

A Tale of Disregard? Reception of the Jurisprudence of the United Nations Committee on the Rights of Persons with Disabilities before the European Court of Human Rights

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Abstract

The Convention on the Rights of Persons Disabilities (CRPD) was hailed as a transformative human rights treaty when it came into force in 2008. This is because the CRPD not only promises the remediation of the under-protection of the rights of persons with disabilities in international human rights law, but it also aims to transform the deep and structural inequalities underpinning the governance of disability through law and policy. The Committee on the Rights of Person with Disabilities (CRPD Committee) has adopted and extended this transformative ethos in its jurisprudence. In this article, we examine the reception of this jurisprudence by the European Court of Human Rights (ECtHR) and ask whether and how the CRPD Committee's interpretation of the CRPD has influenced the case law of the ECtHR. By focussing on the right to legal capacity, accessibility and reasonable accommodation, we demonstrate that the transformative jurisprudence of the CRPD Committee was met with visible disregard in Strasbourg. Our findings point to both the importance of specialised human rights treaties and jurisprudence in advancing the rights of historically discriminated groups and the challenges of judicially diffusing transformative protections for the rights of persons with disabilities into general human rights law.

Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol (OP), providing competence to the Committee to receive individual communications, both entered into force on 3 May 2008.¹ At the end of 2023, there were 189 States parties to the CRPD and one entity-party, the European Union.² The competence of the CRPD Committee to receive individual communications has been accepted by 100 state parties in a short time

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¹ CRPD Committee, Report of the Committee on the Rights of Persons with Disabilities on its twenty-sixth session (7–25 March 2022), ¶ 1, UN Doc. CRPD/C/26/2 (May 27, 2022).

² The CRPD is therefore the second most ratified UN Humans Treaty after the Convention on the Rights of the Child (CRC) with 196 state parties.

span.³ By the end of 2023, the CRPD Committee delivered eight General Comments (GCs), 67 individual decisions, including inadmissibility and discontinuance decisions, 41 views on the merits, among which 38 found multiple violations of the Convention, amounting to a rich body of jurisprudence interpreting and applying the CRPD to concrete situations, contexts and facts.

The CRPD has been hailed as a transformative human rights treaty since its adoption. This is because the CRPD seeks to tackle deep structural root causes that undermine the equal recognition of rights of persons with disabilities as human rights. In addition, as Mégret observed, the CRPD is a call to rethink and transform general human rights law and doctrines through the lens of the rights of persons with disabilities. As Mégret put it there are ‘a dozen of divides (in human rights law) which the Convention either ignores, transcends, or substantially reinvents’.⁴ These include inter alia the negative and positive rights divide, the absolute and qualified rights divide, the civil and political v. economic, social and cultural rights divide, the public and private sphere divide, and the immediate obligation v. progressive realization divide.⁵ The CRPD, therefore, is a text that seeks to engender a double transformation: the under-protection of the rights of persons with disabilities in human rights law and the ‘business as usual’ doctrines of general human rights law.

In this article, we examine how the CRPD Committee jurisprudence advances the double transformative ethos of the Convention, and how this jurisprudence has been received by the European Court of Human Rights (ECtHR). We develop the second aspect of our inquiry with a focus on the Strasbourg’s Court’s reception of the CRPD Committee’s case law and GCs. This focus on caselaw and GCs is warranted because these constitute concrete forms of treaty interpretation by the CRPD Committee, capable of clarifying the treaty provisions and applying them to new facts, and circumstances, not necessarily foreseen or left ambiguous by the treaty drafters. As such, case law and GCs are more amenable to consideration by courts in comparison to Concluding Observations issued by the Committee.⁶ Our investigation of the ECtHR’s reception of the CRPD Committee’s jurisprudence is significant because the success of the transformative mission of the CRPD depends on whether the ethos of the treaty becomes part of general of human rights law and domestic law. The ECtHR is a significant institution capable of diffusing CRPD norms not only for forty-six Member States of the Council of Europe, as well as the European Union⁷, but also for other jurisdictions which recognize the persuasive authority of the ECtHR.⁸

The ECtHR adjudicated a significant number of cases concerning the rights persons with disabilities both before and after the entry into force of the CRPD and addressed similar issues

³ The CRPD Committee is also the third most ratified UN individual complaint mechanism, following the Human Rights Committee (116 ratifications) and the CEDAW (114 ratifications).

⁴ Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights*, 12 Int’l J. Hum. Rts. 261, 264 (2008).

⁵ *Id.* at 264-271.

⁶ Eva Brems, *UN Human Rights Treaty Bodies Talking to Domestic Adjudicators Through Their Quasi-judicial Work: An Examination of CERD and CEDAW*, 45 HUM. RTS. Q. 568 (2023); C. Cora True-Frost, *Listening to Dissonance at the Intersections of International Human Rights Law*, 43 MICH. J. INT’L L. 361 (2022).

⁷ All Member States of the Council of Europe with the exception of Liechtenstein, are parties to the CRPD. The CRPD is also the only UN human rights treaty ratified by the European Union.

⁸ The case law of the European Court of Human Rights is invoked by non-state parties to the European Convention on Human Rights, even before the proceedings before UN Human Rights Committees. For example, see *Z v. Australia*, Communication 2049/2011, ¶ 6.2, UN Doc. CCPR/C/111/D/2049/2011 (July 18, 2014); *K.E.R. v. Canada*, Communication 2196/2012, ¶ 4.10, UN Doc. CCPR/C/120/D/2196/2012 (July 28, 2017).

to that of the CRPD Committee in its jurisprudence.⁹ Our investigation into the reception of CRPD jurisprudence by the ECtHR focusses on three areas that have been subject to decisions delivered by both the CRPD and the ECtHR namely, the interpretation of ‘equal recognition before the law’, the interpretation of the positive obligations to ensure accessibility, and the interpretation of the reasonable accommodation duty. Focusing on decisions engaging similar fact patterns allows us to assess whether and how the interpretation and application of the CRPD by the CRPD Committee has had an impact on the interpretation of rights of persons with disabilities by the ECtHR.

In what follows, we first start with a discussion of the transformative ethos of the text of the CRPD and the role of the CRPD Committee’s jurisprudence in concretizing and developing such an ethos. In part 2, we expand on the CRPD Committee’s jurisprudence on the right to exercise legal capacity as well as the interpretation of accessibility and reasonable accommodation norms. In part 3, we analyze the case law of the ECtHR on these three themes with a view to assess the impact of the CRPD’s jurisprudence on the ECtHR’s own case law. We show that whilst the ECtHR is generally open to referring to the text of the CRPD treaty itself, the CRPD Committee’s jurisprudence receives limited engagement, and that the ECtHR disregards the concrete interpretations advanced by the CRPD Committee. In Part 4, we consider the reasons behind this disregard and explore a) the lack of express binding qualities of UN Committee’s jurisprudence; b) the discrepancies between the text and the interpretive canons of the European Convention on Human Rights (ECHR) and the CRPD jurisprudence; c) the lack of fit between the general doctrines of the ECtHR and the CRPD Committee; and d) ableism as the dominant belief system prevalent at the ECtHR. We finally reflect on what the CRPD Committee can do to weaken resistance and maximize its influence in the field of general human rights law.

CRPD Text and Interpretation by the CRPD Committee: A Transformative Ethos and Agenda

Scholarship on the CRDP has consistently underscored the unique contributions of the treaty text to international human rights law.¹⁰ Mégret has seminaly posited that the CRPD text provides ‘a unique opportunity to rethink how we conceive of the human rights of all, and could, as such, be a very fruitful way of charting the future of human rights.’¹¹ Such assessments find resonance in the analysis of Lord and Stein, who suggest that the CRPD ‘breaks new grounds in human rights law’,¹² while Goldschmitt perceives the principles enshrined in the Convention to hold ‘a broader meaning beyond the context of disability rights.’¹³

⁹ See, the Factsheet of the European Court of Human Rights on ‘Persons with disabilities and the European Convention on Human Rights’, April 2023, available at https://www.echr.coe.int/documents/d/echr/fs_disabled_eng.

¹⁰ See, for example, Gauthier de Beco, *The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities*, 68 INT’L & COMP. L.Q. 141 (2019), Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 Hum. Rts. Q. 494 (2008); Janet E. Lord & Michael Ashley Stein, *Charting the Development of Human Rights Law Through the CRPD*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 731, 734 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano eds., 2017).

¹¹ Mégret, *supra* note 4, 74.

¹² Lord & Stein, *supra* note 10, 734.

¹³ Jenny E. Goldschmidt, *New Perspectives on Equality: Towards Transformative Justice through the Disability Convention?*, 35 NORDIC J. HUM. RTS. 1, 6-7 (2017).

These assessments are based on the text of the CRPD, which, both in its preamble and in its substantive provisions, entrench the ‘social model of disability’ by shifting the focus to barriers in society, politics, economics and law from impairments and differences of persons with disabilities in realising the rights of persons with disabilities as human rights.¹⁴ The preamble specifically holds 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’ and recognises ‘the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices’.¹⁵ The preamble further places a strong emphasis on the gap between the theory and practice of the full enjoyment of the rights of persons with disabilities with a specific reference to structural, intersectional, and multiple forms of discrimination faced by persons with disabilities.¹⁶

It is against this backdrop that the text of the CRPD focusses on closing the effective protection gap for persons with disabilities. The treaty text first lays out cross-cutting general principles of interpretation of the rights of persons with disabilities (Article 3) and general obligations triggered by all rights provided for in the Convention (Article 4). This is followed by a list of substantive standalone rights and obligations stretching across the civil, political, economic, social and cultural rights spectrum.

Article 3 CRPD sets out eight general principles for the interpretation of the Convention as a whole: respect for inherent dignity; individual autonomy, including the freedom to make one’s own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities; and respect for the right of children with disabilities to preserve their identities. General obligations of states under Article 4 CRPD range from adopting comprehensive legislative, administrative and other measures to implement the Convention and to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; to refrain from engaging in any act or practice that is inconsistent with the present Convention; to ensure that public authorities and institutions act in conformity with the present

¹⁴ Rosemary Kayess & Phillip French, *Out of Darkness Into Light: Introducing the United Nations Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 7 (2008); Degener argues that ‘the CRPD goes beyond the social model of disability and codifies a human rights model of disability’, which provides a more holistic approach to the inclusion and equality of people with disabilities, through its focus on the ‘human dignity’ of persons with disabilities. Theresia Degener, *A New Human Rights Model of Disability*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 42 (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano eds., 2017). The human rights model of disability complements the social model by emphasizing that the enjoyment of human rights is not defined by one’s impairment or any other status, and is thus extended as a policy to address all human rights matters. Anna Lawson & Angharad E. Beckett, *The Social and Human Rights Models of Disability: Towards a Complementarity Thesis*, 25 INT’L J. HUM. RTS. 348 (2021).

¹⁵ Convention on the Rights of Persons with Disabilities pmb. paras. (e), (n), Dec. 13, 2006, 2515 U.N.T.S. 3.

¹⁶ See, inter alia, the CRPD’s preamble paragraph (k): ‘Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world’; and paragraph (p) ‘Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination 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’.

Convention; and to ensure any person, organisation or private enterprise do not discriminate against persons with disabilities.

Substantive rights include new rights, such as accessibility (Article 9), freedom from exploitation, violence and abuse (Article 16), right to live independently and being included in the community (Article 19), right to personal mobility (Article 20), and right to habilitation and rehabilitation (Article 26). However, substantive rights also include familiar rights in general human rights law, such as the right to life (Article 10), equal recognition before the law (Article 12), liberty and security of person (Article 14). These well-established rights are not merely repeated. Instead, they are reformulated to ensure that persons with disabilities are never treated as ‘objects’, but as the ‘subjects’ of these rights.¹⁷ Article 12 of the CRPD on equal recognition before the law is illustrative of this point. Whilst the first paragraph of this provision requires state parties to ‘reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law’, the second paragraph of this provision requires state parties to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.’ The CRPD’s approach to formulations of both new and familiar rights is characterised as groundbreaking precisely because these rights are underpinned by a dual commitment to autonomy and support. It is this ‘paradigm of interdependence’ that is hailed by scholars as the ‘major advance’ of the Convention,¹⁸ placing an explicit emphasis on the need for ‘widespread structural change in society and increased participation and inclusion for persons with disabilities.’¹⁹

The CRPD Committee’s jurisprudence, which interprets and applies the CRPD to concrete situations is best understood against the backdrop of the transformative features of the CRPD text as a whole. In its General Comments and decisions, the Committee clearly relies on this transformative ethos in its efforts to concretize the provisions of the treaty. The Committee also engages in progressive interpretation of the text in the light of the overall object and purpose of the treaty. The latter is best illustrated in the Committee’s early case law on the definition of disability. According to Article 1 CRPD, persons with disabilities ‘include those who have long-term physical, mental, intellectual, or sensory impairments’ that, when combined with ‘various barriers may hinder their full and equal participation in society’. This definition narrows the definitional scope of disability to impairments of a ‘long-term’ nature, potentially excluding those with temporary or fluctuating impairments. In *SC v. Brazil*, delivered in 2014, however, the Committee offered an expansive temporal definition of disability when it examined a communication concerning a bank teller who, following a motorcycle accident and medical leave of six months, faced demotion upon returning to work. Brazil, defending this demotion, argued that temporary incapacities fell outside the scope of the Convention’s definition of ‘disability’ under Article 1. The Committee, however, held that the definition of disability under the Convention is relational. The interaction between individuals with impairments and the attitudinal environmental barriers they face must be taken into account when determining whether a person falls within the scope of the Convention. On this basis, the Committee found that ‘illness’ is a disability, as the former ‘can develop into an impairment in

¹⁷ Eilionóir Flynn & Anna Arstein-Kerslake, *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, 10 INT’L J. LAW CONTEXT 82, 83 (2014).

¹⁸ Amita Dhanda, *Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities*, 5 INT’L J. ON HUM. RTS. 43, 48 (2008).

¹⁹ Andrea Broderick, *Article 4 CRPD: General Obligations*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 106, 125 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

the context of disability as consequence of its duration or its chronicity'. For this reason, the complaint fell within the scope of the definition of disability under Article 1.²⁰

To date, individual cases brought before the CRPD Committee span across a wide spectrum of rights, encompassing political rights such as the right to vote,²¹ civil rights, inter alia, the right to perform jury duty,²² the right to liberty,²³ and the right to enjoy family life,²⁴ economic rights such as the right to work,²⁵ and social rights, including the right to health,²⁶ the right to social security,²⁷ and the right to inclusive education.²⁸ In what follows we focus on the Committee's concretization of CRPD obligations under three provisions, namely legal capacity (Article 12 CRPD), interpretation of positive obligations to ensure accessibility (Article 9 CRPD), and the interpretation of the reasonable accommodation duty (Article 5 CRPD, Article 14 CRPD, Article 24 CRPD, Article 25 CRPD, Article 27 CRPD, Article 30 CRPD).

Article 12 CRPD: Empowering persons with disabilities to exercise their legal capacity

Article 12 was the focus of the first General Comment of the CRPD Committee in 2014.²⁹ In this General Comment, the CRPD Committee explained that, based on the state reviewed, it identified 'a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention'.³⁰ This misunderstanding, according to the Committee, revealed 'a general failure to understand that 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'.³¹

The Committee's guiding concept in its interpretation of Article 12 CRPD is the respect for 'universal legal capacity'.³² This, according to the Committee, foremost requires replacing all

²⁰ *SC v. Brazil*, Communication 10/2013, ¶ 6.3, UN Doc. CRPD/C/12/D/10/2013 (Oct. 2, 2014). Also see, *Z v. Tanzania*, Communication 24/2014, UN Doc. CRPD/C/22/D/24/2014 (Sept. 19, 2019); *X v. Tanzania*, Communication 22/2014, UN Doc. CRPD/C/18/D/22/2014 (Aug. 18, 2018); *Y v. Tanzania*, Communication 23/2014, UN Doc. CRPD/C/20/D/23/2014 (Aug. 31, 2018) wherein the Committee further emphasised the importance of 'a human rights-based model of disability', which requires taking into account 'the diversity of persons with disabilities' and the 'interaction between individuals with impairments and attitudinal and environmental barriers'.

²¹ *Given v. Australia*, Communication 19/2014, UN Doc. CRPD/C/19/D/19/2014 (Feb. 16, 2018); *Bujdosó et al. v. Hungary*, Communication 631/1995, UN Doc. CCPR/C/67/D/631/1995, (Sept. 9, 2013).

²² *Beasley v. Australia*, Communication 11/2013, UN Doc. CRPD/C/15/D/11/2013 (Apr. 1, 2016); *Lockrey v. Australia*, Communication 13/2013, UN Doc. CRPD/C/15/D/13/2013 (Apr. 1, 2016); *J.H. v. Australia*, Communication 35/2016, UN Doc. CRPD/C/20/D/35/2016 (Aug. 31, 2018).

²³ *X v. Argentina*, Communication 8/2012, UN Doc. CRPD/C/11/D/8/2012 (Apr. 11, 2014).

²⁴ *Domina and Bendtsen v. Denmark*, Communication 39/2017, UN Doc. CRPD/C/20/D/39/2017, Aug. 31, 2018).

²⁵ *Gröniger v. Germany*, Communication 2/2010, UN Doc. CRPD/C/D/2/2010 (Apr. 4, 2014); *Sahlin v. Sweden*, Communication 45/2018, UN Doc. CRPD/C/23/D/45/2018 (Aug. 21, 2020).

²⁶ *H.M. v. Sweden*, Communication 3/2011, UN Doc. CRPD/C/7/D/3/2011, (Apr. 19, 2012); *X v. Argentina*, supra note 23; *Bacher v. Austria*, Communication 026/2014, UN Doc. CRPD/C/19/D/26/2014, (Feb. 16, 2018); *Al Adam v. Saudi Arabia*, Communication 38/2016, UN Doc. CRPD/C/20/D/38/2016 (Sept. 20, 2018); *Mangisto and al-Sayed v. State of Palestine*, Communications 67/2019 and 68/2019, UN Doc. CRPD/C/28/D/67/2019, UN Doc. CRPD/C/28/D/68/2019 (Mar. 23, 2023).

²⁷ *Bellini v. Italy*, Communication 51/2018, UN Doc. CRPD/C/27/D/51/2018 (Aug. 26, 2022).

²⁸ *García Vara v. Mexico*, Communication 70/2019, UN Doc. CRPD/C/28/D/70/2019 (Mar. 23, 2023).

²⁹ General Comment No. 1 (2014) - Article 12: Equal Recognition Before the Law, UN Doc. CRPD/C/GC/1 (May 19, 2014).

³⁰ *Id.* ¶ 3.

³¹ *Id.*

³² *Id.* ¶¶ 8, 25.

forms of substituted decision-making with supported decision-making in all areas of law affecting the legal capacity of persons with disabilities. This approach finds its roots in the wording of the third paragraph of Article 12.³³ As stated in General Comment No. 1, everyone, irrespective of their disability, should have the right to exercise their legal capacity and must be provided the necessary support to do so.³⁴

The Committee's first application of Article 12 CRPD was in the case of *Bujdosó et al. v. Hungary*, delivered a year before the conclusion of General Comment No 1 in 2013. In this case, the Committee seminally held that the exclusion from voting at parliamentary and municipal elections due to the appointment of legal guardians to *Bujdosó* and others was inherently discriminatory and violated Article 29 CRDP (participation in political and public life), read alone and in conjunction with Article 12.³⁵ The Committee was particularly firm in its assertion that 'no individual should be barred from voting due to perceived or actual disabilities', stressing that it would not tolerate 'any reasonable restriction or exception for any groups of persons with disabilities', including those providing for an individualized 'capacity assessment'.³⁶ In *Rekassi v. Hungary* in 2021, the Committee, when addressing the question of legal guardianship in the context of the conclusion of a life insurance policy, further held that a decision on a life insurance policy made without the author's consent constituted a violation of Article 12.³⁷ The Committee's observation was unequivocal: decisions should prioritize the 'individual's will and preferences' and, in cases where these are indeterminable, a 'best interpretation' approach should be employed over a 'best interest' assessment, otherwise there would be violation of Article 12(3), (4) (general obligations), and (5) (equality and non-discrimination) CRPD.³⁸

The Committee's case law has also concretised the right to legal capacity in the context of deprivation of liberty in a series of individual cases. In the landmark case of *Noble v. Australia* in 2016, the Committee found that the domestic court's decision, which declared Noble unfit to plead and resulted in his civil detention for over 13 years, effectively denied him the right to exercise his legal capacity to plead not guilty and to scrutinize the evidence against him.³⁹ Critically, since Noble's intellectual disability was the 'core cause' of his detention, the Committee found a violation of Article 14 (1) (b) of the Convention according to which 'the existence of a disability shall in no case justify a deprivation of liberty'.⁴⁰ Later on in *Medina Vela v. Mexico* in 2019, the Committee confirmed that the failure to provide the support and

³³ Anna Nilsson & Lucy Series, *Art. 12 CRPD: Equal Recognition before the Law*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 339, 341 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018). There is purported ambiguity permeating Article 12, in particular paragraphs 3 and 4. Article 12(3) spells out an obligation of States parties to provide support to exercise legal capacity to people with disabilities on an equal basis with others, while article 12(4) defines safeguards which must be put in place against 'measures relating to the exercise of legal capacity'.

³⁴ General Comment No. 1 (2014), supra no 29, ¶ 15

³⁵ *Bujdosó et al. v. Hungary*, supra note 21, ¶ 9.5.

³⁶ *Id.* ¶¶ 9.4, 9.6.

³⁷ *Rekassi v. Hungary*, Communication 44/2017, ¶¶ 11.6-11.8, UN Doc. CRPD/C/25/D/44/2017 (Sept. 6, 2021),.

³⁸ *Id.*, ¶ 11.6.

³⁹ *Noble v. Australia*, Communication 7/2012, ¶¶ 8.4-8.6, UN Doc. CRPD/C/16/D/7/2012 (Sept. 2, 2016); In 2023, the Committee specified that committal treatment is a form of social control which should be supplanted by official criminal sanctions for confirmed offenders, given that the process used to decide if someone should undergo treatment lacks the safeguards inherent in standard criminal procedures, *X v. Denmark*, Communication 61/2019, ¶ 9.2, UN Doc. CRPD/C/29/D/61/2019 (Aug. 25, 2023).

⁴⁰ *Id.* ¶ 8.7. In 2019, the Committee asserted that indefinite hospitalizations, even without demonstrated violence or abuse, amount to inhuman and degrading treatment, *Doolan v. Australia*, Communication 18/2013, ¶ 8.10, UN Doc. CRPD/C/22/D/18/2013 (Aug. 30, 2019).

accommodation to individuals with disabilities, necessary to exercise their rights in the context of the administration of justice, violated their right to legal capacity, amongst other rights provided for in the Convention.⁴¹

The Committee's interpretation and application of legal capacity under Article 12 CRPD we discussed in this sub-section has the following three features. First, the Committee constructs legal capacity as requiring supported decision-making. This necessitates the rejection of any defense of substitute decision-making in all circumstances in which the legal capacity of persons with disabilities arises in law, policy or judicial procedures. Second, it treats the respect for legal capacity as an immediate obligation for the state parties, requiring domestic courts not to recognise outcomes that are based on substitute decision-making. Third, the Committee views the absence of supported decision-making in the context of legal capacity, whether in law or in judicial decision-making, inherently discriminatory.

Article 9 CRPD: Accessibility norm

The accessibility norm provided under Article 9 CRPD has been one of the most frequent themes in the jurisprudence of the CRPD Committee. The CRPD's second General Comment, issued in 2014, focusses on this norm.⁴² The Committee delivered decisions concerning the lack of accessibility both in the public and private spheres. Applicants before the Committee have raised the lack of accessibility of public services, such as tram lines,⁴³ free-to-air television,⁴⁴ voting services,⁴⁵ jury services,⁴⁶ and tertiary education.⁴⁷ With regard to private services, the lack of accessibility of private banking services,⁴⁸ and even the accessibility of the private property of other natural persons,⁴⁹ have come before the Committee.

Nyusti & Takács v. Hungary in 2013 was the first case decided by the Committee on the interpretation and application of Article 9 CRPD. The case concerned the accessibility of automated teller machines (ATMs) of a private bank, OTP Bank, for visually impaired individuals. Two individuals with visual impairments separately concluded contracts for private account services with the OTP bank. They paid the same level of fees as other OTP clients, but were denied access to the use of their banking services and transactions as the OTP Bank's ATMs lacked Braille fonts, audible instructions, and voice assistance. Hungary argued before the Committee that private entities were not bound by the Convention's accessibility obligations and pointed to the challenges of retrofitting ATMs. However, the Committee, rejected this argument, recalling Article 4(1)(e) of the Convention that requires state parties 'to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise'. In addition, it reminded the state that it is under an immediate obligation to ensure that all new objects, infrastructure, facilities, goods, products, and services are fully accessible for persons with disabilities under Article 9 CRPD. For existing physical environment, transportation, information and communication, and services, including ATMs, definite time-frames needed to be established and adequate resources

⁴¹ *Medina Vela v. Mexico*, Communication 32/2015, ¶ 10.6, UN Doc. CRPD/C/22/D/32/2015 (Sept. 6, 2019).

⁴² General Comment No. 2 (2014) - Article 9: Accessibility, UN Doc. CRPD/C/GC/2 (Apr. 11, 2014).

⁴³ *F v. Austria*, Communication 21/2014, UN Doc. CRPD/C/14/D/21/2014 (Aug. 21, 2015).

⁴⁴ *Henley v. Australia*, Communication 56/2018, UN Doc. CRPD/C/27/D/56/2018 (Aug. 26, 2022).

⁴⁵ *Bujdosó et al. v. Hungary*, supra note 21; *Given v. Australia*, supra note 21.

⁴⁶ *Beasley v. Australia*, supra note 22; *Lockrey v. Australia*, supra note 22.

⁴⁷ *García Vara v. Mexico*, supra note 28.

⁴⁸ *Nyusti & Takács v. Hungary*, Communication 1/2010, UN Doc. CRPD/C/9/D/1/2010 (Apr. 16, 2013).

⁴⁹ *Bacher v. Austria*, supra note 26, ¶ 9.2.

allocated for the removal of barriers.⁵⁰ When applying Article 9 to the facts of the case, the Committee observed that the authors, nor anyone in a similar situation to the authors in Hungary, had access to the ATMs. This led to the finding of a violation of Article 9, wherein the Committee emphasized a gap between the implemented measures and the unachieved accessibility outcomes.⁵¹ This finding seemingly characterized ATM accessibility as an immediate obligation and an obligation of result.⁵² General Comment No. 2, which was issued after this decision, however, refers to an obligation to gradually achieve accessibility in existing infrastructures;⁵³ thus distinguishing the nature of the obligations arising under Article 9 CRPD according to whether the inaccessible element is built pre or post-ratification.

In *F v. Austria*, decided in 2014, a visually impaired individual argued that a brand-new tram line lacking a digital audio system violated Article 9 CRPD. In response, the Austrian government underlined the financially burdensome nature of installing a digital audio system.⁵⁴ The CRPD Committee responded to Austria's defense of the economic burden by emphasizing that 'the obligation to implement accessibility is unconditional... the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities.'⁵⁵ The Committee took into account the fact that most other tram lines were equipped with a digital audio system and that the new tram line was built after Austria's ratification of the Convention. It, therefore, found a violation of Article 9 (1) CRPD with regard to the right to equal access to information and communication technologies and public facilities and services.⁵⁶

The Committee's decisions in *Beasley v. Australia* and *Lockrey v. Australia*, both decided in 2016, delved deeper into the link between accessibility and disabled persons' right to participate fully in all aspects of life. The dismissal of two deaf individuals from jury duty, on account of their communication methods, prompted the Committee to recognize jury duty as 'a manifestation of active citizenship', which fell within the scope of the right to accessibility under Article 9.⁵⁷ The Committee found that, by not providing Auslan interpretation for Beasley and steno-captioning for Lockrey, Australia prevented their participation in a clear 'aspect of life' in violation of their rights under Article 9.⁵⁸

In its efforts to underscore the broad applicability of the Convention, particularly concerning accessibility, the Committee has placed a significant emphasis on the extension of Article 9 to the private sphere. In *Bacher v. Austria* in 2018, the demolition of a wheelchair access to a home due to a private property dispute was claimed to violate the Convention's accessibility rights. Addressing Austria's stance that its obligations under the Convention pertain solely to public facilities and services, excluding 'purely private matters',⁵⁹ the Committee clarified that the State must ensure all its decisions, including those involving private disputes, align with the Convention.⁶⁰ The Austrian domestic court, in prioritizing the right to property of the other

⁵⁰ General Comment No. 2, supra note 42, ¶ 24.

⁵¹ *Nyusti & Takács v. Hungary*, supra note 48, ¶¶ 9.6, 10.1, but see *Id.* ¶ 10 (2)(a).

⁵² Anna Lawson, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takács v. Hungary*, 30 S. AFR. J. HUM. RTS. 380, 385 (2014).

⁵³ General Comment No. 2, supra note 42, ¶ 24

⁵⁴ *F v. Austria*, supra note 43, ¶ 4.9.

⁵⁵ *Id.* ¶ 8.4; See also General Comment No. 2, supra note 42, ¶ 25.

⁵⁶ *Id.* ¶¶ 8.7 -8.8.

⁵⁷ *Beasley v. Australia*, supra note 22, ¶ 8.6; *Lockrey v. Australia*, supra note 22, ¶ 8.6. See Article 9(1) CRPD.

⁵⁸ *Beasley v. Australia*, supra note 22, ¶ 8.6; *Lockrey v. Australia*, supra note 22, ¶ 8.6.

⁵⁹ *Bacher v. Austria*, supra note 26, ¶ 9.2.

⁶⁰ *Id.* ¶ 9.2.

party and overlooking the ‘multifaceted consequences’ on Bacher’s accessibility rights,⁶¹ violated the accessibility norm under the Convention.⁶²

Our review of the CRPD Committee's jurisprudence on accessibility indicates that this norm applies across multiple environments and aspects of life, encompassing both public and private spheres. Aiming to eliminate all barriers that impede equal access for persons with disabilities, the Committee initially took a strict approach when scrutinizing State measures to ensure accessibility, treating the norm as requiring specific results for any existing elements. However, the Committee later distinguished the nature of this obligation depending on whether the inaccessible element existed before or was introduced after the State ratified the Convention. While the Committee has recognized that for pre-existing elements, the accessibility obligation is one of conduct, it treats the obligation to implement accessibility—whether gradually or immediately—as unconditional, meaning that omissions cannot be justified by citing the burden of providing access for persons with disabilities.

Reasonable accommodation duty

The principle of reasonable accommodation permeates the Convention as a whole. It not only appears as part of the overarching equality provision under Article 5, but also as a duty under individual articles of the Convention ranging from the right to liberty and security to the rights to health, work and education. The Committee clarified the scope of reasonable accommodation and explained how it relates to accessibility in its General Comment No. 2 as follows:

Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. Accessibility standards must be broad and standardized. In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access. In such cases, reasonable accommodation may apply.⁶³

The CRPD jurisprudence on reasonable accommodation, therefore, views this principle as a distinct obligation towards specific individuals in concrete situations. The case of *H.M. v. Sweden*, the very first case on the merits issued by the Committee in 2011, concretised the expectations placed on states regarding their duty of reasonable accommodation towards individuals. HM, a woman with a chronic connective tissue disorder was denied permission to construct an exercise pool crucial for her condition due to the Planning and Building Act’s uniform application to all properties.⁶⁴ In this case, the Committee underscored the need for flexible interpretation and application of legislation to cater for individual needs and

⁶¹ *Id.* ¶ 9.8.

⁶² *Id.* ¶ 9.9.

⁶³ General Comment No. 2, *supra* note 42 para. 25. Also see, General Comment No. 4 (2016) – Article 24: The Right to Inclusive Education, UN Doc. CRPD/C/GC/4 (Aug. 26, 2016).

⁶⁴ *H.M. v. Sweden*, *supra* note 26, ¶ 8.2.

emphasized that the rigid application of the Planning and Building Act resulted in discriminatory consequences that denied the complainant's right to healthcare and rehabilitation.⁶⁵ Moreover, the state's rigidity in uniformly applying the law, instead of taking proactive measures to address the needs of H.M., was found to have deprived her of the only option that could facilitate the full enjoyment of her right to live and be included in the community.⁶⁶

Jungelin v. Sweden, decided in 2014, provided the Committee with its first occasion to address reasonable accommodation in the context of the right to work and the relationship between undue burden and the reasonable accommodation in individual cases. Jungelin, impaired in sight, had not been hired by the Social Insurance Agency because the Agency's computer systems could not be adapted for her sight impairment. The justification was that adjusting their systems to cater for her would be overly complicated and lengthy. In this case, the Committee affirmed that states enjoy a certain margin of appreciation when assessing the reasonableness of accommodation measures and determined that the refusal in question was grounded on objective and reasonable concerns.⁶⁷ However, this decision was not unanimous. Six Committee members dissented, voicing concerns about the expansive interpretation of the concept of 'undue burden' in assessing the reasonableness of accommodations.⁶⁸

Given v. Australia is the leading case of the Committee in clarifying the relationship between accessibility as an ex-ante duty and reasonable accommodation as a duty that requires addressing specific needs of particular individuals in a specific context *ex nunc*. Given had cerebral palsy and wanted to cast her vote by secret ballot on an equal basis with the rest of the electorate. She was unable to do so because her polling station did not have adaptive technology (a technology which was available in state elections, but not in federal elections). The assistance she was provided with to vote meant that she could not vote in secret. For these reasons, she argued a violation of Article 29 (right to participate in public life) in conjunction with Article 9 and Article 5 of the Convention. The Australian government counterargued that the CRPD does not require the provision of assistive technologies under the state's duty to make all public services accessible to persons with disabilities. It asserted that the provision of such technologies is not a justiciable, but an aspirational obligation under the Convention.⁶⁹ Moreover, Australia argued that the author was given assistance to vote and was thus reasonably accommodated and that, in any case, the cost of providing assistive technologies would impose an undue burden on the authorities.

In response, the Committee affirmed that Article 29 of the CRPD requires ensuring that voting procedures are accessible, appropriate and easy to understand and use. The Committee then made a distinction between accessibility as an obligation towards groups and reasonable accommodation as an obligation towards individuals — emphasizing that 'state parties have

⁶⁵ *Id.* ¶ 8.8.

⁶⁶ *Id.* ¶ 8.9; Subsequently, in a series of cases against Spain - *MRiV, VFC* and *JM* - the rigid laws and the absence of genuine dialogue on reasonable accommodation, concerning modified duties and mandatory retirements, were found to be in violation of the right to work, read alone and in conjunction with the right to non-discrimination. *M.R. i V. v. Spain*, Communication 48/2018, ¶ 7.10, UN Doc. CRPD/C/26/D/48/2018 (Mar. 24, 2022); *V.F.C. v Spain*, Communication 34/2015, ¶¶ 8.6-8.10, UN Doc. CRPD/C/21/D/34/2015 (Apr. 2, 2019); *J.M. v. Spain*, Communication 37/2016, ¶ 9.11, UN Doc. CRPD/C/23/D/37/2016 (Aug. 21, 2020).

⁶⁷ *Jungelin v. Sweden*, Communication 5/2011, ¶¶ 10.5-10.6, UN Doc. CRPD/C/12/D/5/2011 (Nov. 14, 2014),.

⁶⁸ *Id.*, Joint opinion of Committee members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (dissenting), ¶ 4; *Id.*, Individual opinion of Damjan Tatic (dissenting).

⁶⁹ *Given v. Australia*, supra note 21, ¶ 4.11.

the duty to provide accessibility before receiving an individual request to enter or use a place or service.⁷⁰ The Committee held that the lack of an explicit mention of assistive technologies under Article 29 does not mean that state parties can exclude the provision of such technologies to persons with disabilities. This is because under Article 9(2) of the Convention, state parties ‘should also take appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems.’⁷¹ The holistic interpretation of the Convention, therefore, required states not to dismiss the provision of such technologies for the purpose of equal access to voting. The gradual nature of the accessibility obligation had to be understood as an unconditional obligation and not as an aspirational one.⁷² In its decision, the Committee further underlined that the availability of assistive technologies in state elections undermined Australia’s argument that the provision of this technology to the applicant would impose an undue burden.

Our analysis shows that the Committee’s jurisprudence on reasonable accommodation has developed over time, emphasizing the individualistic nature of the reasonable accommodation duty in specific contexts and situations and the important role it plays countering the rigidity of ableist laws and policies. Whilst the Committee has recognised that states enjoy a margin of appreciation it has kept this margin narrow. Finally, the Committee has been careful to distinguish between reasonable accommodation and accessibility obligations of states, showing that a state may be in violation of both, only one or none depending on the facts of the case. Significantly, as held in *Given*, accessibility as an *ex ante* duty needs to be interpreted broadly in the context of states’ obligations to make assistive technologies available to persons with disabilities.

Reception of CRPD Jurisprudence by the European Court of Human Rights

The previous section has shown that the CRPD Committee has a rich jurisprudence establishing principles of interpretation for assessing concrete cases. In this section we focus on the reception of this jurisprudence by the ECtHR and show that the Court’s engagement with the CRPD jurisprudence on equal recognition before the law, accessibility and reasonable accommodation has been one of disregard. This is despite the fact that the ECtHR generally recognises that it will interpret the ECHR, as far as possible, in harmony with other rules of international law,⁷³ including the CRPD.⁷⁴ While the Court has engaged with the CRPD text since its adoption, it has done so by decoupling it from the CRPD Committee jurisprudence.⁷⁵

The ECtHR first acknowledged the text of CRPD one year after its entry into force, in 2009, in *Glor v. Switzerland*. This case concerned a person who had to pay an exemption tax for having been found unfit for military service due to his diabetes. In this case the Court introduced the CRPD in order to support its assessment that there was an emerging ‘worldwide consensus on the need to protect people with disabilities from discriminatory treatment’.⁷⁶ A year later in

⁷⁰ *Id.* ¶ 8.5

⁷¹ *Id.* ¶ 8.6

⁷² *Id.* ¶ 8.8.

⁷³ *Al-Adsani v. United Kingdom*, App. 35763/97, Eur. Ct. H.R., ¶ 55 (Nov. 21, 2001).

⁷⁴ *Enver Şahin v. Turkey*, App. 23065/12, Eur. Ct. H.R., ¶ 60 (Nov. 30, 2018).

⁷⁵ Not all judgments concerning the rights of persons with disabilities refer to the CRPD treaty, see e.g. *P.W. v. Austria*, App. 10425/19, Eur. Ct. H.R. (Jun. 26, 2022).

⁷⁶ *Glor v. Switzerland*, App. 13444/04, ¶ 53 (Apr. 30, 2009). Also see,

Kiss v. Hungary, which concerned stripping of voting rights of the applicant because he was under a partial guardianship, the Court referred to Articles 1 (purpose), 12 (equal protection before law) and 29 (participation in public life) CRPD both in its ‘relevant law’ section and in its substantive reasoning.⁷⁷ In *Kiss*, the ECtHR found that disenfranchising certain individuals pursued a legitimate aim, namely that of ‘ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs’.⁷⁸ It then held that the blanket and automatic restriction of voting rights to those under partial guardianship was disproportionate. Furthermore, the Court opined that the ‘the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny’.⁷⁹ For the Court, the key problem was the lack of ‘individualised judicial evaluation’ of each person under partial guardianship, which constituted an excessive interference and a violation of Article 3 of Protocol 1 on the right to vote.⁸⁰ It is important to note that, when this judgment was delivered, the CRPD Committee had not yet issued any General Comments or decisions on legal capacity and the Court’s decision, therefore, relied on its own interpretation of Article 12 and 29 of the CRPD. In hindsight, however, the supported decision-making principle played no role in the Court’s assessment in *Kiss*. The Court did not challenge the lack of supported decision-making when assessing the legitimate aim or the proportionality of the restriction.

Two years post-*Kiss*, the *Stanev v. Bulgaria* Grand Chamber judgment of 2012 marked a progressive, yet cautious, development in the ECtHR’s case law on the rights of persons with intellectual and psycho-social disabilities. The case concerned a man placed under involuntary guardianship and confined to a specialized home, claiming violations of inter alia his right to liberty, freedom from inhuman and degrading treatment, and access to justice. The Court first recognized that the keeping of Stanev in a specialised home constituted detention within the meaning of Article 5 ECHR, especially considering that it was the state authorities that confined him there without his consent, the imposition of strict rules on leaves of absence, and the extensive duration of his placement.⁸¹ The Court further held that this constituted an unlawful deprivation of liberty as his detention in the special home lacked his consent, there were no regular medical examinations by the authorities, and there was no evidence that the person posed a risk of violence to himself or others.⁸² In addition, the Court further declared that preventing disabled individuals from direct court access to restore their legal capacity violated their fair trial rights under Article 6 ECHR. While doing so, it specified that ‘the Court is 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’ with reference to the CRPD amongst others.⁸³ *Stanev* demonstrates notable progress for access to justice for persons with disabilities; yet, the Court also refrained from ruling out disability as a potential basis for restricting the right to liberty or making a wholesale commitment to a universal right to legal capacity in line with the CRPD Committee.

Emily Kakoullis & Yoshikazu Ikehara, *Art. 1 CRPD: Purpose*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 35 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

⁷⁷ *Kiss v. Hungary*, App. 38832/06, Eur. Ct. H.R., ¶¶ 14, 44 (May 20, 2010).

⁷⁸ *Id.* ¶ 38 (the applicant also accepted that this was a legitimate aim).

⁷⁹ *Id.*

⁸⁰ *Id.* ¶ 44.

⁸¹ *Stanev v. Bulgaria*, App. 36760/06, Eur. Ct. H.R., ¶ 132 (Jan. 7, 2012).

⁸² *Id.* ¶¶ 148-160.

⁸³ *Id.* ¶¶ 244-245.

The Strasbourg Court's case law has, therefore, used the CRPD as a lynchpin of worldwide trends for the protection of right of persons with disabilities, but neither *Kiss* nor *Stanev* engaged substantively with the transformative ethos of the CRPD and its call for revisiting the well-established rights and doctrines in general human rights law. We now turn to how the Court has received the burgeoning case law of the CRPD Committee in the fields of legal capacity, accessibility, and reasonable accommodation.

Reception of the CRPD's Article 12 Jurisprudence by the ECtHR: Open resistance

The tension between the CRPD Committee's and the ECtHR's interpretations of the equal protection before law provision of the CRPD treaty first materialized in the *A.-M.V. v. Finland* case in 2017. By the time *A.-M.V. v. Finland* was deliberated, the CRPD Committee had already delivered *Bujdosó et al v. Hungary* and its General Comment No. 1. It had, therefore, already clarified that it would not compromise on what it considered to be the core principles concerning the right to legal capacity, namely finding all forms of substitute decision-making procedures as a violation of Article 12 CRPD and demanding the replacement of these procedures with supported decision-making models, by, inter alia, taking into account the diversity of persons with disabilities.

The *A.-M.V.* case concerned an individual with cognitive impairments who wanted to change their guardian and decide their place of residence. In this case, the ECtHR considered both Article 12 of the CRPD and General Comment No 1. Although the latter unambiguously states that the 'best interests' standard is inconsistent with Article 12 and affirms that states must transition from substitute decision-making regimes to a system of supported decision-making, the ECtHR chose not to follow the interpretive principles laid out in General Comment No. 1. Instead, it held that 'the applicant's well-being and interests required that the mentor arrangement be maintained' because their disability prevented them from fully 'understanding the significance and implications of the decision they wished to make'.⁸⁴ An important missing element in the Court's judgment is the lack of any discussion of the states' positive obligation to provide the necessary support and assistance to enable persons with intellectual or psychosocial disabilities to exercise their legal capacity, liberty, and autonomy. The ECtHR, therefore, steered away from fully adopting the social model of disability that the CRPD's case law openly called for in similar cases.⁸⁵

The right to vote for persons with disabilities has emerged as the second site of resistance to the CRPD's case law on Article 12 in a series of cases starting with *Strøbye & Roselind v. Denmark*. The proactive inclination shown in *Kiss* a decade ago, and the response by the CRPD's Committee in *Bujdosó et al.*, which had, as suggested by the third-party interveners, aimed to 'influence the understanding of the European Court of Human Rights',⁸⁶ initially appeared to set a favourable scene for the Court. The case concerned authors who had been prevented from voting in the 2015 parliamentary elections in Denmark for being under guardianship and having failed the capacity assessments required to be able to vote. Despite the CRPD Committee's clear assertion in *Bujdosó et al.*, regarding the absolute nature of the right to vote on an equal basis with others, the ECtHR did not engage with or even acknowledge the Committee's case law in this case.

⁸⁴ *A.-M.V. v. Finland*, App. 53251/13, Eur. Ct. H.R., ¶ 89 (Mar. 23, 2017).

⁸⁵ See also Delia Ferri & Andrea Broderick, *The European Court of Human Rights and the Human Rights Model of Disability: Convergence, Fragmentation, and Future Perspectives*, in EUROPEAN YEARBOOK ON HUMAN RIGHTS 261, 288 (Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak & Gerd Oberleitner eds., 2019)

⁸⁶ *Bujdosó et al. v. Hungary*, supra note 21, ¶ 5.5.

Instead, the ECtHR noted the remarks made by the Danish Minister for Justice, in which he rebuked the *Bujdosó et al.* decision in favor of *Kiss* and pointed out that ‘[u]nlike judgments delivered by the European Court of Human Rights, views issued by the Committee on the Rights of Persons with Disabilities are, however, not binding on Denmark.’⁸⁷ The Court itself limited its engagement with the CRPD to only citing Articles 12 and 29 of the CRPD and the Committee’s Concluding Observations on Denmark’s State Report.⁸⁸ The ECtHR then went on to reaffirm that the right to vote was not absolute and that the contested restriction pursued a legitimate aim.⁸⁹ In assessing proportionality, it considered that only persons deemed legally incompetent after an individualized judicial evaluation were disenfranchised, thus distinguishing this case from *Kiss*.⁹⁰ The Court then proceeded to find that the measure fell within Denmark’s margin of appreciation, given that there was no common ground between the national laws of the Contracting States, as well as ‘at the international and European level’, to uncouple disenfranchisement from deprivation of legal capacity.⁹¹

This reference to the lack of a European consensus was repeated three months later in *Caamaño Valle v. Spain*. This case concerned the disenfranchisement of the applicant’s cognitively disabled daughter. The Court clarified its stance, noting that while it is not its role ‘to express an opinion on whether Article 29 of the CRPD imposes stricter obligations’ than Article 3 Protocol 3, the majority of state parties to the latter instrument ‘seem to allow for restriction based on the mental capacity of the individual concerned’.⁹² This was protested by Judge Lemmens in his dissenting opinion. He argued that the fact that 45 of the 47 member states of the Council of Europe had ratified the CRPD indicated that there was a consensus on the unconditional right of persons with intellectual disability to exercise their right to vote.⁹³ In *Marinov v. Bulgaria* in 2022, the Court found a violation once again due to the automatic nature of disenfranchisement on account of the applicant being under partial guardianship, reiterating the principles it set out in *Kiss*, but not addressing principles laid out by the CRPD Committee.⁹⁴

Accessibility and reasonable accommodation: Lack of principled engagement with the CRPD’s jurisprudence

The distinction between the accessibility norm and reasonable accommodation, that the Committee has extensively drawn in its General Comments and case law, has also received a lack of principled engagement by the ECtHR. The ECtHR first introduced reasonable accommodation as a standard to assess whether the state authorities discriminated against a

⁸⁷ *Strøbye & Roselind v. Denmark*, Apps. 25802/18 & 27338/18, Eur. Ct. H.R., ¶ 60 (Feb. 2, 2021).

⁸⁸ *Id.* ¶ 70.

⁸⁹ *Id.* ¶ 97.

⁹⁰ *Id.* ¶ 107.

⁹¹ *Id.* ¶¶ 111-112. 19 European States had laws restricting the voting rights of individuals lacking legal capacity, and the Venice Commission acknowledged in a 2002 report that, under specific conditions, individuals could be deprived of their right to vote, see *Id.* ¶ 68.

⁹² *Caamaño Valle v. Spain*, App. 43564/17, Eur. Ct. H.R., ¶ 59 (May 11, 2021).

⁹³ *Id.*, Dissenting Opinion Judge Lemmens, ¶ 8-9. He also points to the Venice Commission, Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, ¶ 2, CDL-AD(2011)045, and the CoE’s Commissioner for Human Rights, whom intervened in the case claiming ‘the right to vote of persons with disabilities should be upheld without exception’. *Id.* ¶ 10.

⁹⁴ *Marinov v. Bulgaria*, App. 26081/17, Eur. Ct. H.R. (Feb. 15, 2022).

person with a disability in *Çam v. Turkey* in 2016.⁹⁵ This case concerned a blind student who was denied admission to a music academy, prompting the Court to find this denial to be a violation of Article 14 (non-discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education) of the ECHR.⁹⁶ Notably, the applicant did not specifically raise the issue of reasonable accommodation. However, the ECtHR raised it on its own initiative. The Court, directly citing the text of the CRPD, held 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.

The Court then determined that ‘the refusal to enrol the applicant in the Music Academy was based solely on the fact that she was blind’ and criticized the failure of the domestic authorities to consider ‘the possibility that reasonable accommodation might have enabled her to be educated in that establishment.’⁹⁷

Whilst this case may at first sight suggest a convergence between the CRPD Committee and the ECtHR, the Court has not referred to any of the General Comments or the individual decisions of the CRPD Committee on reasonable accommodation when adopting this doctrine into its own case law. This meant that the Court did not distinguish between *ex ante* non-conditional obligations of accessibility to ensure access to all blind persons to the music academy and the *ex nunc* obligations of allowing access to the academy for the applicant in order to remedy the particular situation. The government attempted to defend the decision by underlining that the Music Academy had no resources, equipment, teaching staff for students with disabilities, nor any regulations on matters relating to disability.⁹⁸ In doing so, the government admitted that they failed in their obligation to make the academy accessible. In response, the Court held that the failure of the authorities concerned reasonable accommodation. In so doing, it offered only a cursory list of failures, namely a failure ‘to identify the applicant’s needs or to explain how her blindness could have impeded her access to a musical education’ and a failure to consider ‘physical adaptations in order to meet any special educational needs arising from the applicant’s blindness’.⁹⁹

The Court’s lack of principled engagement with the CRPD Committee’s jurisprudence on accessibility and reasonable accommodation continued in the case of *Enver Şahin v. Turkey*, issued two years later.¹⁰⁰ In this case, the applicant requested adjustments to the university buildings so that he can access them with a wheelchair. Instead, he was offered the option of being carried by someone to the upper floors as the university lacked the funds to make the

⁹⁵ *Çam v. Turkey*, App. 51500/08, Eur. Ct. H.R. (Feb. 23, 2016). Note that there was a reference to reasonable accommodation in *Z.H. v. Hungary*, App. 28973/11, Eur. Ct. H.R. (Nov. 8, 2012) but the Court does not define it as part of discrimination.

⁹⁶ *Id.* ¶ 69.

⁹⁷ *Id.* ¶¶ 65, 66, 68.

⁹⁸ *Id.* ¶ 51.

⁹⁹ *Id.* ¶ 68.

¹⁰⁰ *Şahin v. Turkey*, supra note 74, ¶ 60

necessary building adjustments. The majority found a violation of non-discrimination, in conjunction with the right to education, due to the university's failure to explore alternative solutions that respect the applicant's need for independence and autonomy.¹⁰¹ Judge Lemmens, once again, criticized this finding in his dissenting opinion by pointing out that what was at stake in this case was accessibility of a building, rather than how Mr. Şahin can access classrooms through reasonable accommodation. With regard to accessibility, however, Judge Lemmens emphasized that the facts of the case would not have necessarily led to a violation outcome, as accessibility is subject to gradual implementation.

The Court's conflation of accessibility and reasonable accommodation was further evidenced in the 2021 case of *Toplak and Mrak v. Slovenia*. Although the case, concerning voting accessibility for individuals with muscular dystrophy, appeared to initially be about accessibility of voting facilities,¹⁰² the Court reverted to framing it as a matter of reasonable accommodation.¹⁰³ Illustrating its willingness to engage with CRPD standards and jurisprudence, the Court cited Article 29 of the CRPD, General Comment No. 2 on accessibility, General Comment No. 6 on equality and non-discrimination, and the CRPD Committee's decision in *Given v. Australia*.¹⁰⁴ However, the Court then opined, with a reference to General Comment No. 2 on accessibility, that '[w]hile adaptations to the voting facilities (such as tables, voting booth and ballot box) were not made in advance, assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs'.¹⁰⁵ As Vrancken observed, 'it goes against the spirit' of General Comment No. 2 to consider 'reasonable accommodation as an equivalent alternative to accessibility'.¹⁰⁶ Indeed, if one adheres to the distinction between accessibility and reasonable accommodation, the adaptation of the polling structure, which was set up after the CRPD's entry into force for Slovenia, to wheelchair users was a general access measure that could not be rectified by placing the onus on affected individuals to request individual reasonable accommodations.

Moreover, the Court challenged once again the essence of accessibility, as delineated by the CRPD Committee, when it applied a disproportionate burden test to assess whether Slovenia had to provide access to assistive technology to enable one of the applicants to vote independently.¹⁰⁷ In doing so, the ECtHR noted that the CRPD Committee in *Given v. Australia* confirmed that assistive technologies are one way, though not the only means, to support disabled individuals in voting.¹⁰⁸ However, the Court overlooked a crucial point in *Given*: the state has an absolute obligation to enable the individual to cast her vote independently and in privacy. The Court - implicitly upholding the view that Judge Lemmens expressed in *Enver Şahin* three years earlier - found that, since the applicant had the possibility of assistance by a person of his own choice, Slovenia had struck 'a fair balance between the protection of the interests of the community and respect' for the applicant's rights and freedoms, 'as safeguarded by the Convention.'¹⁰⁹

¹⁰¹ *Id.* ¶ 71.

¹⁰² *Toplak and Mrak v. Slovenia*, Apps. 34591/19 & 42545/19, Eur. Ct. H.R., ¶ 117.

¹⁰³ *Id.* ¶ 121.

¹⁰⁴ *Id.* ¶¶ 54-57.

¹⁰⁵ *Id.* ¶ 119.

¹⁰⁶ Merel Vrancken, (*Not*) *Applying CRPD Standards and the Question of Fair Referencing: Toplak and Mrak v. Slovenia*, STRASBOURG OBSERVERS (Feb. 8, 2022), available at <https://strasbourgoobservers.com/2022/02/08/not-applying-crpd-standards-and-the-question-of-fair-referencing-toplak-and-mrak-v-slovenia/>.

¹⁰⁷ *Toplak and Mrak v. Slovenia*, supra note 102, ¶ 128.

¹⁰⁸ *Id.* ¶ 127.

¹⁰⁹ *Id.* ¶ 130.

A similar conflation of accessibility and reasonable accommodation can be observed in *Helgi Lárusson v. Iceland* in 2022, which dealt with accessibility in respect of public cultural buildings. Despite referencing the CRPD and General Comment No. 2 on accessibility, General Comment No. 6 on equality and non-discrimination,¹¹⁰ the Court, again, assessed the accessibility issue from the angle of reasonable accommodation, concluding that it would be burdensome for the state to implement necessary measures.¹¹¹ Overall, the ECtHR's approach distinctly frames accessibility challenges through the prism of the state's duty to provide reasonable accommodation. Rather than mere confusion, the Court's case law seems to reveal a refusal to interpret and integrate accessibility as an autonomous norm imposing an unconditional obligation, as opposed to a qualified obligation, which allows for a balancing exercise between individual rights and general interests.

Appraisal: Reasons for Disregard, Potential for Deeper Convergence?

The CRPD Committee has generated an impressive body of case law to date. This case law challenges many entrenched laws and practices that have historically marginalized persons with disabilities. Central to the Committee's jurisprudence is a demand for respect for the diversity, autonomy, and inclusion of the rights of persons with disabilities in general human rights law. For this to succeed, the Committee calls for a paradigmatic shift to ensure that the rights of persons with disabilities attain priority over the legitimate aims historically informed by able or ableist societies. The goal, therefore, is not the mere integration of persons with disabilities into existing systems through minimalist adjustments to these systems. Instead, the goal is an active dismantling of structural disadvantages, stereotypes, and discrimination. In pursuing an interpretation of the Convention that is driven by its object and purpose, the CRPD Committee challenges well-established legal doctrines — in particular, those reflecting ableist paradigms — within international human rights law. Yet, as our study shows, the impact of the CRPD jurisprudence is limited before the ECtHR, a key site for the diffusion of the interpretations of the CRPD Committee into general human rights law.

We identify four reasons for this disregard as well as obstacles that may oppose deeper convergence between the CRPD case law and the ECtHR and probe their explanatory strength. These are a) the lack of express binding qualities of UN Committee's case law; b) the discrepancies between the text and the interpretive canons of the ECHR and the CRPD Committee; and c) lack of fit between the general doctrines of the ECtHR and the CRPD Committee; and d) ableism as the dominant belief system prevalent at the ECtHR.

The first possible reason is a general problem in human rights treaty interpretation. It concerns whether UN human rights treaty committees can be treated as emitting authoritative interpretations of the UN human rights treaties. The general view is that the interpretation of the Committees is highly authoritative, or in the words of the ICJ must be ascribed 'great weight'¹¹² when other international courts and tribunals interpret UN human rights treaties. These interpretations, however, do not expressly constitute primary sources of international

¹¹⁰ *Lárusson v. Iceland*, App. 23077/19, Eur. Ct. H.R., ¶ 57 (May 31, 2022).

¹¹¹ *Id.* ¶ 63. Andrea Broderick, *Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings*, STRASBOURG OBSERVERS (Aug. 30, 2022), available at <https://strasbourgoobservers.com/2022/08/30/arnar-helgi-larusson-v-iceland-muddying-the-waters-on-inaccessibility-of-public-buildings/>.

¹¹² *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, ¶ 67, 2010 ICJ Rep. 639 (Sept. 30, 2010); see also BVerfG, Order of the Second Senate of 29 January 2019 - 2 BvC 62/14, ¶ 65.

law. As we have shown, the ECtHR regularly cites the CRPD, recognising it as part of its international legal environment. The CRPD Committee jurisprudence, however, are often decoupled from this legal environment or are selectively used.¹¹³ In *N v. Romania*, a case that concerned the detention of the applicant in a psychiatric hospital, the Court underlined that it is up to the Court to decide the significance of CRPD jurisprudence when it held:

The Court has consistently held that it 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. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them. In the present case, the Court considers relevant the provisions of the United Nations Convention on the Rights of Persons with Disabilities as interpreted by the Committee on the Rights of Persons with Disabilities, and the other relevant international instruments cited.¹¹⁴

The selective coupling and decoupling of UN human rights treaties and the jurisprudence of their Committees can also be observed in the practice of other international courts. The ICJ's interpretation of the scope of the Convention on the Elimination of Racial Discrimination as not including discrimination on the grounds of nationality, for example, was contrary to the Committee on the Elimination of Racial Discrimination (CERD)'s interpretation of the same definition.¹¹⁵ Commentators, however, point out that Strasbourg's decoupling of the text of a UN core human rights treaty from the jurisprudence of its Committee are much less frequent in respect of the ICCPR and the Human Rights Committee.¹¹⁶

The second possible reason, we identify, is the ECtHR's finding of incompatibility between the jurisprudence of the CRPD and the ECHR. Indeed, the text of the ECHR bears distinct imprints of time and philosophy. For instance, Article 5 of the ECHR, while detailing the right to liberty, provides an exception for persons deemed of 'unsound mind'. Such stipulations, reflective of the era they originate from, are clearly at odds with Article 14 CRPD. This may explain why the Court decides many cases relating to the right to liberty of persons with cognitive impairment without any reference to Article 14 CRPD.¹¹⁷ Similarly, the right to free elections under Article 3 of the First Protocol to the ECHR provides for the right to vote, while Article 29(a)(ii) of the CRPD explicitly protects the right 'to vote by secret ballot', a nuance not expressly covered in the former.¹¹⁸ Finally, the ECHR does not have any provisions concerning accessibility in contrast to the CRPD, which may explain its lack of engagement with this particular obligation. Whilst textual differences between the ECHR and CRPD are

¹¹³ For an example of the active use of CRPD case law to bring ECtHR case law closer to it, however, see, *N v. Romania*, App. 59152/08, Eur. Ct. H.R., ¶¶ 102-103 (Nov. 28, 2017). The Court referred to the Committee's Guidelines on the right to liberty and security of persons with disabilities and *Noble v. Australia*. The ECtHR deemed N's detention arbitrary, primarily due to inadequate reviews assessing societal danger, but also suggested a potential shift by noting that 'such detention might be in contention, especially considering Article 14 § 1 (b) CRPD, which asserts that a disability should never serve as a justification for deprivation of liberty', *Ibid.* ¶ 159.

¹¹⁴ *Ibid.* ¶ 147.

¹¹⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, ¶ 105, ICJ Rep. 2021, p. 71 (Feb. 4, 2021).

¹¹⁶ Anja Seibert-Fohr, *The European Court of Human Rights and the Human Rights Committee: Two Actors with a Common Mission*, Eur. Conv. on Hum. Rts. L. Rev. 1 (2024) (see the numerous cases referred therein).

¹¹⁷ See eg *P.W. v. Austria*, supra note 75; *W.D. v. Belgium*, App. 73548/13, Eur. Ct. H.R. (Sep. 6, 2016).

¹¹⁸ In contrast, International Covenant on Civil and Political Rights art. 25(b), Dec. 16, 1966, 999 UNTS 171 provides for the right to vote by secret ballot.

important, however, it must also be borne in mind that the ECtHR is well known for interpreting the Convention as a living instrument. It has also referred to the CRPD and provisions within CRPD, such as reasonable accommodation, to inform the contemporary interpretation of the ECHR.

The third possible reason, we identify is that the ECtHR does not follow the interpretations of the CRPD Committee so long as these are at odds with its own long-standing interpretative doctrines, in particular the operation of the doctrines of European consensus and margin of appreciation in assessing legitimate aims and the balancing of rights with public interests.¹¹⁹ The margin of appreciation doctrine provides for deference to national legislatures, executives and courts in particular when the Court finds that there is no clear European consensus concerning the widening of the scope of a Convention right or narrowing the remit of legitimate aims. The Court is also known for employing the ‘global consensus’ doctrine to narrow down the margin of appreciation of member states with reference to globally ratified treaties.¹²⁰ The Court’s case law on voting rights for persons with disabilities, however, shows that the Court, instead of relying on the near universal ratification of the CRPD in Europe, relies on the lack of implementation of CRPD provisions to find a lack of European consensus. In addition, the Court allows for a wide margin of appreciation when it accepts the legitimate aims put forward by states despite clear guidance from the CRPD Committee that acceptance of such legitimate aims (such as guardianship arrangements that do not respect supported decision-making) would amount to discrimination under the CRPD.

Our analysis shows that the lack of fit between the general doctrine of ECtHR and CRPD Committee jurisprudence has explanatory power in the two issue-areas we examined. First, the ECtHR stays clear from the CRPD’s absolute and universal construction of the legal capacity norm and in turn its interpretation of the right to vote as an absolute right. Instead, the Court treats this right as a qualified right. This may be because of the narrow sets of interests the ECtHR protects under absolute right constructions. Beyond the universally accepted gross violations like the prohibition of torture or slavery, the ECtHR typically reserves the status of ‘absolute rights’ for rights intrinsic to one’s inner thoughts and beliefs. In contrast, the CRPD Committee interprets certain rights, including the right to legal capacity or the right to be treated equally, as having an absolute nature, highlighting the chasm between the two bodies. Second, the Court’s lack of engagement with accessibility as an unconditional obligation also points to a tension with the margin of appreciation doctrine. For the ECtHR, the realisation of the accessibility obligation ultimately falls within the discretion of states. The reasonable accommodation obligation, on the other hand, fits better with existing doctrines because it calls for balancing the duty to accommodate against the undue burden that this may impose on the state. In contrast, the CRPD Committee’s understanding proposes that there is no margin of appreciation as to what obligations of result need to be achieved in the realm of accessibility and the gradual measures to achieve such results require strict scrutiny. Whilst the CRPD Committee also recognises that states have a margin of appreciation to assess reasonable accommodation measures, its understanding of such margin remains considerably narrower than the ECtHR.

The fourth and final possible reason we identify is the dominance of ableism, defined by Campbell as ‘a network of beliefs, processes and practices that produces a particular kind of

¹¹⁹ Jens T. Thielen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (2020).

¹²⁰ *Demir and Baykara v. Turkey*, App. 34503/97, Eur. Ct. H.R., ¶ 85 (Nov. 12, 2008).

self and body (the corporeal standard) that is projected as perfect, species-typical and therefore essential and fully human',¹²¹ deep in the world views of the judges of the ECtHR. This deeper structural reason may explain why the rights of persons with disabilities receive recognition when they fall within the parameters of the ableist world. The Court's willingness to embrace legitimate aims restricting the rights of persons with disabilities without any scrutiny, its full trust in judicial appointments of legal guardians regardless of whether these appointments respect supported decision-making, and its conditional embrace of reasonable accommodation of persons with disabilities so long as this does not create undue burdens from an ableist perspective can be seen as manifestations of this deeply entrenched belief system, presented through human rights doctrines.

Against the backdrop of these potential reasons with varying explanatory value, what, if anything, can the CRPD Committee do to increase the diffusion of its jurisprudence into the case law of the European Court of Human Rights? Admittedly, the CRPD Committee's hands are tied with regard to the understanding of the legal status of its views by the ECtHR or by any other domestic or international court. Whether the views of the UN Committees are treated as highly authoritative or binding depend on each and every legal system.¹²² With regard to the textual discrepancies between the ECHR text and interpretative canons, this is also not an area in which the CRPD Committee can exert much influence, given that it is up to the ECtHR to interpret its text and doctrines as a living instrument in the light of its broader international legal environment.

The CRPD Committee may, however, seek to have a positive impact by making its case law more court-friendly, closing the doctrinal gap between its jurisprudence and the ECtHR's case law. As we have shown, the Committee has been ambitious in interpreting the CRPD, but it may not have consistently provided clear step-by-step judicial reasoning when it establishes its principles of interpretation or when it applies such principles to facts. A more judicialized form of treaty interpretation and application may well improve the diffusion of the case law of the CRPD Committee into general human rights law and may, in turn, increase the number of judges on the Strasbourg bench willing to interrogate their ableist approach.

The Committee in its case law has not only interpreted the ambiguities permeating the CRPD, but it has also gone beyond the text of the CRPD, utilising a teleological approach. Far from being an unusual practice, this method of treaty interpretation is widely adopted not only by the CRPD and other UN Treaty Bodies, but also by the ECtHR and other international courts.¹²³ But most importantly, the CRPD Committee is exceptionally well-positioned to defend its teleological interpretative approach, as the CRPD distinguishes itself from other human rights

¹²¹ Fiona Campbell, *Contours of Ableism: The Production of Disability and Aabledness* (2009), at 44.

¹²² E.g. Committee on the Rights of Persons with Disabilities, Follow-up progress report on individual communications, CRPD/C/28/3 (June 20, 2023). For example, Austria does not consider that there was a violation in *Bacher*, and regarding *Bujdosó et al.* observes that in its new law the full limitation of legal capacity to be ordered much more rarely, only when no other solution is possible in the individual circumstances of the person concerned. Australia disagrees with Committee findings in *Beasley and Given*, as well as with findings in *Noble*, see Response of Australia to the Views of the Committee on the Rights of Persons with Disabilities in Communication No. 7/2012, *Noble v. Australia*, available at https://remedy.org.au/correspondence/2020_Aust_response_to_CRPD_views_in_JH_v_Aust.pdf.

¹²³ Human Rights Committee, General Comment No. 24 (1994): 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, UN Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994); *Loizidou v Turkey*, App no 15318/89, Eur. Ct. H.R., ¶¶ 93, 96 (Mar. 23, 1995); Eirik Bjorge, *The Evolutionary Interpretation of Treaties* 36 (2014).

treaties by incorporating a list of general principles in both its preamble and a binding article, which were indeed intended by the drafters to ‘guide the interpretation of the convention in accordance with the Vienna Convention on the Law of Treaties.’¹²⁴ Admittedly, the CRPD is a complex treaty and the CRPD Committee has itself encountered difficulties in consistently interpreting the text in some cases, leading to subsequent revisions.¹²⁵ It is, therefore, not surprising that other courts may be hesitant to fully follow the Committee’s interpretation, in particular if the latter does not clearly lay out its interpretative reasoning. In interpreting the CRPD, the Committee should be transparent in its interpretative process, seizing the chance to disclose how its interpretations adhere to the Vienna Convention on the Law of Treaties,¹²⁶ to rebut any presumption by other courts that its jurisprudence is influenced by an activist bias.¹²⁷ An approach that also considers the *travaux préparatoires*, text, and subsequent state practice would be more persuasive for other courts or quasi-judicial bodies that aim to integrate the CRPD within their own conventional framework.

In the three areas of case law we examined above, further doctrinal clarity may make the case law of the CRPD also more receptive by courts. Regarding accessibility, for example, the Committee has not yet formulated clear doctrinal tests as to how the procedural and substantive obligations are violated given that accessibility of existing infrastructures is a progressive obligation that needs to be implemented over time. The CRPD Committee could also provide a clear list of doctrinal questions when assessing the undue burden arguments from state authorities, attempting to excuse their failure to provide reasonable accommodation. The CRPD Committee has resorted to the language of margin of appreciation in its case law, but it is not clear how it understands or applies this doctrine. Similarly, the CRPD Committee can address whether the test of legitimate aims applies to cases of disability-based discrimination and, if so, how.¹²⁸ In recent cases, procedural and jurisdictional issues have been addressed through extensive references and, at times, deference to the case law of other human rights bodies, particularly the Human Rights Committee and the European Court of Human Rights.¹²⁹ By identifying instances where its findings on substantive rights concur with those of other bodies, the Committee can further reinforce the spirit of cross-fertilization.¹³⁰ Concurrently, this engagement does not preclude the CRPD Committee from taking a firm stance in promoting the rights of persons with disabilities and applying the social disability model, or from challenging jurisprudence of other bodies that conflicts with its interpretation of the CRPD.¹³¹

¹²⁴ Sarah Arduin, *Art. 3 CRPD: General Principles*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 84, 89 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018); see also *id.* at 87-90.

¹²⁵ For example, see *Nyusti & Takács*, *supra* note 48, as well as accompanying text to fn 51-53

¹²⁶ See Daniel Moeckli, *Interpretation of the ICESCR: Between Morality and State Consent*, in *The Human Rights Covenants at 50: Their Past, Present, and Future* 48 (Daniel Moeckli, Helen Keller & Corina Heri eds., 2018), making a similar critique of the Committee on Economic, Social and Cultural Rights. See also Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 *VAND. J. TRANSNAT’L L.* 905 (2009)

¹²⁷ Mehrdad Payandeh, *Fragmentation Within International Human Rights Law*, in *A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGE IN INTERNATIONAL LAW* 297 (Eirik Bjorge & Mads Adenas eds., 2015).

¹²⁸ Sándor Gurbai, *Beyond the Pragmatic Definition? The Right to Non-Discrimination of Persons with Disabilities in the Context of Coercive Interventions*, 22 *HEALTH HUM. RTS.* 279 (2020).

¹²⁹ See *Mangisto and al-Sayeed*, *supra* note 26 (on extra-territorial jurisdiction); *Bellini v. Italy*, *supra* note 27 (exhaustion of domestic remedies); *J.S. v. UK*, Communication 85/2021, UN Doc. CRPD/C/27/D/85/2021 (Aug. 26, 2022) (recognizing that ECtHR new single judge procedure bars it from re-examining complaint); *Sabadie v. France*, Communication 52/2018, CRPD/C/29/D/52/2018 (Aug. 25, 2023) (role of clerks).

¹³⁰ *Bellini v. Italy*, *supra* note 27, ¶ 7.9.

¹³¹ *Id.* ¶ 9.2.

Conclusion

In their study on the use of external instruments by the ECtHR in 2018, Staes and Damamme held that the ECtHR ‘has a comprehensive view on the external norm setting’ when it comes to cases on the rights of persons with disabilities.¹³² Our analysis of the reception of the CRPD Committee’s case law, however, has shown that this ‘comprehensive view’ might reflect the ECtHR’s approach to the text of the CRPD, but not necessarily the jurisprudence of the CRPD Committee.

Prior to the CRPD Committee’s General Comments and decisions relating to the CRPD’s application to specific cases, the ECtHR in *Kiss* and *Stanev* appeared to be open to revising its stance on the rights of persons with disabilities, signalling that more autonomy and access to justice should be accorded to persons with disabilities. To a degree, we observe that the ECtHR also aligned itself with certain CRPD norms. There are also instances of ECtHR engagement with the case law of the CRPD, most notably in *N v. Romania*.¹³³ This engagement, however, cherry-picks some aspects of the case law without fully internalizing core tenets. Overall, as exemplified in *Toplak & Mrak* as well as in *Larusson*, there is a pattern of resistance towards following the CRPD Committee’s case law in Strasbourg. The Court does not entirely embrace the distinction between reasonable accommodation and the more challenging right to accessibility. Cases such as *A.-M.V.*, *Strobye and Rosalind*, *Caamaño Valle* and *Marinov* reveal that deprivation of legal capacity is still considered in accordance with the ECHR and even full deprivation of legal capacity and liberty may still be justified when the cognitive impairment are ‘of a kind or degree’ warranting such a measure.¹³⁴ The ECtHR, therefore, continues to treat persons with disabilities from the perspective of vulnerability and maintains that individuals with psycho-social disabilities require protection from themselves or could pose societal dangers necessitating detention. An important missing element in the Court’s jurisprudence is the obligation to provide the necessary support and assistance that enables persons with disabilities to exercise their legal capacity, their liberty and their autonomy - central themes within the case law of the CRPD Committee.

Our findings raise concerns about the reach of the transformative ethos of the CRPD before the ECtHR. The resistance of the ECtHR to the case law of the CRPD also has knock-on effects for the success of the CRPD before domestic courts in Europe, given that the ECtHR’s margin of appreciation doctrine currently legitimizes resistance to the CRPD. We proposed that the CRPD Committee can seek to counter this resistance by offering more comprehensive judicial reasoning in its decisions, developing tests that other courts can use (or find hard to refuse) and by explaining how it arrives at certain interpretations of the text of the CRPD, with clear reference to the familiar canons of interpretation contained within the Vienna Convention rules on interpretation. We recognise, however, that even if the CRPD case law were more court-friendly, presented through the doctrines of general human rights law, this may not achieve the desired judicial diffusion of the CRPD as ableism is not easy to transform one case at a time.

¹³² Dorothea Staes & Joseph Damamme, *The Use of External Instruments by the European Court of Human Rights: (Missed) Opportunities for the Rights of Persons with Disabilities*, in HUMAN RIGHTS TECTONICS 193, 197 (Emmanuelle Bribosia & Isabelle Rorive eds., 2018).

¹³³ See supra note 113.

¹³⁴ *Nikolyan v. Armenia*, App. 74438/14, Eur. Ct. H.R., ¶ 122 (Oct. 3, 2019).

