

THE ROLE OF REASONABLE ACCOMMODATION IN
SECURING SUBSTANTIVE EQUALITY FOR PERSONS WITH
DISABILITIES: THE UN CONVENTION ON THE RIGHTS OF
PERSONS WITH DISABILITIES

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INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (CRPD or Convention)¹ elaborates for the first time in a legally binding international human rights convention the concept of reasonable accommodation, explicitly linking it to the realization of *all* human rights – civil, political, economic, social, cultural – and embedding it within the non-discrimination mandate. In so doing, the CRPD animates both theoretical as well as practical discussions about rendering all rights meaningful for some 650 million persons with disabilities worldwide. The Optional Protocol to the CRPD (OP-CRPD),² adopted at the same time as the Convention, together with the newly adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)³, provide new entry points for claimants with disabilities and their representative organizations with the opportunity to enrich human rights advocacy through the application of reasonable accommodation across all spheres of life. The progressive application of reasonable accommodation through these new complaints mechanisms should likewise rouse – and one hopes considerably stimulate – the somewhat sluggish development of this concept in other human rights realms, including in the European Court of Human Rights and other regional systems.

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

² Optional Protocol to the Convention on the Rights of Persons with Disabilities *opened for signature* Mar. 30, 2007, G.A. Res. 61/106 (2007) [hereinafter CRPD Optional Protocol or OP-CRPD].

³ Optional Protocol to the Covenant on Economic, Social and Cultural Rights *opened for signature* Sept. 24, 2008 G.A. Res. A/RES/63/117 (2008) [hereinafter OP-ICESCR].

This chapter reviews the concept of reasonable accommodation as it is articulated in the CRPD, the human rights treaty where it makes its first appearance. This analysis is then set against the more timid manifestation of the reasonable accommodation duty in other human rights realms, including its application in the UN and regional human rights systems. The CRPD, it is hoped, will help enliven the reasonable accommodation duty and thereby give impetus for its further development in international as well as national human rights practice. This possibility, we argue, is genuine given the procedural mechanisms now in place for advancing disability discrimination and reasonable accommodation claims under the two new Optional Protocols to the CRPD and ICESCR respectively.

I. REASONABLE ACCOMMODATION UNDER THE CRPD

The CRPD, in its design, is a roadmap for the re-integration of all human rights – civil, political, economic, social and cultural. The Convention places the substantive equality of persons with disabilities as its purpose⁴ and embodies the interrelationship of all rights, thereby challenging the bifurcation of the Universal Declaration of Human Rights⁵ into two Covenants.⁶ The CRPD also achieves a reorientation of disability issues as rights claims (as opposed to medical or charitable concerns),⁷

⁴ CRPD, *supra* note 1 at art. 1 (identifying the “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.”). *Id.*

⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948). The UDHR encompasses civil, political, economic, social and cultural rights in one, holistic instrument. Academic commentary on the subsequent separation of civil and political rights on the one hand and economic, social and cultural rights on the other in the two Covenants and the ensuing debate on negative and positive liberty is ubiquitous. See especially Carter, I. (2007). Negative and positive liberty. *Stanford Encyclopedia of Philosophy*, available at: <http://plato.stanford.edu/entries/liberty-positive-negative/#Bib> visited on November, 12, 2010).

See also MacCallum, C. (1967). Negative and positive freedom. *Philosophical Review*, 76, 312–334.; Young, R. (1986). *Beyond negative and positive liberty*. New York: St. Martin's Press.; Berlin, I. (1969). Two concepts of liberty. In I. Berlin (Ed.), *Four essays on liberty* (pp. 118–172). London: Oxford University Press.

⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

⁷ See generally, Stein, M.A. (2007). Disability human rights. *California Law Review*, 95(1), 75–122.; Lord, J.E. (2002). *Understanding the role of an international*

and creates a framework for analyzing the role of the State in terms of legal obligations embedded within a substantive equality framework.⁸

Transcending Formal Equality Frameworks

Formal models of equality require all similarly situated people receive the same treatment and for laws and policies to be formulated in a neutral manner.⁹ This model ignores human difference, and, more importantly, the societal barriers that inhibit rights enjoyment and full participation. Anna Lawson usefully summarizes the consequences of a formal model of equality approach in relation to the rights of marginalized groups:

Its focus is therefore on requiring identical treatment. It would insist, for instance, that a university treat identically qualified applicants in the same way regardless of the fact that they might have different genders, racial background, or physical impairments. It would insist that employers offer promotion to identically situated people on the same basis regardless of such differences; that hospitals offer them beds on the same basis; that electoral authorities allow them to vote on the same basis; and that public housing services offer them accommodation on the same basis. Clearly, the application of a system of formal equality begs the question of what should be regarded as relevant difference and who should be treated as similarly situated.¹⁰

Substantive equality is, by contrast, less concerned with equal treatment and more focused on equal access and equal benefits.¹¹ This requires more than restraint on the power of the state; positive action or positive measures and an allocation of resources may be necessary to ensure

convention on the human rights of people with disabilities. Washington: National Council on Disability.

⁸ Lord, J.E. & Stein, M.A. (2010), Assessing economic, social and cultural rights: The Convention on the Rights of Persons with Disabilities, in Malcolm Langford & Eibe Reidel (Eds.), *Equality and economic and social rights* 4–5.

⁹ The literature on the limitation of formal models of equality – particularly in relation to securing the rights of marginalized groups – is significant. Of particular note are the following: Fredman, S. (2002). *Discrimination law*. Oxford: Hart Publishing.; Hendricks, A. (1995). The significance of equality and non-discrimination for the protection of disabled persons. In T. Degener, & Y. Koster-Dreese (Eds.), *Human rights and disabled persons: Essays and relevant human rights instruments* (pp. 40–53). The Netherlands: Martinus Nijhoff Publishers.

¹⁰ Lawson, A. (2008). *Disability and equality law in Britain: The role of reasonable adjustment*. Portland: Hart Publishing.

¹¹ Lawson, *supra* note 10 at 19. See also, Brodsky, G. & Day, S. (2002). Beyond the social and economic rights debate: Substantive equality speaks to poverty. *Canadian Journal of Women and the Law*, 14, 184–219, 206–207.

all people are equally able to realize their human rights.¹² In contrast to formal equality, substantive equality requires that the State not only fulfill its obligation of conduct, but also the obligation of result in the process of implementing human rights.¹³ Sandra Fredman has proposed four specific goals of substantive equality including: (1) breaking the cycle of disadvantage associated with marginalized groups; (2) promoting respect for equal dignity as a strategy for remedying stereotyping, stigma and violence associated with marginalized status; (3) positive affirmation and recognition of marginalized identity; and (4) facilitation of full participation in society.¹⁴

A core goal of substantive equality is to ensure the equal distribution of benefits among members of society and to transform the unequal power relations between persons that may inhibit equal access to human rights.¹⁵ In some circumstances, this may require treating persons with disabilities differently, where treating them the same would fail to recognize critical needs, ignore barriers to full inclusion and undermine realization of human rights.¹⁶ As the Committee on Economic, Social and Cultural Rights stated in relation to persons with disabilities:

The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.¹⁷

¹² Fredman, S. (2005). Providing equality: Substantive equality and the positive duty to provide. *South African Journal of Human Rights*, 21(2), 163–190, 163.

¹³ Alston, P. & Quinn, G. (1987). The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*, 9(2), 156–229, 185.

¹⁴ Fredman, *supra* note 12, 167.

¹⁵ Liebenberg, S. & Goldblatt, B. (2007). The interrelationship between equality and socio-economic rights under South Africa's transformative constitution. *South African Journal of Human Rights*, 23(2), 335–361, 342.

¹⁶ Lawson, *supra* note 10, 22–23.

¹⁷ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5, Persons with disabilities* (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003) at para 9.

The point of departure for developing a robust disability discrimination law is thus the recognition that substantive equality for persons with disabilities requires steps beyond embedding bald discriminatory proscriptions in laws and policies. It necessitates positive action to ensure inclusion and participation of disabled persons who have been subjected to historic discrimination and isolation through physical, social and attitudinal barriers,¹⁸ as well as a failure to make appropriate accommodation in workplaces and education, among other domains of life.¹⁹ The substantive equality framework also reflects on both the process and results of positive measures: it compels an inquiry as to whether those efforts taken have adequately involved affected groups and facilitated the actual realization of human rights through the positive measures taken. The inclusion of the reasonable accommodation requirement in the CRPD recognizes that affirmative steps must be taken beyond the guarantee of formal legal equality to move toward equality in fact, as discussed in more detail below.²⁰

Reasonable Accommodation as a Substantive Equality Facilitator

The inclusion of reasonable accommodation within the framework of non-discrimination and equality in the CRPD constitutes a considerable advance in the re-unification of human rights obligations. Or, as Anna Lawson suggests, reasonable accommodation in the CRPD serves a “peculiar bridging role.”²¹ In this sense, its application across all rights – civil, political, economic, social and cultural – draws together and thus re-aggregates human rights law.

¹⁸ See generally Lord & Stein, *supra* note 8.

¹⁹ CESCR, *supra* note 17 at para 15.

²⁰ Lawson observes that in arguing for the reunification and interdependence of all human rights, it is vital not to conflate overarching legal obligations of states with legal requirements which arise in particular circumstances. Specifically, reasonable accommodation is a non-discrimination obligation and as such, the non-discrimination obligation requires the implementation of reasonable accommodation measures. Lawson argues that these measures generally require positive action, but only the failure to implement the reasonable accommodation duty, and not the failure to undertake positive measures, is actionable as a violation of the right to non-discrimination. Further, the failure to accord reasonable accommodation measures should be understood as one manifestation of discriminatory conduct, akin to direct discrimination or indirect discrimination. Lawson, *supra* note 10, 222–225.

²¹ Lawson, A. (2009). The UN convention on the rights of persons with disabilities and European disability law: A catalyst for cohesion? In O. Arnardottir & G. Quinn (Eds.), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (pp. 320). Leiden: Martinus Nijhoff, 103.

The concept of reasonable accommodation, which was initially expressed in the domestic disability law of the United States,²² first appeared at the international level in General Comment 5 of the Committee on Economic, Social and Cultural Rights (CESCR).²³ Drawing on that language, the CRPD defines reasonable accommodation in Article 2 as:

[N]ecessary 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.²⁴

As a structural matter, obligations of equality and non-discrimination, including reasonable accommodation, are expressed in Article 5, within the group of provisions that have general application across the CRPD. Article 5(2) obliges States Parties to “prohibit all discrimination on the basis of disability.”²⁵ Disability discrimination is defined in Article 2 to mean:

[A]ny 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.²⁶

Denial of reasonable accommodation is thus a separate and distinct basis upon which to found a claim for disability discrimination under the CRPD. Moreover, the integration of reasonable accommodation into the formal definition of non-discrimination in Article 2 of the CRPD establishes that the realization of fundamental civil and political rights requires implementation through positive measures in order to address ongoing systemic discrimination against persons with

²² *Rehabilitation Act* 1973, 29 USC s. 701 et seq & 28 CFR part 41 (Department of Justice); 29 CFR Part 32 (Department of Labor); 45 CFR Part 84 (Department of Health and Human Services).

²³ CESCR, *supra* note 17. For useful background on the adoption of this General Comment, see Alston, P. (1995). Disability in the international covenant on economic, social and cultural rights. In T. Degener & Y. Koster-Dreese (Eds.), *Human rights and disabled persons: Essays and relevant human rights instruments* (pp. 94–105). The Netherlands: Martinus Nijhoff Publishers.

²⁴ CRPD, *supra* note 1, at art. 2.

²⁵ *Ibid.*, at art. 5(2).

²⁶ *Ibid.*, at art. 2.

disabilities. In addition, Article 5 requires that States “take all appropriate steps to ensure that reasonable accommodation is provided” in taking measures “to promote equality and eliminate discrimination.”²⁷ As Anna Lawson has argued persuasively, this provision, along with Article 8 (awareness-raising) requires not only the provision of reasonable accommodation but also positive steps in relation to raising awareness of the duty to accommodate, measures that can be taken, and compliance mechanisms.²⁸

The duty to provide reasonable accommodation in the CRPD extends to a broad array of social actors, including the State, employers, education providers, health care providers, testing and qualification bodies, providers of goods and services and private clubs. The duty requires these actors to reasonably adjust policies, practices and premises that impede the inclusion and participation of persons with disabilities.²⁹ While the reasonable accommodation duty falls within the articles of general application and therefore applies across all of the articles, it is also specifically referenced in the specific substantive articles on liberty and security of the person (Article 14(2)), education (Article 24), employment (Article 27), as well as Article 12 which references, within the access to justice realm, the “provision of procedural and age appropriate accommodations.”³⁰

Reasonable accommodation requires positive measures to address the unique needs of persons with disabilities in order to ensure the equal right to work, education, health and to an adequate standard of living – these are usually programmatic in nature. In this sense, the obligation to reasonably accommodate the unique needs of persons with disabilities merges with the obligation under the ICESCR and under the economic, social and cultural rights (ESC rights) provisions in the CRPD, to apply the maximum of available resources to realizing the substantive rights in question. The CRPD offers an exceptional model of “convergent paradigms of rights and remedies and the importance of the standard of reasonableness in reviewing the right to positive measures in light of available resources in the context of both equality rights and ESC rights.”³¹

²⁷ Ibid., at art. 5(3).

²⁸ Lawson, *supra* note 10, 32.

²⁹ Ibid., at p. 222.

³⁰ CRPD, *supra* note 1 at art. 13(1).

³¹ Porter, B. (2009). The reasonableness of articles 8(4) – Adjudicating claims from the margins. *Nordic Journal of Human Rights*, 27(1), 39–53. Special issue: Perspectives on a new complaint and inquiry procedure: The Optional Protocol to

The link between reasonable accommodation and disability discrimination in the CRPD thus creates an obligation of immediate effect.³² Accordingly, the CRPD ensures that reasonable accommodation is equally required in relation to civil and political rights and ESC rights.³³ The precise implications of this remain somewhat unclear.³⁴ Anna Lawson suggests that the language the concept of “reasonableness” and “undue burden” serve to introduce some notion of progressive realization into the non-discrimination calculus. While this language can allow for some interpretation of the temporal implications of the duty to accommodate, even a conservative reading of this obligation would conclude that, at a minimum, there is the immediate requirement to take steps through legislative and other measures to realize disability rights to available resources. The implementation of reasonable accommodation over the long term will be required to meet comprehensively the obligations of the right to equality and non-discrimination.³⁵

The consequence of this explicit coupling of non-discrimination and reasonable accommodation in the CRPD is that the right to non-discrimination (understood as a civil right) can only be realized through its application to *all* human rights. This version of substantive equality, essential for gaining human rights traction for socially, economically and historically marginalized groups, thus requires more than formal

the International Covenant on Economic, Social and Cultural Rights (Malcolm Langford, guest editor) pp. 39–53, 42.

³² Lord & Stein, *supra* note 8, 7. See also Lawson, *supra* note 22, 103. (“States are therefore required to prohibit such failure [to provide reasonable accommodation] by Article 5(2) and to do so immediately as the right to be free from discrimination is a civil and political right to which the principle of progressive realization does not apply.”) *Id.*

³³ CRPD, *supra* note 1 at art. 5.

³⁴ Lawson points out that the integration of civil and political rights with economic, social and cultural rights in the CRPD met with some controversy during the drafting of the CRPD and that one aspect of the compromise reached was the inclusion of “reasonableness” and “undue burden” into the text, which, she asserts, re-introduces, to some extent, concepts of progressive realization and a margin of discretion. Lawson, *supra* note 21, 104. However, as Bruce Porter notes, the concept of “margin of appreciation” has been rarely discussed within UN treaty bodies and appears in no treaty text and further that it has been associated with the abandonment of effective judicial remedies for ESCR claims relating to poverty. See, Porter, *supra* note 31 at 47.

³⁵ ICESCR, *supra* note 6, art. 2. See also Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States Parties’ obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003) at para 1–2.

equality in the application of human rights law. It also undermines the untenable and increasingly rejected position that civil and political rights are “negative” and require little positive action or investment of resources on the part of the State.³⁶

The CRPD therefore makes explicit the interconnectedness and interdependence of all human rights. Civil and political rights of non-discrimination and participation are required to disrupt the patterns of exclusion, and economic and social rights are needed to address the legacy of marginalization including poverty and inaccessibility.³⁷ The CRPD serves to re-conceptualize and unite civil and political rights and economic, social and cultural rights in the realization of equality for persons with disabilities by requiring reasonable accommodation through positive measures in all areas of life.³⁸ This innovative application of reasonable accommodation under the CRPD offers new opportunities for disability rights advocates seeking justice for violations of the rights of persons for disabilities under its Optional Protocol and indeed for disability advocates seeking to press economic, social and cultural rights claims under the newly adopted Optional Protocol to the ICESCR.

II. THE NASCENT DEVELOPMENT OF REASONABLE ACCOMMODATION IN HUMAN RIGHTS LAW

The CRPD gives full expression to the legal obligation to provide reasonable accommodation for persons with disabilities. This concept was in use in various international and regional fora and at work in domestic legal frameworks prior to the adoption of the CRPD. Its invocation was made explicit in international human rights law through the adoption of *General Comment 5* on persons with disabilities by the Committee on Economic, Social and Cultural Rights, as noted above.³⁹ Thus, for example, the duty to accommodate was applied implicitly in cases involving disabled prisoners before the UN Human Rights Committee and the European Court of Human Rights and also in relation to the provision of support systems and the design of educational

³⁶ Lawson, *supra* note 10, 32.

³⁷ Lord & Stein, *supra* note 8, 4–5.

³⁸ Porter, *supra* note 31, 42.

³⁹ CESCR, *supra* note 17.

environments and curricula for disabled children and adults under the European Social Charter.⁴⁰ Therefore, although the adoption and entry into force of the CRPD represents a watershed moment in the development and recognition of this critical concept, it has been evolving at all levels for many years.

In this section, we will review some threshold cases which apply reasonable accommodation in a manner that is implicit or underdeveloped. We will examine those cases and use them as a basis to reevaluate the ways in which the more explicit and legally binding nature of reasonable accommodation under the CRPD might have offered greater relief for the complainant and a coherent method for applying the substantive equality framework to address current and past discrimination. This analysis will provide the foundation for some preliminary observations as to the role that the CRPD may play in enriching disability discrimination cases at regional and international levels. Finally, the legal standards required under the ICESCR will also be integrated where the case involves economic and social rights in an attempt to posit what a holistic examination and recognition of economic and social rights of persons with disabilities might look like under the CRPD.

The Duty to Accommodate Prisoners

An early and fertile ground for the application of reasonable accommodation in cases concerning rights violations against persons with disabilities was, not surprisingly, in the realm of mistreatment of prisoners. The paradigmatic case in this context is *Price v United Kingdom*,⁴¹ decided by the European Court of Human Rights (ECtHR), where the court found that the complainant had experienced degrading treatment, in violation of Article 7 of the European Convention on Human Rights⁴² through the failure to accommodate for her disability in the prison setting. The complainant, Ms. Price, had foreshortened limbs

⁴⁰ *Autism Europe v France*, Complaint No. 13/2002, decision on the merits of 4 November 2003.

⁴¹ *Price v UK*, European Court of Human Rights, App. No 33394/96 (2001) 34 EHRR 1285.

⁴² Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

and also had a serious kidney condition. Owing to her refusal to respond to questioning about her financial position in a debt recovery proceeding, Ms. Price was sentenced to three nights in jail. During this time, she was forced to sleep in a very cold cell, she was not allowed access to her battery charger for her wheelchair, her bed was inaccessible to her and she had to rely on male prison staff to assist her in using the toilet after she had been left there for three hours waiting for a female attendant. Following her release, she required medical treatment due to her inability to use the toilet facilities.

The Court held that the conditions faced by the complainant amounted to degrading treatment notwithstanding any evidence of an intention to humiliate Ms. Price.⁴³ While the Court rendered a positive decision in this case, it did not take up the opportunity presented to explicitly discuss the duty to afford prisoners with disabilities reasonable accommodation in the context of their prison confinement. While the case demonstrates the willingness of the Court to take into account the different needs of differently situated prisoners on the basis of impairment or health status, it did not go as far as it might in its reasoning. Thus, while *Price* discloses some element of reasonable accommodation at work, it is not specifically defined and does not appear as a stand-alone claim, rather, it is implicit and contingent on its application to a specific substantive right, in this case, inhuman and degrading treatment or punishment.

The ECtHR and other courts in Europe have issued similar judgments in cases where the traditional prison setting has a degrading and dehumanizing impact on persons with disabilities.⁴⁴ So too have treaty bodies, in as much as the Human Rights Committee, the body that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR),⁴⁵ found that standard accommodations for a death row inmate who experienced paralysis violated Article 10 of the ICCPR (rights of prisoner to dignity and respect) on the basis that he

⁴³ *Price*, *supra* note 41 at para. 30.

⁴⁴ See *Mouisel v France*, European Court of Human Rights App No 67263/01 (2002) ECHR 740. See also *Napier v Scottish Ministers* (2004) Scottish Law Times 555 p. 41–42. For discussion of these cases, see O’Cinneide, C. (2009). Extracting protection for the rights of persons with disabilities from the human rights framework – Established limits and new possibilities. In G. Quinn, & O. Arnadóttir (Eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*. The Netherlands: Martinus Nijhoff Publishers.

⁴⁵ ICCPR, *supra* note 6.

was unable to clean out his cell or climb onto his bed.⁴⁶ Finally, the Inter-American Commission of Human Rights has held that in the case of persons with mental disabilities, prison settings must also be appropriate for their mental and physical needs.⁴⁷

All of these cases are limited, however, both in requiring a violation of an underlying substantive right, as well as limiting the discussion of the violations to those relating to the rights to life, dignity and humane treatment and not as a denial of the right to be free from discrimination and to be accommodated as part of the non-discrimination obligation. The CRPD, in contrast, offers a legal framework which can embrace both the substantive rights involved in these cases, and, crucially, adequately address the underlying discrimination, which has created or exacerbated the violations. Therefore, if *Price* had been brought forward in a claim before the CRPD Committee, the failure of the State to ensure Ms. Price was immediately accommodated in accessible and appropriate prison facilities would have constituted a *prima facie* violation of Article 5.⁴⁸ If the Court in *Price* had the CRPD as a tool of interpretation, and assuming it chose to use it, it could have avoided the inquiry as to whether any substantive rights had been violated and it might have grounded its finding in the failure to provide reasonable accommodation thus situating its decision within the non-discrimination obligation.⁴⁹

While *Price* might have been decided on non-discrimination grounds alone of course, the CRPD incorporates a full range of civil, political, economic, social and cultural rights into its text. Indeed, on the facts in *Price*, the substantive rights of non-discrimination and equality, accessibility,⁵⁰ freedom from cruel, inhuman and degrading treatment or punishment,⁵¹ physical and mental integrity of the person,⁵² and right to health⁵³ were all at play as a basis for claiming a rights violation. In claiming any one of these substantive rights under the CRPD,

⁴⁶ *Hamilton v Jamaica*, Communication No 616/1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

⁴⁷ See *Victor Rosario Congo v Ecuador*, Case 11.427, Report No. 63/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 475 (1998).

⁴⁸ CRPD, *supra* note 1 at art. 5.

⁴⁹ Lawson, *supra* note 10, 224.

⁵⁰ CRPD, *supra* note 1 at art. 9.

⁵¹ *Ibid.*, at art. 15.

⁵² *Ibid.*, at art. 17.

⁵³ *Ibid.*, at art. 25.

it will be important for the Committee on the Rights of Persons with Disabilities to recognize that many components of ESC rights are subject to immediate obligations and that often the positive measures required in relation to ESC rights are concomitantly required on the basis of civil and political rights obligations. The concept of what is “reasonable” will have to be developed in a manner which is not allowed to erode in any way the non-derogability or immediacy of certain obligations, such as the obligations to refrain from cruel or unusual treatment and to take positive measures to afford prisoners access to adequate healthcare, food, shelter, sanitation and other necessities.

In relation to the right to health for example, the Committee could require the State Party to show that steps toward ensuring reasonable accommodations had been made with regards to the substantive provision of Article 25 (health) to meet its immediate obligations to ensure non-discrimination, as well as showing that steps were being taken to progressively realize these rights within maximum available resources.⁵⁴ Article 25 requires that persons with disabilities have the right to the highest attainable standard of health without discrimination and that all appropriate measures should be taken to ensure access to health services that are gender sensitive.⁵⁵ Consequently, because Ms. Price had kidney problems, and she was not provided accessible toilet facilities and was not attended by a female assistant, her substantive right to health was also violated in this case.

The CRPD therefore, is much more inclusive of the human rights of persons with disabilities than the framework offered in the traditionally bifurcated human rights framework and capable of addressing the various dimensions of discrimination and violations of rights. It allows increased flexibility in terms of the claims which can be sent to the Committee and it broadens the opportunity for rights bearers to claim their full spectrum of rights. Under the CRPD, Ms. Price could find relief even without a showing of degrading treatment as it recognizes that denial of reasonable accommodation in itself is a violation of fundamental rights. Ms. Price could also make the connection between the discrimination she experienced in terms of lack of reasonable accommodation and the unique and disproportionate impact it had on her right to health, therefore possibly increasing the liability of the State for its failure.

⁵⁴ CESCR, General Comment 5, *supra* note 18 at para 9.

⁵⁵ *Ibid.*

The Duty to Accommodate in the Spheres of Sport, Recreation and Play

The duty to accommodation persons with disabilities in the realm of sport, recreation and play as it is reflected in the CRPD breaks new ground in offering the most detailed expression of such rights in any international human rights instrument. This augers well for applying concepts of disability discrimination and equality to this realm of social life given the peculiar hostility such claims have garnered in human rights cases.

In *Botta v Italy*,⁵⁶ the applicant, Mr. Botta, an Italian national, claimed a violation of his rights under the European Convention on Human Rights, including discrimination on the basis of disability. Mr. Botta, who was physically disabled, vacationed at Lido degli Estensi, a seaside resort in 1991, and found that the resort did not have accessible facilities to enable persons with mobility impairments to access the beach and the sea. Moreover, the resort failed to comply with Italian legislation on access insofar as it lacked special access ramps, lavatories and washrooms. The statute in question included provisions intended to guarantee persons with disabilities effective access to private buildings and establishments and the removal of architectural obstructions. A further government decree required that all future contracts awarding concessions to private beaches include a clause obliging the beaches to install at least one changing cubicle and one lavatory specially designed for the use of disabled people as well as a special ramp enabling access to the beach and the sea.

In March 1991, Mr. Botta complained to the mayor of Commachio, the municipality where the resort was located, and requested that the resort's facilities be made accessible in conformity with the legislation and decree. Later in the same year, Mr. Botta returned to the resort and found that no changes to facilitate accessibility had been made. Thereafter, he lodged a complaint against the minister for merchant shipping, the harbor-master and the local mayor, alleging they failed in their official duty to require the private beaches to install facilities for people with disabilities. In July 1992, Mr. Botta applied to the European Commission of Human Rights following the discontinuation of the proceedings by the local prosecutor's office and district court. Although by the time the application was submitted, in July 1997, some of the

⁵⁶ *Botta v Italy*, 26 EHRR 241 (1998).

private beaches in question had installed accessible changing cubicles and lavatories, none of them had built a ramp designed to permit persons with disabilities to gain access to the beach and the sea.

Mr. Botta, in his application, asserted that his private life had been impaired, along with the development of his personality, on account of the Italian State's failure to take appropriate measures to ensure that the private bathing establishments at the resort in question were accessible to him. He asserted that he was unable to enjoy social relations on an equal basis with others which would enable him to participate in the life of the community and to exercise essential rights. He stressed that the failure of the State in this regard was not interference, but rather failure to discharge its positive obligations to adopt measures and to monitor compliance with domestic provisions relating to private beaches.

Relying on Article 14 (non-discrimination), together with Article 8 (privacy), Mr. Botta asserted that he was the victim of disability discrimination. He admitted that there was no longer any such *de jure* discrimination, since Italian legislation not only contained various provisions designed to ensure equality, but also required "positive measures" in favor of persons with disabilities. The disparity continued to exist in fact, however, given the facts in this particular case. Moreover, he noted the Court's practice to consider the particular circumstances of a given case in order to decide whether there had been any discriminatory treatment and the need for the Court to focus on the specific manner in which the impugned domestic rules were applied to the person concerned, rather than how they may be exercised in the abstract.

The Government argued that Mr. Botta's interpretation of Article 8 was too broad and would inexorably alter the meaning of the provision to require positive obligations to ensure the satisfactory development of each individual's recreational activities. The Government likewise rejected the argument that Mr. Botta had experienced disability discrimination in the case.

The Court found that Article 8 of the Convention did not apply in this case; instead, it determined that the right asserted by Mr. Botta (to gain access to the beach and sea at a place distant from his normal place of residence during his holidays) under Article 8 concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was urged to take and his private life. The Court noted that Article 8 could require

the State to take positive measures which may include regulating private conduct, but that these obligations are present only where there is a direct and immediate link between the positive measures sought and the applicant's private or family life, a requirement which was not fulfilled in the present case. Regarding Article 14, the Court found that as the facts of the case did not fall within the ambit of a specific substantive provision of the Convention, Article 14 could not apply.

This case perhaps best exemplifies the perils of segregating rights into separate instruments. The applicant in this case was attempting to fit his social rights claim into an ill-fitting civil rights suit. Privacy rights were an uncomfortable fit and the Court was, in any case, unwilling to find a stand-alone disability discrimination violation. Traditional human rights framings are in this sense inimical to ESC rights and reinforce their devalued status in human rights practice.

The CRPD, in contrast to the ECHR, includes social rights and, in particular, guarantees to persons with disabilities the right to participate in sport, recreation, leisure and play. Article 30(5) requires States to encourage and promote the inclusion of persons with disabilities in mainstream sporting activities, "at all levels."⁵⁷ Applying the requirement of Article 5 that reasonable accommodation be provided, States must take specific measures to ensure that persons with disabilities are able to access mainstream sport.⁵⁸ Article 30(5) further requires States to provide opportunities for participation in both disability-specific sport and recreation and mainstream sport programming – a requirement that likewise triggers the duty to accommodate.⁵⁹ It also recognizes and affirms the rights of persons with disabilities to organize, develop and participate in sport and recreation with other persons with disabilities in disability-specific and mainstream programs which again requires that reasonable accommodations be provided.⁶⁰ Article 30 further ensures the rights of persons with disabilities to access and to use sporting, recreational and tourism facilities which, in keeping with Article 5 as well as Article 9 (accessibility) requires specific measures to facilitate access.⁶¹ States also must take measures to ensure that persons with disabilities are included as recipients of services and programming

⁵⁷ CRPD, *supra* note 1 at art. 30(5)(a).

⁵⁸ *Ibid.*, at art. 5(3).

⁵⁹ *Ibid.*, at art. 30(5)(b).

⁶⁰ *Ibid.*, at art. 30(5)(b).

⁶¹ *Ibid.*, at art. 30(5)(c); art. 5(3); art. 9.

by organizers.⁶² Finally, Article 30 recognizes the right of children with disabilities to play and to participate in recreation, leisure and sporting activities in the school system.⁶³

The CRPD thus offers much to disability rights advocates and other human rights advocates interested in making claims in relation to sport, recreation and play. Article 30(5), as the most comprehensive expression of the right to participate in sport, recreation and play in human rights law, provides a solid framework for achieving substantive equality in this realm. The scant attention paid to recreation and leisure rights in both human rights law and practice⁶⁴ and its highly skeptical reception in the *Botta* case, suggest that there is ample room for the CRPD to help transform human rights work in this area.

The Duty to Accommodate Children with Disabilities in Educational Settings

In *MDAC v Bulgaria*,⁶⁵ the European Committee of Social Rights (European Committee) considered a collective complaints claim raised by the Hungarian-based Mental Disability Rights Advocacy Center and the Bulgarian Helsinki Committee. The complaint argued that children with disabilities (ranging from moderate, severe to profound) who were residing in certain social care home institutions in Bulgaria, received no education on account of their disabilities and that this constituted a violation of Article 17(2) of the Revised European Social Charter.⁶⁶ That provision requires States “to take all appropriate and necessary measures designed to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.” The collective complaint further alleged

⁶² *Ibid.*, at art. 30(5)(e) & (c).

⁶³ *Ibid.*, at art. 30(5)(d).

⁶⁴ See Lord, J.E. & Stein, M.A. (2009). Social rights and the relational value of the rights to participate in sport, recreation and play. *Boston University International Law Journal*, 27, 249–281 (arguing that “even under an energized progression of social rights cases in international and domestic courts, rights relating to sport, recreation, leisure and play remain on the sidelines of human rights practice.”). See also Stein, M.A. & Lord, J.E. (2007). Jacobus tenBroek, participatory justice and the UN Convention on the Rights of Persons with Disabilities. *Texas Journal of Civil Liberties and Civil Rights*, 13.

⁶⁵ *MDAC v Bulgaria*, Complaint No. 41/2007, European Committee of Social Rights, Decision of 3 June 2008.

⁶⁶ European Social Charter (revised), (ETS No. 163), entered into force January 7, 1999.

disability discrimination in violation of Article E of the Revised European Social Charter which protects against discrimination.

The complaint argued that nothing occurring inside the institutions constituted education for these children. The complaint averred that legislation guaranteeing the right to education for all children was not implemented in respect of these children residing in the social care institutions and referenced evidence to support their claim, including, for example, government data indicating that only 6.2% of children living in the relevant institutions were enrolled in schools. The complaint further stated that mainstream schools were not adapted to accommodate the needs of such children and that staff in those institutions were provided either no education at all, or inadequate education. The complaint also alleged that a lack of resources or the progressive realisation of rights could not, in this case, serve as a valid defence on the facts.

The European Committee found that there was a violation of Article 17(2) (right to education) as a stand-alone right and, when coupled with Article E (non-discrimination), a further violation grounded in disability discrimination. In particular, the Committee found that the children with disabilities in question were denied an effective right to education on account of disability discrimination.

With regard to the violation of the right to education, the European Committee found that, although the Bulgarian government had undertaken measures to respect the right to education for children with disabilities living in institutions, for example through legislation and action plans, those laws and policies had not been effectively implemented. They also found that there were inadequate standards for the right to education and equality of educational opportunities. Specifically, the Committee found that Bulgarian educational standards were inadequate because mainstream educational institutions and curricula were not accessible in practice as only 2.8% of children with intellectual disabilities residing in institutions were integrated in mainstream primary school. In addition, only 3.4% of the children attended special classes, which also indicated that special education was not accessible to children living in the institutions at issue. Finally, the Committee found that mainstream schools were not adapted to the specific needs of children with intellectual disabilities, teachers were not properly trained and resources were not developed to cater to the educational needs of children with disabilities. Moreover, due to the absence of primary educational opportunities, children with disabilities were ineligible to enter secondary education.

The European Committee rejected the claims of the Bulgarian government that there were inadequate resources to implement the right and determined that the government had failed to fulfil the three core criteria consistent with progressive realisation of rights, namely, (1) a reasonable timeframe, (2) measurable progress and (3) financing consistent with the maximum use of available resources. More particularly, the Committee noted the slow progress in implementation and the failure to undertake even the most basic measures, such as staff training or providing information on education requirements to institutions.

On the disability discrimination claim, the European Committee found that although disability is not explicitly listed as a prohibited ground of discrimination in Article E, it was indeed captured by the term “other status.” Moreover, the Committee noted that the failure to take appropriate measures to take account of existing differences may also amount to discrimination. In that regard, the Committee articulated the principle that the obligation to provide evidence in support of the claims should be appropriately adjusted when it comes to matters of discrimination. Thus, given the evidence provided that showed the low percentage of children receiving an education in the institutions at issue, as compared to other children, the burden shifted to the government to refute such evidence. Finding no such evidence and no legal justification for the denial of access to education, the Committee determined that the disparity between the two groups of children was so great that it constituted discrimination against the children with disabilities.

Similarly, in another education complaint before the European Committee on Social Rights, *Autism Europe v France*,⁶⁷ the applicant, Autism Europe, asserted that France was failing to meet its obligation under, *inter alia*, Article 15(1) of the revised European Social Charter. This claim essentially alleged that children and adults with autism were not able to exercise the effective enjoyment of the right to education in mainstream school settings or in specialized educational institutions due to inadequate support. In other words, the school system was failing to accommodate their individual needs. The Committee found that France had failed to meet its obligations under the Charter insofar as it had failed to demonstrate that it was taking reasonable steps towards the fulfillment of Article 15 and other associated rights, including Article 17 (the right of children to social support) and Article E (equality).

⁶⁷ *Autism Europe v France*, *supra* note 40.

The *MDAC v Bulgaria* case and the *Autism Europe v France* case reflect a progressive trend in recognizing and applying the right to an education for children with disabilities and, further, in animating the non-discrimination and equality provision of the Charter. Yet, the framework for non-discrimination and equality and reasonable accommodation in education in the CRPD offers additional tools for the European Committee on Social Rights (and indeed other treaty monitoring bodies) to draw upon in such cases. This is promising given the openness of the Committee to be guided by other standards and treaty body jurisprudence (e.g., General Comments on the ICESCR) in its work.⁶⁸ The level of detail provided on the right to education in the CRPD should be helpful in guiding the Committee in future cases involving the education of children and adults with disabilities.

Article 24 of the CRPD requires States Parties to ensure that persons with disabilities have access to an inclusive education system at all levels, as well as to lifelong learning opportunities, including to tertiary, vocational and adult education. Article 24 specifically requires States Parties to ensure the elimination of discrimination on the ground of disability from all aspects of education. Notably, it also requires States Parties to ensure that reasonable accommodation of impairment and disability related needs is provided at all levels of the education system. Reasonable accommodation is thus applicable to education both as a result of the general obligation of non-discrimination and equality in Article 5 and as an aspect of Article 24. Significantly, Article 24 requires States Parties to ensure that education is directed towards a number of fundamental goals, which include the development of human personality and potential, a sense of dignity and self-worth, respect for human rights, fundamental freedom and human diversity and effective participation in a free society. The provision has a strong thrust towards the provision of inclusive education and requires States Parties to provide the individualized services, such as individualized educational plans, and supports necessary to facilitate inclusion.

Finally, Article 24 addresses the learning and social development needs of children and young persons with sensory disabilities. In this particular context, States Parties are required to facilitate the learning

⁶⁸ The European Social Rights Committee has a fairly strong record of looking to treaty body jurisprudence to guide its work. See, e.g., *MDAC v Bulgaria*, Complaint No. 41/2007, *supra* note 65 at para. 37 (citing the Committee on Economic, Social and Cultural Rights). *Id.*

of Braille and other alternative modes, means and formats of communication, and orientation and mobility skills and are required to facilitate peer support and mentoring to assist children and young persons with sensory disabilities to develop a positive self-image and social networks. Children who are deaf or deafblind must be provided with the opportunity to learn sign languages, and the linguistic identity of the deaf community must be promoted. Educational instruction must be delivered in the most appropriate languages and modes and means of communication for the child with sensory disability, and in environments that maximize their academic and social development. In order to realize these rights, States Parties are required to ensure that teachers are employed who are qualified in sign language and/or Braille, and to provide training to ensure that all staff working in the education system are sensitive to the needs of persons with disabilities, and are able to effectively use augmentative and alternative communication, and adapt and use educational techniques and materials appropriate for children with disabilities.

The detailed articulation of the right to education for children as well as adults with disabilities in the CRPD, inclusive of the duty to accommodate, provides a highly contextualized, disability-specific understanding of this right. As such, it would be surprising if Article 24 did not serve as a prominent guide for regional and international human rights procedures. Given that the facts in *MDAC v Bulgaria* and in *Autism v France* are, very unfortunately, not at all isolated instances of violations in the area of education for persons with disabilities, it is to be hoped that the Optional Protocols to the CRPD and ICESR serve as catalysts to action and advocacy.

The Duty to Accommodate Persons with Mental Disabilities

In *Purohit and Moore v The Gambia*,⁶⁹ mental health advocates witnessed the inhuman treatment of mental health patients in a hospital psychiatric unit. In their complaint to the African Commission on Human and Peoples' Rights on behalf of the mental health patients detained in the unit, the principal legislation governing mental health, the *Lunatics Detention Act of 1917*, was challenged. The complaint detailed that the Act contained no guidelines for making a determination and

⁶⁹ *Purohit and Moore v The Gambia*, Communication No. 241/2001 (2003), AHRLR 96.

diagnosis of mental disability, there were no safeguards required during the diagnosis, certification or detention of the person, there was no requirement for consent to treatment, no independent examination of hospital conditions and no provision was made for legal aid or for compensation in the case of a rights violation. Finally, persons in the psychiatric unit were denied their right to vote.

The complaint also argued that the failure to include the provisions above resulted in a violation of Articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4) of the African Charter on Human and Peoples' Rights.⁷⁰ The complainants argued that by ratifying the African Charter, a State undertakes the obligation to take immediate steps to align its domestic laws and practice with that required under the Charter and that The Gambia failed to do so in this case. The Act in question was adopted in 1917 and had not been amended since 1964, during which time extensive progress had been made in the understanding of human rights requirements. The complaint also argued that because the Act condemned any person declared a "lunatic" to automatic and indefinite detention, Articles 2 (non-discrimination) and 3 (equal protection) of the Charter were violated. Finally, because a person found to have a mental disability was detained indefinitely without due process, this also constituted discrimination on the ground of disability. The State responded that domestic remedies had not been exhausted and although no appeal procedure existed in the Act itself, a Constitutional complaint could have been brought to seek remedies and, further, that amendments were currently underway.

The Commission found that the type of remedy offered by the State was in reality only available to wealthy people and thus not an "available remedy" and ordered the Government to replace the Act with a new legislative scheme for mental health that was compatible with the African Charter on Human and Peoples' Rights, as well as more specific international standards for the protection of persons with disabilities. It noted that the rights to be free of cruel and degrading treatment, to liberty and security of person, to political participation as well as a showing of a legal basis for the detention and an opportunity for an appeal, were not adequately protected under the existing Act. The Commission also held that The Gambia failed to comply with

⁷⁰ African (Banjul) Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

requirements of Articles 16 (best attainable standard of physical and mental health) and 18(4) (right to special measures for disabled persons with regards to moral and physical needs) and that States Parties were required to take concrete and targeted steps to ensure the right to health.

The African Commission, however, took it upon itself to read into Article 16 the obligation on the part of States Parties “to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.”⁷¹ This could be seen as an attempt to narrow the obligations of States to realize the right to health in relation to the duty to take immediate steps to progressively realize the right to health within maximum available resources under the ICESCR, to which The Gambia is also a party. The African Charter itself does not limit State obligations in this way.⁷²

In *Purohit*, following a CRPD analysis, it could be argued that the failure to repeal or amend the *Lunatics Detention Act* itself was a denial of reasonable accommodation. The Act’s provisions had the purpose and effect of creating barriers in many aspects of life for those deemed to fall under its purview, therefore the Act itself was discriminatory and, as a consequence, in violation of the CRPD. Also, the Act did not prevent the State from providing appropriate therapeutic and other supportive care, which could be interpreted as a failure to ensure substantive equality. The framework for determining when positive measures are required should be in a “comparison...not between those who are provided a benefit and those who are denied it, as in the traditional paradigm of under- inclusion...[r]ather it is between those who need a benefit in order to enjoy equality and those who do not.”⁷³ Accordingly, it could be argued that The Gambia’s failure to provide the appropriate adjustments in their legislation to ensure equality and human rights for persons with disabilities amounted to discrimination and a violation of Article 5 of the CRPD.

Secondly, the Act failed to reasonably accommodate persons with mental disabilities in terms of numerous substantive rights. The Act did not include a right to challenge a finding of mental disability and

⁷¹ *Purohit*, *supra* note 69 at para. 84.

⁷² African Charter *supra* note 70.

⁷³ Porter, B. (1998). Beyond Andrews: Substantive equality and positive obligations after Eldridge and Vriend. *Constitutional Forum*, 9(2), 71–82, 78.

did not include the provision of legal aid to challenge this finding by other means such as a Constitutional challenge. Articles 12 and 13 of the CRPD affirm the legal recognition of persons with disabilities and the right to exercise legal capacity, as well as the support to do so through legal aid and procedural accommodations. Further, safeguards must be in place to ensure that any denial of legal capacity respects human rights and the will of the person, is proportional, and subject to review by a competent, independent body, among other criteria.⁷⁴ In this case, persons found to fall under the Act were subject to automatic detention and this would be a violation of Article 14 of the CRPD, which requires the detention be in compliance with international law, including the right to appeal and reasonable accommodation. Also, this policy of automatic detention would violate the right to live independently and be included in the community under Article 19.

The Act also failed to meet even the most basic standards with regard to the right to health. As the African Commission noted, there were no therapeutic objectives nor programs or resources allocated to realize the right to health for persons with mental disabilities.⁷⁵ Under the CRPD, the Committee would be able to find numerous violations of the right to health. State parties are required to “[p]rovide those health services needed by persons with disabilities because of their disabilities” and “provide care...on the basis of free and informed consent,”⁷⁶ neither of which were done in this case. Further, because this is an economic and social right, the State would have been required to show it had used maximum available resources to realize the highest attainable standard of health on a basis of non-discrimination.⁷⁷ **The CRPD’s recognition of reasonable accommodation for persons with mental disabilities combined with the right to health and other substantive rights would provide support for a more progressive interpretation of the duties of the State in this case.** Explicit requirements of reasonable accommodation, non-discrimination and the immediate duty to take steps to progressively realize the right to health within maximum

⁷⁴ *Ibid.*, at art. 12(4).

⁷⁵ Communication No. 241/2001 (2003) at para 83.

⁷⁶ CRPD, *supra* note 1 at art. 25(b) and (d).

⁷⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (2000) at paras 30–32.

available resources would rebut watered-down interpretations of State obligations such as those that resulted in *Purohit*.

The Duty to Accommodate – Moving Forward

The foregoing case analysis suggests that the CRPD's substantive equality framework, including its reasonable accommodation concept, offers promise and indeed greater human rights protection for persons with disabilities than that which existed in general instruments of human rights law. Indeed, *Glor v Switzerland* is suggestive of this promise. In that case, decided by the ECtHR, the Court made major steps toward ensuring the human rights of persons with disabilities.⁷⁸ Swiss law requires all men to engage in military service or alternative civilian service.⁷⁹ Glor, a person with Type 1 diabetes, was declared unfit for military service by an army doctor and was then assigned to civil protection services, but he claimed that he was never called upon to perform his duties. Based on the Swiss tax code, all men not having a "major disability" (defined by domestic case law as meaning the individual's physical or mental integrity was affected by at least 40%) are subject to a service exemption tax of about 3% of net salary. Based on a medical examination, it was determined that Glor did not meet this 40% threshold and was subject to the exemption tax. Glor appealed the tax as he claimed he was always prepared to engage in military service and that he was the subject of discriminatory treatment.

The Court's decision recognized disability, for the first time, as a basis for discrimination under article 14 of the European Convention on Human Rights (ECHR).⁸⁰ The Court also detailed the numerous ways in which Switzerland could have provided reasonable accommodation (although this particular terminology was not invoked) for the complainant in light of his disability. The Court specifically explained that Switzerland could have been more responsive to Mr. Glor's individual circumstances, such as by assigning him to activities which required less physical effort.⁸¹ Perhaps most importantly, the Court

⁷⁸ *Glor v Switzerland*, European Court of Human Rights, Application No. 13444/04, 30 April 2009.

⁷⁹ Switzerland Const. art. 59 § 1.

⁸⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

⁸¹ *Glor*, *supra* note 78 at paras. 91, 94 and 95.

cited the CRPD as the most contemporary understanding of the content of disability rights, to which it should look in interpreting the ECHR.⁸²

The *Glor* case provides an example of how the CRPD can influence interpretation of the human rights of persons with disabilities, specifically the obligation of reasonable accommodation. The CRPD's integration of all human rights and its textual recognition of substantive equality through the duty of reasonable accommodation create a coherent framework for understanding and addressing discrimination against persons with disabilities. In the next section, this chapter will outline two mechanisms for adjudicating the duty of reasonable accommodation at the international level and how the understanding of the rights as defined under the CRPD can be effectively claimed by disability advocates.

III. THE OPTIONAL PROTOCOLS UNDER THE CRPD AND ICESCR

CRPD Optional Protocol Procedures

The Optional Protocol to the CRPD, adopted at the same time as the Convention itself and also entered into force on the same day, provides a mechanism for individual and group communications and an inquiry procedure. These present rich opportunities for developing the concept of reasonable accommodation in relation to CRPD rights and expanding disability rights claims.⁸³ The CRPD's communications and inquiry procedures are similar to other such procedures within the human rights system.⁸⁴ Interestingly, however, the drafters excluded inter-state communication procedures on the basis that such procedures are little used and thus would add little value to the Convention.⁸⁵

⁸² *Ibid.*, at para. 53.

⁸³ See CRPD Optional Protocol, *supra* note 2. As of this writing, there are 87 signatories and 47 ratifications to the CRPD Optional Protocol.

⁸⁴ See, e.g., Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* Dec. 22, 2000 [hereinafter OP-CEDAW] and OP-ICESCR, *supra* note 3.

⁸⁵ Under the inter-state complaints procedure of the ICCPR, for example, a State must consent to the procedure before another State can launch such a complaint, rendering the procedure a particularly blunt one in practical terms. See, e.g., ICCPR, *supra* note 6, at art. 41(1) ("A State Party to the present Covenant may at any time declare

The CRPD's treaty monitoring body, the Committee of the Rights of Persons with Disabilities (the CRPD Committee), is empowered to review individual and group communications which allege violations of the Convention by participating States Parties. Communications may also be submitted *on behalf of* aggrieved individuals. This paves the way for disabled peoples organizations and, it is to be hoped, mainstream human rights groups, to take on disability rights claims under the CRPD.

Under the CRPD Optional Protocol, the admissibility of communications follows standard practice.⁸⁶ Thus, communications are inadmissible when they are submitted anonymously⁸⁷ or when the alleged events in question have occurred *prior* to and did not continue after, State Party ratification of the Optional Protocol.⁸⁸ Likewise, communications are rendered inadmissible: (1) when the "same matter" has been considered previously by the CRPD Committee; (2) when it is being reviewed simultaneously "under another procedure of international investigation or settlement;"⁸⁹ (3) where the complainant has failed to exhaust domestic remedies (unless these can be shown to be futile);⁹⁰ (5) where the communication is unfounded or unsubstantiated;⁹¹ or (6) where it abuses the right to submit under, or conflicts with, the provisions of the CRPD.⁹²

The Committee may, at any time after receiving a communication but before determining its merits, request a State Party to adopt sufficient interim measures "to avoid possible irreparable damage" to the

under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant."). During the course of the CRPD negotiations, a study prepared by the Office of the High Commissioner for Human Rights found that inter-state communications had fallen into desuetude, with the only exception being their use in the European human rights system. See OHCHR *Expert paper on existing monitoring mechanisms, possible relevant improvements and possible innovations in monitoring mechanisms*, (submission to the 7th Session of the Ad Hoc Committee), UN Doc. A/AC.265/2006/CRP.4, at p. 14, para. 51, *online*, <http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7unedchrmonitor.doc>.

⁸⁶ See, e.g., OP-CEDAW, *supra* note 84; OP-ICESCR, *supra* note 3 and the International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

⁸⁷ ICCPR, *supra* note 6, at art 2(a).

⁸⁸ *Ibid.*, at art. 2(f).

⁸⁹ *Ibid.*, at art. 2(c).

⁹⁰ *Ibid.*, at art. 2(d).

⁹¹ *Ibid.*, at art. 2(e).

⁹² *Ibid.*, at art. 2(b).

alleged victims of its actions;⁹³ such action does not, however, imply the ultimate admissibility or merits of the given communication.⁹⁴ The possibility of such precautionary measures is important and has been clearly demonstrated in a petition concerning the rights of persons with mental disabilities before the Inter-American Commission on Human Rights of the Organization of American States.⁹⁵ That case also illustrated the proactive role that can be played by certain monitoring bodies, with the Commission converting an original individual complaint to one that encompassed all individuals institutionalized in the State facility.⁹⁶ Given that the CRPD is authorized to hear group complaints⁹⁷ (as well as to make inquiries regarding systemic CRPD violations under the inquiry procedure⁹⁸) it would follow that similar action would fall within its purview.⁹⁹ In addition, although the Ad Hoc Committee did not take up the suggestion of the Office of the High Commissioner for Human Rights for the inclusion of a specific provision allowing the Committee to address urgent situations through early warning measures, it is submitted that the Committee would be empowered to do so.¹⁰⁰

⁹³ Ibid., at art. 4(1).

⁹⁴ Ibid., at art. 4(2).

⁹⁵ In December 2003, in a landmark decision on a petition, the Inter-American Commission on Human Rights approved a petition for precautionary measures to protect the lives and physical integrity of people detained in a psychiatric institution in Paraguay and requested that the Government of Paraguay adopt all necessary measures to protect the lives, health, and the physical, mental and moral integrity of the 460 people detained in the institution, with special attention to the situation of women and children. See *Precautionary measures granted or extended by the Commission during 2003: Paraguay, on behalf of the patients of the Hospital Neurosiquiátrico (Neuro-psychiatric Hospital)*, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2003, OEA/Ser./L/V/II.118, doc. 25., rev. 2 (2001), ch. III.C, para. 60.

⁹⁶ Ibid.

⁹⁷ CRPD Optional Protocol, *supra* note 2, at art. 1(1).

⁹⁸ Ibid., at art. 6.

⁹⁹ For example, in *International Association Autism – Europe (IAAE) v France*, 3 CoE. 12 (10 March 2004), the European Committee on Social Rights engaged in a far-reaching investigation of the extent to which children with autism were mainstreamed into France's school system.

¹⁰⁰ See, e.g., OHCHR Expert Paper, *supra* note 85, p. 15, para. 55. CERD developed early warning and urgent action measures in 1993, which may be invoked by the Committee or interested parties. See CERD, *Working Paper on Prevention of Racial Discrimination, including Early Warning and Urgent Action Procedures*, A/48/18, annex III online, http://www2.ohchr.org/english/bodies/cerd/docs/A_48_18_Annex_III_English.pdf (visited November 12, 2010).

States Parties are to be confidentially apprised of admissible communications by the CRPD Committee, and are required to respond in writing thereto with explanations or clarifying statements within six months.¹⁰¹ The Committee will consider communications in closed meetings, and transmit any suggestions or recommendations to both the concerned State Party and the petitioner.¹⁰² Thus, as with other communication procedures, communications under the Optional Protocol are confidential and recommendations issued in relation to communications are not enforceable. Nonetheless, it will be within the power of the CRPD Committee to craft follow-up procedures to fortify the recommendatory nature of its findings.

The Optional Protocol to the CRPD includes an inquiry procedure,¹⁰³ similar to those employed by other human rights monitoring mechanisms, to allow the initiation of investigations, particularly regarding egregious or systematic human rights violations.¹⁰⁴ A procedure of inquiry is triggered in cases where the Committee receives “reliable” information relating to “grave or systematic violations” of Convention obligations by a State Party.¹⁰⁵ In such cases, the CRPD Committee must call on that State Party to collaborate in an investigation of the information and submit its observations.¹⁰⁶ Thereafter, the Committee reviews the information submitted by the State Party and reliable information submitted by other parties.¹⁰⁷

The Committee may choose to authorize one or more of its members to conduct an inquiry and report “urgently” to the Committee.¹⁰⁸ Such an inquiry may include a visit to the territory of the State Party subject to consent of the State Party (consent being a standard principle of international legal process). The findings of the inquiry are sent to the State Party, along with Committee “comments and

¹⁰¹ CRPD, *supra* note 1, at art. 3.

¹⁰² *Ibid.*, at art. 5.

¹⁰³ CRPD Optional Protocol, *supra* note 2, at art. 6.

¹⁰⁴ See, e.g., *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 at art. 20 [hereinafter CAT]; See also the Charter-based 1503 <http://www2.ohchr.org/english/bodies/chr/complaints.htm> communications procedure, now administered under the Human Rights Council pursuant to HR Council Res. 5/1, UN Human Rights Council: Institution Building, 18 June 2007.

¹⁰⁵ CRPD Optional Protocol, *supra* note 2, at art. 6.

¹⁰⁶ *Ibid.*, at art. 6(1).

¹⁰⁷ *Ibid.*, at art. 6(2).

¹⁰⁸ *Ibid.*, at art. 6(2).

recommendations.”¹⁰⁹ The State Party is given an opportunity to respond within six months.¹¹⁰ As with other inquiry mechanisms, the procedure is confidential and is thus closed to the public; written findings are similarly not made public.¹¹¹ The Committee may follow-up with the State Party after six months and invite the State to indicate what measures it assumed in reply to the inquiry.¹¹² In addition, the Committee may solicit the State Party to include details of these measures in its regular reporting cycle.¹¹³

ICESCR Optional Protocol Procedures

On December 10th, 2008, on the 60th Anniversary of the Universal Declaration of Human Rights, the United Nations adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).¹¹⁴ The adoption of this Optional Protocol represents historic progress in the full realization of all human rights by providing an opportunity for redress for economic, social and cultural rights, four decades after the adoption of the Optional Protocol to the ICCPR. The human rights contained in the ICESCR have been historically marginalized and the previous High Commissioner on Human Rights, Louise Arbour, noted that the adoption of the OP-ICESCR represents “human rights made whole,” by reuniting the rights originally enshrined in the Universal Declaration of Human Rights and by providing the opportunity for redress for violations of human rights “typically linked to poverty, discrimination, and neglect that victims frequently endure in silence and helplessness.”¹¹⁵ Therefore, the new opportunity for an effective remedy provided by the OP-ICESCR is critical in ensuring all human rights of persons with disabilities are addressed and it provides an alternative forum for raising ESC rights violations of disabled persons. As jurisprudence develops under the OP-ICESCR, it must be flexible enough to meet the particular needs of groups and individuals who have experienced violations of ESC

¹⁰⁹ *Ibid.*, at art. 6(3).

¹¹⁰ *Ibid.*, at art. 6(4).

¹¹¹ *Ibid.*, at art. 6(5).

¹¹² *Ibid.*, at art. 7(2).

¹¹³ *Ibid.*, at art. 7(1); CRPD, *supra* note 1, at art. 35.

¹¹⁴ OP-ICESCR, *supra* note 3.

¹¹⁵ Arbour, L. (8 July 2008). Human rights made whole. *Policy Innovations*, online, http://www.policyinnovations.org/ideas/commentary/data/000068/pf_printable (visited November 21, 2010).

rights in order to ensure it serves more than a merely formal mechanism for complaint, but it also must offer effective and appropriate remedies and therefore serves as a forum to seek substantive equality.¹¹⁶

Like the OP-CRPD, the OP-ICESCR provides for both individual and group communications, as well as inquiry procedures initiated by the Committee, and it generally follows those procedures developed under other, similar mechanisms.¹¹⁷ In contrast to the OP-CRPD, the OP-ICESCR retains the inter-state inquiry procedure, allowing for the greatest range of possible complaints.¹¹⁸ The admissibility requirements under the OP-ICESCR closely match those enumerated under the OP-CRPD¹¹⁹ and the request for interim measures.¹²⁰ The process for examining a communication¹²¹ also mirrors those under the OP-CRPD, detailed above.

The OP-ICESCR contains three unique provisions not found in other international treaties. The first is in article 4, which gives the Committee discretionary authority in exceptional circumstances to decline to consider a communication that “does not reveal the author has suffered a clear disadvantage.”¹²² There is little guidance from the *travaux préparatoires* of the Working Group on the OP-ICESCR on how this article should be applied and it is still unclear how the ESCR Committee will interpret this provision.¹²³ Another distinctive provision contained in the OP-ICESCR is contained in article 7, which allows for the offices of the Committee to be used for the negotiation of a friendly settlement, “on the basis of respect for the obligations set forth in the Covenant” and an agreement “closes consideration of the communication” by the Committee.¹²⁴ The civil society response to this addition has generally been favorable. It is seen as increasing the possibility of more fully addressing the systemic roots of the issue which gave rise to the case; however, there is an equally keen awareness of the need to address

¹¹⁶ Porter, *supra* note 31, at 41.

¹¹⁷ See, e.g., OP-CEDAW, *supra* note 84.

¹¹⁸ OP-ICESCR, *supra* note 3 at art. 10.

¹¹⁹ *Ibid.*, at art. 3.

¹²⁰ *Ibid.*, at art. 5.

¹²¹ *Ibid.*, at art. 8.

¹²² *Ibid.*, at art. 4.

¹²³ See, International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Considerations of the International NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure* (Sept. 2009) at 12.

¹²⁴ OP-ICESCR, *supra* note 3 at art. 7.

inequality of arms (an imbalance of power between a complainant and the responding State) and to maintain continuous follow up on the implementation of agreements.¹²⁵

The third unique provision, which will be of particular importance for emerging jurisprudence under both the OP-CRPD and the OP-ICESCR, is Article 8(4) of the OP-ICESCR. This provision integrates a “reasonableness” standard of review, allowing the ESCR Committee to assess whether steps have been taken by the State to use maximum available resources in conjunction with Article 2(1) of the Covenant.¹²⁶ This standard of review reveals the compatibility of approaches under both the CRPD and the ICESCR in assessing the positive measures that must be undertaken in particular circumstances to ensure reasonable accommodation.

Standards of reasonableness under the OP-ICESCR must also be allowed to interact with the emerging standards of reasonableness elsewhere, such as under the new CRPD and its Optional Protocol. Reasonable accommodation for persons with disabilities is a very contextual and individualized approach to reasonableness review, which may provide a useful framework to ensure reasonableness review of rights claims under the OP-ICESCR is also framed around individual dignity and equality, and should thus not be confused with abstract policy review disconnected from rights claiming.¹²⁷

Buttressing Reasonable Accommodation Duties and Disability Rights Advocacy under the Optional Protocols

The two Optional Protocols are likely to buttress the path-breaking work of disability rights advocates in pressing disability rights claims in regional and international human rights procedures. Ideally, the procedures offered in the Optional Protocols may well open up advocacy in relation to some of the most marginalized members of the disability community. The CRPD inquiry procedure, for example, has the potential to advance the major work of disability rights organizations that have exposed, particularly through monitoring and reporting practices, egregious abuses against children and adults with disabilities in institutions which are too often shielded from public

¹²⁵ See NGO Coalition, *supra* note 123 at 12.

¹²⁶ OP-ICESCR, *supra* note 3, at art 8.

¹²⁷ Porter, *supra* note 31, 52.

scrutiny.¹²⁸ One might well imagine, for example, an inquiry concerning the institutionalization of persons with disabilities in abusive and squalid conditions and absence of community living arrangements, systematic exclusion of disabled children from schools, or the widespread failure to accommodate persons with disabilities in health prevention programs, such as HIV/AIDS education outreach or child immunization programs. The concept of reasonable accommodation, made applicable across the CRPD, can in such cases serve as an additional device with which advocates can press not only for the cessation of abuse, but for accommodations required in respect of Article 19 (living independently and in the community), Article 24 (education), Article 25 (health) and Article 28 (adequate standard of living), among others. Moreover, the Protocols can serve to protect not only persons with disabilities, but also those associated with disabled persons. The CRPD prohibits discrimination against “any person” on the basis of disability, thereby opening the door to claims not only by persons with disabilities themselves, but by those who have been discriminated against because of a mistaken assumption of disability, or due to their association with a disabled person.¹²⁹

The OP-ICESCR should also be viewed as a viable forum for the submission of claims of violations of economic, social and cultural rights of persons with disabilities. Persons with disabilities around the world experience such violations of their economic, social and cultural rights, including violations to their right to adequate housing, food, water and sanitation, health, work and education. Discrimination and failure to accommodate for the needs of disabled persons in accessing public services, such as health, education or food distribution systems, are only a few examples of the unique and disproportionate impact such violations of economic, social and cultural rights can have on persons with disabilities. In many countries, many or all economic, social and cultural rights are not recognized or enforceable by law, leaving people with little hope of an effective remedy.

¹²⁸ See, e.g., Mental Disability Rights International, *Human Rights & Mental Health: Mexico* (2000), *Children in Russia's Institutions: Human Rights and Opportunities for Reform* (1999), *Human Rights & Mental Health: Hungary* (1997); (2003); *Human Rights & Mental Health: Uruguay* (1995); Amnesty International Press Release, *Bulgaria: Disabled Women condemned to “Slow Death”*, AI Index: EUR 15/002/2001; Mental Disability Advocacy Center, *Liberty Denied: Mental Disability Detention in Hungary* (2003).

¹²⁹ Lord & Stein, *supra* note 8, 6–7.

In addition to the normative framework that the ICESCR provides for claiming ESC rights generally, the adoption of General Comment 5 by the Committee on Economic, Social and Cultural Rights of General Comment 5, as noted above, allows for greater understanding of the particular impacts that a lack of ESC rights have on persons with disabilities. The Committee's embrace of reasonable accommodation¹³⁰ and the explicit recognition and full elaboration of the concept in the CRPD – intended by the drafters to clarify the human rights obligations already set forth in the two Covenants through disability specific contextualization – provide tools through which ESC rights can be advanced and made meaningful.

CONCLUSION

The CRPD, in expressing for the first time in a legally binding human rights instrument the requirement that reasonable accommodation be accorded to persons with disabilities in the actualization of their rights, firmly situates disability rights within a progressive substantive equality rights framework. In so doing, it challenges outmoded characterizations about disability issues as belonging to medical or charitable spheres of action and thus grounded in paternalistic, welfare-oriented claims of beneficence. It offers opportunities not only for disability rights advocates to press their claims in human rights terms by invoking reasonable accommodation duties in respect of civil, political, economic, social and cultural rights, but potentially carves out new space for advocacy in other parts of the human rights movement. For example, the CRPD's non-discrimination and reasonable accommodation framework can animate HIV/AIDS discrimination claims, advance economic, social and cultural rights advocacy (in particular sidelined rights such as the right to sport, recreation and play) and potentially press forward the rights of other marginalized groups, such as religious minorities.¹³¹

The new procedural mechanisms offered up by the CRPD's Optional Protocol and the new ICESCR Optional Protocol, in addition to the **1995 Additional Collective Complaints Protocol to the *European Social***

¹³⁰ CESCR, General Comment 5, *supra* note 17.

¹³¹ Anna Lawson has usefully pointed to the historical connection between the development of reasonable accommodation and religious minority protection. Lawson, *supra* note 10, 5.

Charter provide fertile ground for fully elaborating the reasonable accommodation duty. In addition, the CRPD offers opportunities for regional human rights systems in Europe, Africa and the Americas to augment their consideration of disability rights cases under the existing regional human rights treaties. It is to be hoped that the international administrative tribunals of international organizations, such as the World Bank Administrative Tribunal or the Administrative Tribunal of the ILO, will likewise use the tools of the CRPD in their settlement of disability rights claims between management and staff members. Finally, as an impetus for domestic level change, the CRPD stands to usher in an unprecedented level of human rights reform in law, policy and practice.

