention, despite being expressly mentioned in Article 5(1)(e) of the ECHR. This would provide a useful analogy for the necessary argument that the express mention of psychiatric detention in the same article does not end the discussion because the concept of "lawfulness" can change over time. A tentative structure for such an article involves:

> (i) an overview of the living instrument doctrine and the acceptance that (a) state conduct acceptable in 1950 may no longer be acceptable; (b) additional obligations may be put on states over time. *Tyrer v UK* App no 5856/72, ECtHR, 25 April 1978, (1978) 2 EHRR 1 (corporal punishment breaches Article 3 in light of modern-day attitudes) is an example of the former; *Rooman v Belgium* [GC], App no 18052/11, 31 January 2019, [2020] MHLR 1 (detention on mental health grounds requires treatment) is an example of the latter, as is the development of the duty to protect doctrine in relation to bodily integrity (developed from cases such as *Osman v UK* App no 23452/94, 28 October 1998, [2000] Inquest LR 101, (2000) 29 EHRR 245).
>
> (ii) a discussion of the development of the use of this approach to challenge activities expressly accepted in the text of the ECHR: the death penalty is the obvious example, and involved *Soering v UK* App no 14038/88, ECtHR (Plenary), 7 July 1989, (1989) 11 EHRR 439 (the majority, against a dissenting judge who considered that the 1950 language was a creature of its time, found that the death penalty did not per se breach Article 3, but additional factors such as the time spent on death row could; but they contemplated that Article 3 might preclude the execution of a juvenile); then *Öcalan v Turkey* App no 46221/99, ECtHR (1st Section), 12 March 2003 (in which the Court avoided the issue because the trial was found unfair), and then cases leading to the ultimate conclusion in *Al-Saadoon and Mufdhi v UK* App no 61498/08, ECtHR (4th Section), 2 March 2010, (2010) 51 EHRR 9.
>
> (iii) an analysis of the limited case law on vagrancy, combined with the development of the case law leading to *Lacatus v Switzerland*, plus the development of standards relating to social security (eg, cases relating to asylum seekers and Articles 3 and 8 of the ECHR; standards in case law from the European Committee on Social Rights, under the European Social Charter 1961 (CETS no 35) and the Revised European Social Charter 1996 (CETS no 163), to consider whether vagrancy is still a "lawful" ground for detention, and the implications of the conclusion.

It is evident that this thesis does not aim to close doors, rather it seeks to demonstrate a process that can be used in relation to a variety of other rights (just as it rests on a process that had in fact been used in advance of the thesis commencing in other areas - law schools, conferences and international cooperation -, as outlined in Chapter 1, the Introduction). Accordingly, what this final chapter seeks to indicate is a future research programme. The process of writing a PhD often involves tangents or data collection that is not used in the final version. Some of the ideas listed here were ones that were explored or even commenced during the process of study but then de-prioritised to allow the completion of a thesis. There is also reference to one paper that was completed but not included in the thesis primarily for word-count reasons (relating to the right to protection in emergencies). There is no claim that this is a comprehensive list of what could (or should) be written.

This future work programme is set out in two sections: first, there are some ideas at thematic or other higher level areas; secondly, there are ideas looking at more specific rights and situations.[575] There is a focus on the ECHR, but one general point to make is that the various articles set out in this thesis and the ideas discussed in this chapter could also be adapted, after the relevant research, to explore

(i) the relationship between the CRPD and the over-arching UN Covenants: it is these Covenants that the CRPD most particularly seeks to give effect to in the context of persons with disabilities because they are part of the same family;

[575] There are also ideas linked to the workings of the CRPD Committee. The process of compiling material has also produced significant data about the internal workings of the Committee: in particular, there are time limits for countries to produce reports on their progress for the Committee to review. Article 35(1) of the CRPD requires the initial report to be done within 2 years of ratification (or entry into force for the early ratifiers) and Article 35(2) requires further reports "at least every four years and further whenever the Committee so requests". However, as is evident from the table in chapter 2 setting out the identified problems with implementing inclusive education, some countries have not had their first review yet and others have had a combination of their second and third review. In essence, the Committee is significantly far behind in its review schedule (and was so before the intervention of the Covid-19 pandemic). Plotting these delays and exploring the reasons for them, a form of audit and critique, is a potential area of research. There are also many instances where there have been second reviews, which might allow a review of the extent to which the CRPD is having an impact or, to the contrary, is being ignored (which might make more important its support from bodies such as the ECtHR and its enforcement processes).

(ii) the relationship between the CRPD and other regional human rights mechanisms (both other Council of Europe treaties and treaties originating in other regions of the world); and

(iii) the relationship between the CRPD and other UN bodies, including Treaty bodies and those that exist under the UN Charter.[576]

A. Thematic or Jurisprudential

As is outlined in Chapter 2, the language of human rights instruments may include higher level concepts and purposes that can then be used to help understand the meaning of other rights. The UDHR's Article 1 references equality in "dignity and rights", but there is no meaning attached to dignity: it features in various CRPD provisions, which is why the CRPD was cited by the ECtHR in relation to the question of defining when conduct in inhuman and degrading for the purposes of Art 3 of the ECHR. Although the ECHR does not mention dignity, the ECtHR has accepted that it is a principle that assists in understanding the meaning of rights. Hence, another matter to be explored is the extent to which the CRPD Committee has assisted in the understanding of this principle. In brief, there is reference to the "dignity" or "inherent dignity" of persons or of persons with disabilities in the Preamble to the CRPD and its Articles 1, 3, 8, 16, 24, and 25; hence, an analysis of the documents available relating to the drafting of the CRPD will be a relevant step. Further, there are references to dignity in various General Comments from the CRPD Committee, including those relating to other Articles,[577] which will have to be analysed for the assistance they give

[576] A range of standards exist in other settings: for example, as is outlined in Chapter 4, the third article, action against human trafficking is required pursuant to a UN Convention relating to transnational crime; and an important part of the business and human rights framework is an OECD document relating to multinational enterprises (see https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm for a recent update). The World Health Organisation has developed materials on training on CRPD principles in relation to CRPD concepts, particularly supported decision-making: I was part of a research project assessing the extent to which this is part of training of New Zealand psychiatrists, which tentatively suggested that trainees were generally aware of the concept. See Giles Newton-Howes et al, *Supported decision making teaching in New Zealand postgraduate psychiatry trainees*, (2022) 30(5) Australasian Psychiatry 653-657.

[577] Including General Comment No 1 relating to Article 12 (CRPD/C/GC/1, 19 May 2014), General Comment No 2 relating to Article 9 (CRPD/C/GC/2, 22 May 2014), General Comment No 3 relating to Article 6 (CRPD/C/GC/3, 25 November 2016), General Comment No 6 relating to Article 5 (CRPD/C/GC/6, 26 April 2018).

as to understanding what is meant; naturally, following the methodology adopted in other articles in this thesis, there will be a review of other documents from the CRPD Committee, including its Concluding Observations to states.

Also evident from Chapter 2 is that comments as to the legitimacy of citing the CRPD arose in cases covering a broad range of rights. Data has been compiled as to the nature of the disability raised in the case (if the applicant had a disability: sometimes the CRPD was cited for a principle), the subject-matter of the dispute (eg, removal of capacity, education, ill-treatment and so on), the Article of the ECHR and the Article of the CRPD cited, whether it was cited by the applicant or government, a third party or apparently raised by the Court, whether it was cited in a majority judgment, a concurrence or a dissent. My initial thought as to an article using this material is to examine it in the context of the choice of the international forum in which to raise an issue if there has been no satisfactory outcome in the domestic courts. Many Council of Europe countries allow people to access either the ECtHR or the complaints process of the CRPD Committee (under the Optional Protocol to the CRPD): hence, a question to explore is whether the CRPD Committee might in some factual settings find a breach of rights in the CRPD that the ECtHR would not find under the ECHR. This might occur if, for example, the ECtHR would find a margin of appreciation that the CRPD Committee would not; or where – as illustrated in Chapter 2, the first article, by reference to voting rights, and in Chapter 5, the fourth article, by reference to mental health law – the standards are not yet integrated and there is more likely to be a finding of a breach by the CRPD Committee.[578]

There are other thematic matters to investigate. For example, the implications of the CRPD for businesses and professions, or the commercial sector more generally is evident from considering several CRPD provisions:

[578] Naturally, a litigator will wish to secure a successful outcome: but there are many factors that could be relevant to determining what is success, including the time taken to secure an outcome, the prospect of damages being awarded, the likelihood of a state reacting to a finding or other aspects of the enforcement process.

(i) Article 12 and the requirement for supported decision-making, and also the indication in Article 12(5) that states must ensure equal rights "to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit".[579]

(ii) Article 9 and accessibility (supplemented by accessibility to information in Article 21 and to culture and sport in Article 30).[580]

(iii) Article 8 and awareness raising includes encouraging the media to use CRPD-compliant portrayals of persons with disabilities.

As for professions and businesses such as academia, there are multiple implications:

(i) for admission policies: eg, should the university experience be available to those with intellectual impairments in the way that it is available to those with impairments that are not intellectual. The ECtHR case law discussed in chapter 3, the article relating to education, involves tertiary education access for persons with vision and mobility impairments: should that be extended or is intellectual merit an inherent feature of access to tertiary education?

(ii) for course design: eg, the need for engineering and architecture schools to teach universal design.

(iii) for professional pathways: eg, the need to ensure that entry into the judiciary does not involve disability discrimination, which may require reasonable accommodation.

[579] Examples of comments made in Concluding Observations are that the EU, which is a party to the CRPD, was recommended to "take appropriate measures to ensure that all persons with disabilities who have been deprived of their legal capacity can exercise all the rights enshrined in European Union treaties and legislation, such as access to justice, goods and services, including banking" (CRPD/C/EU/CO/1, 2 October 2015, paras 36-37); and a concern to Senegal was the "lack of legislation and other policy measures to ensure that persons with disabilities, particularly persons with psychosocial or intellectual disabilities, enjoy their legal capacity on an equal basis with others, including their capacity to enter into contracts, open bank accounts and take out bank loans and mortgages …", which required legislative change to provide supported decision-making (CRPD/C/SEN/CO/1, 13 May 2019, paras 21-22). Note also Article 25(e), which precludes discrimination in relation to health and life insurance: this has led to specific comments, for example to the Republic of Korea, which was asked to preclude the situation of life insurance being permissible only for those with mental capacity.

[580] This has implications for public procurement and also the banking industry in relation to matters such as automated teller machines: an example is that there was concern expressed to Hungary about the inaccessibility of ATMs, and recommendations made included reviews of various areas, including "the regulations on public procurement", and having "mandatory requirements and timelines for ensuring accessibility for persons with disabilities, enforcement of such regulations, penalties for non-compliance and mechanisms for independent monitoring of the implementation of accessibility"; there were also specific recommendations to implement various EU Directives (CRPD/C/HUN/CO/2-3, 20 May 2022, paras 18-19). The reference here to the EU highlights another important aspect of this as it has issued Directives designed to meet its obligations under the CRPD, which will provide an enforcement process via EU law, but also provide a practical enforcement mechanism in relation to non-EU countries that trade with the EU and have to meet EU standards as a result.

These thematic matters could also look at the role of the CRPD in relation to important human rights principles. For example, making rights practical and effective involves reading in and expanding rights: a well-known example is that the right to life has given rise to an ancillary right to investigate (which is not mentioned in the text of Article 2 of the ECHR or Article 6 of the ICCPR).[581] As has been set out in Chapter 1, Articles 31-33 of the CRPD set out obligations as to data collection to inform policies, international cooperation and national implementation and monitoring that are instances of steps that states have to take; and there are multiple examples of steps such as training of staff and of education. However, as is evident in Chapter 3, the second article, relating to education, where the CRPD Committee has outlined steps that need to be taken to secure inclusive education, it refers frequently to the need for plans with timelines, monitoring and enforcement mechanisms. This suggests a further more general article on the processes that the CRPD Committee has identified as being central to implementing rights.[582]

B. More Specific Rights

An attempt to systematise some of the ideas involves using a variation of the table set out in Chapter 1, showing the links between the rights set out in brief in the UDHR and expanded upon – at least generally so, though with exceptions – in the ICCPR/ICESCR, ECHR (in relation to civil and political rights) and CRPD. Naturally, there is scope for something in relation to each right, with the text of the CRPD and comments from the CRPD Committee, whether General Comments or the collation of Concluding Observations and other material, setting out views as to what a disability perspective produces in relation to the content of a right. However, if that

[581] See, for example, *Edwards v UK* App no 46477/99, 14 March 2002, (2002) 35 EHRR 19, [2002] MHLR 220, in which the ECtHR set out detailed rules for what sort of investigation must follow a death in custody.

[582] Another more general article that has been prompted by discussion during the oral examination was the use in the ECtHR of references to people with disabilities being 'vulnerable' and requiring extra protection, whereas the CRPD and its social model of disability emphasises that the focus should not be on individual impairments but on systemic failures in society. The CRPD Committee has made various comments about the importance of moving away from other models of disability, including the charity model that seems common in South America: this prompted the question of exploring the extent to which the CRPD Committee's guidance could be used to support a change of language in the ECtHR.

is taken as read, the following summary sets out some of the more prominent articles that might be of particular interest:

Right	**UDHR, ICCPR and ECHR Art**	**Relevant CRPD Art**	**Article Idea**
Life	UDHR Art 3, ICCPR Art 6, ECHR Art 2	Article 10 - Right to life Article 11 - Situations of risk and humanitarian emergencies – right to equal protection and assistance	An article published but not included in the thesis for reasons of space is K Gledhill and N Baird 'Ensuring a disability perspective in disaster law: The contribution of the Committee on the Rights of Persons with Disabilities' [2021] Yearbook of International Disaster Law 432-466. This discussed the CRPD Committee's approach under CRPD Article 11; initial comments had been made about the approach to the Covid-19 pandemic (in Concluding Observations to Estonia and France), which have now been supplemented. Since there are both reviews of pandemic responses ongoing and the need to prepare for a further one, an article that sets out a CRPD-compliant plan for responding to a future pandemic is an obvious idea.
No slavery etc	UDHR Art 4, ICCPR Art 8, ECHR Art 4.	Art 27(2)	An issue that has featured in several concluding observations is the use of what are termed sheltered workshops; an article that explores these, why the Committee is opposed to them and drawing analogies with the arguments against segregated education, seems worthy of consideration.
No torture etc	UDHR Art 5, ICCPR Art 7 and Art 10 (re those in detention), ECHR 3	Arts 15-17 (and also Art 25 re consent to medical treatment)	Chapter 5, containing the article on mental health detention and compulsion gives a flavour of the CRPD Committee's views about the risks of ill-treatment in institutional settings; and Chapter 4, relating to human trafficking, also discusses these rights. The Committee therefore adds support to existing calls for not just regulating restraints and segregation (as, eg, the Mental Health Units (Use of Force) Act 2018 (UK)), but for their abolition. An article that comprehensively sets out the Committee's position and rationale for it will supplement existing literature by providing an overview of the extent of the problem and the rationale offered in CRPD terms; this may well extend beyond mental health settings.
Recognition as a person.	UDHR Art 6, ICCPR Art 16	Art 12 – Equal recognition as a person, leading to supported decision-making.	The role of Art 12 in mental health settings is noted in Chapter 5, and the role of Art 12 in the commercial space is one of the thematic articles noted above.

Liberty rights	Art 9 UDHR, ICCPR Art 9, ECHR Art 5	Art 14 (though, as noted in Chapter 5, this has to be read with other relevant articles)	See the footnoted discussion in the introduction to this chapter about the potential article relating to the question of whether vagrancy remains a valid basis for detention under ECHR Art 5(1)(e). There is a linked CRPD element to this in that the CRPD Committee has made various comments about the additional risks of poverty for persons with disabilities, including from the additional costs of disability and disadvantages in the job market (linked to the failure to comply with the obligations of CRPD Art 27); this will support the contention that vagrancy linked to disability cannot be a basis for detention.
Fair trial rights	Art 10 UDHR, Art 14 ICCPR, Art 6 ECHR (and various protocols)	Art 13 - Access to justice - Equal access to justice, with procedural accommodations and training of relevant staff.	The CRPD Committee has regularly drawn attention to two well-established features of many criminal justice systems, the insanity verdict (which means that guilt is not established but still leads to compulsion being used) and the unfitness to stand trial process (which often leads to a finding against the person and compulsion, invariably using a lesser standard of proof than for a criminal conviction and invariably investigating the act only and not any mental element). An article setting out this and suggesting what a compliant system would require, namely the "procedural accommodations" made obligatory by Art 13. An additional article in contemplation is to examine what might count as reasonable accommodation in a prison setting. As the Committee suggests that the criminal law, which is there to protect the public from harm, is something that can be used in place of mental health detention, there is in prospect an extended use of the criminal justice system: naturally, reasonable accommodation will apply to all impairments, not just those that are psychosocial or intellectual. This will build on existing jurisprudence from the ECtHR that takes into account the impact of an impairment (eg *Price v UK* App no 33394/96, 10 July 2001, [2001] Prison LR 359, (2002) 34 EHRR 53 (inhuman and degrading treatment from conditions of detention of prisoner with four impaired limbs); ZH v Hungary App no 28973/11, 8 November 2012), [2014] MHLR 1 (inhuman and degrading to detain person with severe intellectual and communication impairments)). Material from the Committee on the Prevention of Torture will also be relevant.

Health	Art 25 UDHR; not in ICCPR or ECHR, but see Art 12 ICESCR	Art 25	Whilst the focus in the thesis has been on psychiatry, but the CRPD Committee has also made various comments about other areas of health practice, for example references to the need for adapted equipment in many settings; intersectionality considerations have often featured here (particularly the rights of women with disabilities, under Art 6 of the CRPD), and also family-planning rights (under Art 22), and also rights relating to accessibility (Art 9) and privacy (Art 21). These articles will be suitable for various collaborative articles with health and medical academics.

There is every prospect that other ideas will arise and be interspersed.

The process of putting together this thesis has often followed the core of legal research, namely reviewing legal texts and interpretations of them by relevant bodies, compiling them and organising them in what hopefully is a systematic fashion. The aim is to reveal emerging or emerged legal rules or principles and then explain how they can be used further. This final chapter seeks to give a flavour of further articles that will follow the same approach, so as to make clear that there is more to do.