

LLM/MA IN: International Human Rights

STUDENT'S NAME: Benashvili Sophio

SUPERVISORS'S NAME: Judith Bueno De Mesquita

**DISSERTATION TITLE**

Addressing the fragmentation of international and regional human rights standards on involuntary placement and non- consensual treatment and its implication for domestic implementation: the case of the Convention on the Rights of Persons with Disabilities, the jurisprudence of the European Court of Human Rights and the Draft Additional Protocol to the Oviedo Convention.

**COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)**

**MARK:**

**SIGNATURE:**

**DATE:**

UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM International Human Rights Law  
2018-2019

Supervisor:  
Judith Bueno De Mesquita

DISSERTATION

**Addressing the fragmentation of international and regional human rights standards on involuntary placement and non- consensual treatment and its implication for domestic implementation: the case of the Convention on the Rights of Persons with Disabilities, the jurisprudence of the European Court of Human Rights and the Draft Additional Protocol to the Oviedo Convention.**

Name: Sophio Benashvili  
Registration Number (optional):  
Number of Words:  
Date Submitted: 11/09/2019

## Introduction

Fragmentation of International human rights law is not a new phenomenon. It has been observed in various forms over a decade. Fragmentation is also the subject for debate between academics and practitioners. Some of them see fragmentation as a positive phenomenon, while some consider that fragmentation is a threat for unity of international human rights law. One of the recent examples of fragmentation between Universal and Regional human rights systems is the issue of non-consensual placement and involuntary treatment of persons with psychosocial disability.

Taking into account that out of forty seven Coe member states forty-six states are States Parties of the UN Convention on the Rights of Persons with disabilities. Adoption of the treaty, which sets a different standard, can hinder the effort UNCRPD and negatively influence States' compliance with their obligations. Moreover, different approach between CRPD and the European Convention towards the subject creates even more risk. Thesis attempts to see how the existing fragmentation can be resolved.

For these purposes the thesis consist of four main chapters. The first chapter looks at the phenomenon of fragmentation of international human rights law and how it relates with the wider phenomenon such as fragmentation of international law. How it is understood by scholars and what are positive and negative aspects of fragmentation.

Second chapter shifts focus to concrete example of fragmentation and the possible conflict of norms between the UNCROD and Draft protocol of Oviedo Convention. Moreover, it examines the jurisprudence of European Court of Human Rights, and leads to the conclusion that the fragmentation is also observed between the approaches of ECtHR and CRPD

The following chapter will discuss how the conflict of norms can be overcome what is the role of domestic legislations of the member states. It will argue that if harmonisation between states with CRPD standard is achieved on large scale it will lead to the emergence of European consensus and will change the approach of the Court which will lead to the harmonisation of the standard between CRPD and the Coe.

The importance of NHRI and SC organisations in achieving the coherence of domestic legislation with UNCRPD standard will be analysed in last chapter. It will focus on importance of article 33 of UNCRPD which envisages the central role for National Human Rights Mechanisms (such as Ombudsman's, Public

Defender's Offices) and to Civil Societies in promotion, protection and monitoring the implementation of the Convention by States. This article can be considered as a practical tool which can effectively influence the States and achieve the harmonisation and compliance of national legislation with the Convention.

## Chapter 1: Understanding Fragmentation of International Human Rights Law

Fragmentation of international law, which lies in the process of globalization<sup>1</sup> is understood as breaking up of system of international law and formation of so-called self-contained regimes<sup>2</sup>. Hence, fragmentation of international human rights law is closely associated with the fragmentation of international law. One of the most comprehensive documents addressing the issue is the Report of the International Law Commission (ILC) which studied this phenomenon.<sup>3</sup> According to the ILC, the main reason of fragmentation is “functional differentiation” of international law, the increasing specialization of its constitutive parts and their “autonomization.”<sup>4</sup> Together with proliferation of rules, regimes and institutions of international law,<sup>5</sup> inexistence of world legislator, and the parallel and diverse law-making process, increasing number of regulated subjects-matters, increases the likelihood of the creation of conflicting norms<sup>6</sup> and could damage the coherence of international law.<sup>7</sup>

Fragmentation is the subject of academic debate over the decade.<sup>8</sup> The amount of literature is enormous. Various commentators have been investigating what is the fragmentation, what are its consequences, whether it should be considered as a positive or negative phenomenon and “how much fragmentation of international law can accommodate before serious tensions or even conflict of rules occur between different fields of law and regions of the world.”<sup>9</sup>

---

<sup>1</sup> Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 *International Law and Politics*, 259, 261, 262 (2007).

<sup>2</sup> For discussion of what is understood by the concept of self-contained regimes, see Report of the Study Group on Fragmentation of International Law, International Law Commission, Fifty-Fourth Session, U.N. Doc. A/CN.4/L.628 (2002), p.86.

<sup>3</sup> UN General Assembly, International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification And Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' (2006).

<sup>4</sup> Commission (n 1).para 11

<sup>5</sup> Wilfried Jenks, *Conflict of Law-Making Treaties*, 30 *British Yearbook of International Law*, 401, 405 (1953)

<sup>6</sup> Marco Milanovic, 'Norm Conflict in International Law Wither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law*.p.68

<sup>7</sup> Ian Brownlie, 'Problems concerning the unity of international law', in 1 *LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: EDUDES EN L'HONNEUR DE ROPERTO AGO*, (A.Giuffre ed.) (1987) p. 156.

<sup>8</sup> Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from the Case Law of the European Court of Human Rights, *Leiden Journal of International Law*' [2015] *Leiden Journal of International Law*.

<sup>9</sup> Svetlana Tyulkina, 'Fragmentation in International Human Rights Law: Political Parties and Freedom of Association in the Practice of the UN Human Rights Committee, European Court of Human Rights and Inter-American Court of Human Rights.' (2014) 32 *Nordic Journal of Human Rights* p.158

a. *Fragmentation as a phenomenon*

As Marjan Ajevski is referring in her work, “the attempt of defining fragmentation is fraught with peril.”<sup>10</sup> It is a complex phenomenon closely connected to the proliferation of international law in general.

As explained in the academic works, the fragmentation of international law is observed when “similar or even identical norms attain different meanings and interpretations, in light of the structure, aim, and specificities of a given treaty.”<sup>11</sup> Moreover, emergence of more law-making international treaties can lead to the situation when the identical matter is regulated in a different, sometimes in a conflicting way.<sup>12</sup>

The system of human rights has a complex architecture, consisting of multiple regimes and layers with political, economic, social and cultural dimensions. These multifaceted mechanisms develop concurrent standards.<sup>13</sup> These regimes are coexisting in parallel and as a rule, a State can be a member of several human rights regimes. As for instance an European State would be a member of both the UN and the Council of Europe and accordingly be a party to international treaties and conventions under both regimes and have obligations towards both institutions. Moreover, in human rights as in international law more and more specialized fields are emerging.<sup>14</sup> The same rights are regulated and defined by multiple treaties, monitored and interpreted by multiple bodies. This leads to fragmentation and the conflicts between the interpretation of norms by specialized treaty bodies or adjudicative bodies.<sup>15</sup> This potentially could create challenges within the functional sub-system,<sup>16</sup> creating space for different interpretations of the standard especially in situations when these treaties have the same States parties.<sup>17</sup>

b. *Views on fragmentation: is it positive or negative phenomenon and examples of fragmentation*

Fragmentation of international law and international human rights law in particular lead to the different position and assessment from international lawyers. Some authors have been very critical towards the phenomenon, associating it with the risk of “erosion of general international law, emergence of conflicting jurisprudence, forum shopping and loss of legal security. While others, consider fragmentation as a technical problem, which can be resolved with more coordination.”<sup>18</sup>

---

<sup>10</sup> Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws' (2014) 32 Nordic Journal of Human Rights 87

<sup>11</sup> Rachovitsa (n 4). p 873

<sup>12</sup> Lorna McGregor, The Relationship of the UN Treaty Bodies and Regional Systems In Routledge Handbook of International Human Rights Law (Scott Sheeran and Sir Nigel Rodley ed, Taylor & Francis Group 2013).P 511

<sup>13</sup> Eva Brems, 'We Need to Look at International Human Rights Law (Also) as a Whole' (*EJIL:Talk!*). Available at : <https://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/>

<sup>14</sup> Lucas Lixinski, 'Choice of Forum in International Human Rights. Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Ahead' (2009) 23 ( U C Dublin L Rev. p.28

<sup>15</sup> Anne (n 15).p.676

<sup>16</sup> Ralf Michaels & Joost Pauwelyn Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law " available at : [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2933&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2933&context=faculty_scholarship) p. 19.

<sup>17</sup> Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20. no.2 The European Journal of International Law.

<sup>18</sup> ILC Report at page 12

The main argument considering the fragmentation as a negative phenomenon is that it “threatens the unity” of human rights.<sup>19</sup> Taking into account the inexistence of hierarchy in international law and absence of “world legislator” one part of authors fear that there is nothing to stop a normative conflict. <sup>20</sup> In contrast, many scholars believe that fragmentation has a positive effect on general international law. Peters, points out that it is “adequate reaction to modernity and modern complexity of life”<sup>21</sup> and its benefit is stimulation of competition between different organisations and regimes. This is of particular importance as it leads to the creativity of these regimes and allows “exploration and experimentation, (...) allows for correcting mistakes, reduces the risk of failure of one single institution, and thus overall leads to improved performance, notably to better law-making and law-application”<sup>22</sup> Moreover, as cited by McGregor, Jonathan Charney, considers fragmentation as a healthy process.<sup>23</sup> The fact that the tribunals differ in their approaches, towards the same issue, the different views elaborated by them, stimulates the debates over the decisions which “help the international community discover what may be the most acceptable interpretations of international law.”<sup>24</sup>

In contrast with the fragmentation of general international law in human rights law some commentators, state that the fragmentation is more connected to the question of conflict of jurisdiction and to the fact that different monitoring/treaty bodies can take different or incompatible decisions or establish such practices.<sup>25</sup> They argue that fragmentation in this self-contained regime is not caused by the existence of different substantive provisions, rather with the “colliding institutional preferences and structural biases of the different human rights treaties,”<sup>26</sup> which can lead to different interpretations of the specific human rights standards.<sup>27</sup> and variation on “what right means.”<sup>28</sup> As noted by Payandeh, tensions related to interaction among them or issues connected to forum shopping or conflicting jurisdictions can be easily mitigated by procedural safeguards.

The question of the threat of unity of international human rights law and the role of fragmentation is often seen from the lens of debate on “Universalism/Relativism.”<sup>29</sup> Lixinski observes that in the context of IHRL, uniformity should be seen as a tool for prioritization “western hegemonic interpretations” of the specific right is not desirable.<sup>30</sup> Moreover, Lorna McGregor considers fragmentation as inevitable due to the extensive number of human rights regimes and “commonalities in the rights provided in their governing treaties.”<sup>31</sup> Tylkina, agrees with this. Moreover, when assessing the fragmentation of approaches regarding the question

---

<sup>19</sup> Rachovitsa, Adamina

<sup>20</sup> Ajevski (n 6). P. 87

<sup>21</sup> Anne Peters(n 15).680

<sup>22</sup> *ibid.*681

<sup>23</sup> J. Charney, ‘The “Horizontal” Growth of International Courts and Tribunals: Challenges and Opportunities?’ (2002) 96 *ASIL Annual Meeting Proceedings* 369 at 370; cited in Lorna McGregor (n 21). P. 515

<sup>24</sup> *ibid.*

<sup>25</sup> Mehrdad Payandeh (n 9).p.299

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> Erik Voeten, ‘Competition and Complementarity between Global and Regional Human Rights Institutions’ (2017) 8 *Global Policy* 120.

<sup>29</sup> Lixinski (n 17).p.30

<sup>30</sup> *ibid.*p 112

<sup>31</sup> Lorna McGregor (n 21).517

of the freedom of association specific to political parties as a challenge to the universality of the standard, states that it represents the phenomenon which should not be considered as a negative.<sup>32</sup> Fragmentation is closely linked to the relativism of human rights. Due to different factors such as political, historical social, cultural and legal circumstances the regional systems of human rights vary from each other. These are the factors which are influencing the formation of the standard and differences can be accommodated through fragmentation. It “allow each system to preserve its autonomy and uniqueness, and to adjust to local conditions in which these instructions function.”<sup>33</sup>

In contrast Berry, who partially agrees with Lixinski that uniformity might undermine the pluralism in international human rights law and give the preference to the interpretations given by more general human rights bodies, over the specialized bodies, still sees the risk in fragmentation.<sup>34</sup> In particular, he states that there is a risk that the “conflicting interpretation...can undermine the legitimacy of a regime and lead to non-compliance with the most onerous interpretation of standards.”<sup>35</sup> In his study

Another problem identified by scholars is the loss of legal certainty. When assessing the fragmentation in the practice of human rights adjudicative bodies, Follesdal highlights that different interpretations and decisions can damage the “stabilization of expectations”.<sup>36</sup> He notes that the resolution of disputes is not the only function of the adjudicative bodies, rather than creation of predictability about the requirements of the certain law for States.<sup>37</sup>

When talking about fragmentation it should be also taken into account that very often states are parties to several international human rights treaties which include and provide for the same human rights. The different interpretation of the rights might affect the national implementation and formation of the standard. Worst scenario in this case would be the existence of the conflicting norms which would lead a State to violate one for the compliance with another. This hypothetical situation is further complicated by the fact that nearly all treaties have their own monitoring bodies, which are looking at the State compliance with the specific treaty provisions and are authorised by States to consider individual complaints against them. <sup>38</sup> Thus, on the domestic level, the principle of legal certainty is particularly significant, as it is in direct correlation with States’ actions directed at interpreting and implementing human rights in their municipal settings to be enjoyed and used by individuals and entities.

---

<sup>32</sup> Tyulkina (n 5).171

<sup>33</sup> *ibid.*

<sup>34</sup> Stephanie E Berry, ‘Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework’ (2017) 24 *International Journal on Minority and Group Rights* 223.

<sup>35</sup> *ibid.*

<sup>36</sup> Andreas Follesdal (n 28).p.2

<sup>37</sup> *ibid.*

<sup>38</sup> Lorna McGregor (n 21).506

Practical examples of challenges raised as a result of fragmentation of international human rights law and different interpretation of the same right by different human rights regimes, as well as within the same regime are evident. As already mentioned, Tyalkina in her article,<sup>39</sup> examined how three jurisdictions - the UN Human Rights Committee, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) interpret the freedom of association of political parties.<sup>40</sup> She found that although the fragmentation while interpreting the right was on face, there was no “substantive normative divergence or convergence” and the differences between the approaches of these institutions could be overcome with the institutional dialogue.<sup>41</sup>

Apart from the fragmentation within the sub-regimes of international human rights law, this phenomena could also be observed within the same regional human rights regional sub-system. Fragmentation between the international human rights and international minority regimes in the Council of Europe serves as an example. Although both, ECHR as well as the Framework Convention for the Protection of National Minorities were developed in the same system, their interpretation of the rights pertaining to the preservation of minority identity is very different.<sup>42</sup> In both cases, respective treaty bodies, such as Advisory Committee to the Framework Convention for the Protection of National Minorities (ACFCNM) and the European Court of Human Rights (ECtHR) interpreted the substantively same norms in a conflicting way.<sup>43</sup> Here, Berry sees the risk that such a practise will lead to undermining of the work undertaken by both bodies. As suggested by Tyalkina, the effective way of conflict mediation can be establishing and enhancing a dialogue between treaty bodies.<sup>44</sup>

Fragmentation in human rights law can be observed also when the different treaty bodies, practicing their quasi-judicial or judicial power arrive to different conclusions while examining the same or factually similar cases. Example of such fragmentation is the case of Layla Sahin,<sup>45</sup> adjudicated by ECtHR and case of Raihon Hudoyberganova v Uzbekistan<sup>46</sup> heard by HRC. Both cases had a very similar factual circumstances and concerned the prohibition of wearing the headscarf in Universities. In one case ECtHR found no violation of the right to manifest the religion and the prohibition of equality and non-discrimination, when HRC in

---

<sup>39</sup> Tyalkina (n 5).

<sup>40</sup> *ibid.* 171; It should be noted that all three human Rights treaties, The International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) contain the special article on the Freedom of Association.

<sup>41</sup> *ibid.* 209

<sup>42</sup> Berry (n 51).

<sup>43</sup> *ibid.*

<sup>44</sup> Stephanie E Berry, ‘Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework’ (2017) 24 *International Journal on Minority and Group Rights* 228.

<sup>45</sup> *Leyla Sahin v. Turkey*

<sup>46</sup> *Hudoyberganova v. Uzbekistan Human Rights Committee, 2004*

contrast in its opinion stated that the state violated the “right to freedom of thought, conscience and religion.”<sup>47</sup>

Academics have different opinions how the fragmentation can be tackled. Some of them see “judicial dialogue” as a solution,<sup>48</sup>. Some commentators consider that the answer is in public international law and Vienna Convention on the Law of Treaties.<sup>49</sup> Though conclusion can be made that evolving nature of human rights law and its diversification leads to the fragmentation. Next chapter will look how the standard non-consensual placement and involuntary treatment is fragmented between United Nations and Council of Europe.

## **Chapter 2 Involuntary Placement and Non-consensual Treatment of persons with psychosocial impairment in two systems;**

### *a. The historical overview of the involuntary placement*

Over the years, persons with disabilities (PwDs) have been discriminated and excluded from participation in society. This fact is well recognised by scholarship and practitioners. Commentators and human rights experts have pinpointed several approaches and models to disability, which evolved with time. One of the earliest model has been so-called Moral and/or Religious model, which looks at the disability as an act of God,<sup>50</sup> In contrast, Charity Model looks at persons with disabilities as victims of circumstances, who need the protection and care.<sup>51</sup> Medical model that found its development from mid-1800 looks at a disability as a disease and “deviation from a normal health,”<sup>52</sup> which should be “treated, fixed, cured and rehabilitated.”<sup>53</sup>

Persons with psychosocial disabilities have been even more stigmatized throughout history. Due to their certain psychosocial disabilities they have been perceived as not having a capacity to make choices and decisions, including and especially about their mental health-care and treatment. They have been seen as “passive beneficiaries of charitable interventions”.<sup>54</sup> This approach has been reflected in international law as well. Terms such as “persons with unsound mind,”<sup>55</sup> “persons with mental disorder,”<sup>56</sup> “mentally ill,”<sup>57</sup> “mentally retarded persons” used in different treaties and policy documents, serve as a good illustration.

---

<sup>47</sup> *ibid.* 517

<sup>48</sup> Anne Peters 696

<sup>49</sup> Vienna Convention on the Law of Treaties. 1969

<sup>50</sup> R Retief M. and Letsosa, 'Models of Disability: A Brief Overview' (2018) 74(1) HTS Teologiese Studies.

<sup>51</sup> *ibid.* also Mary Ann Jackson, 'Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale?' 7(1) Laws. 2018;

<sup>52</sup> Mary Ann Jackson,

<sup>53</sup> Mary Ann Jackson,

<sup>54</sup> Silvia Favalli 520

<sup>55</sup> Article 5 ECHR

<sup>56</sup> Oviedo Convention Article 7

<sup>57</sup> Draft Convention

Medical and Biomedical models of disability build on this presumption, developed paternalistic policies and laws, towards persons with psychosocial disabilities.<sup>58</sup> As explained by Vikram, Faraaz and Ashley, Biomedical approach towards mental health encourages the view that in some cases “substitute decision – making” is necessary, i.e., “the judgment of a proxy superseding that of an individual, when that individual is deemed to be “incapacitated”.<sup>59</sup> This model led to the introduction of guardianship laws<sup>60</sup> delegating a right to make decisions to family members and/or legal guardians. This approach was widely accepted (and still is) in international and domestic legal and policy documents regulating the medical treatment of persons with psychosocial disability and their placement in special medical facilities and institutions.<sup>61</sup> As explained later by the Special Rapporteur, substitute decision makers,<sup>62</sup> who as a rule are appointed by third parties, are making decisions based on “what they considered to be in the best interest” of persons with psychosocial and cognitive disabilities<sup>63</sup> and are not taking into account will and preferences of a person.

Before adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2006, at the international level the rights of PwDs were protected through general human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR). In Council of Europe (CoE) the rights of persons with disabilities are protected through the European Social Charter (ESC) and the European Convention on Human Rights (ECHR) and various policy documents.<sup>64</sup> Both regimes introduced different non-binding documents, including 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1982 World Programme of Action concerning Disability Persons, 1971 Declaration on the Rights of Mentally Retarded Persons, Council of Europe Disability Action Plan 2006-2015 etc<sup>65</sup>

As rightly pointed out by Lawrence, human rights protection of persons with psychosocial disabilities, including in cases of involuntary placement and non-consensual treatment has been mainly focused on three tenants. First, providing safeguards with “the right to fundamental fairness in compulsory admission and

---

<sup>58</sup> Silvia Favalli, ‘The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: “From Zero to Hero”’ (2018) 18 Human Rights Law Review 520.

<sup>59</sup> Patel Vikram Mahomed Faraaz, Stein Michael Ashley, ‘Involuntary Mental Health Treatment in the Era of the United Nations Convention on the Rights of Persons with Disabilities’ [2018] PLoS Med 2.

<sup>60</sup> Degener (n 6).

<sup>61</sup> ‘For Example the World Programme of Action Concerning Disabled Persons, Adopted by the General Assembly on 3 December 1982, (Resolution 37/52) Highlights That “When people such as the severely mentally disabled may not be able to represent themselves adequately in decisions affecting their lives, family members or legally designated agents should take part in planning and decision-making.” UN Declaration on the Rights of Mentally Retarded Persons, illustrates the biomedical approach towards the persons with Psychosocial disabilities. Out of 7 principles two principles – fifth and seventh were defining the right to “qualified guardian”# and the procedural guarantees of restriction their rights in certain cases.”

<sup>62</sup> As explained in the report forms of substitute-decision making are different forms of “guardianship, judicial interdiction, curatorship, conservatorship and mental health laws that allow involuntary treatment and commitment.” *ibid.* please also see: United Nations Convention on the Rights of Persons with Disabilities, ‘Committee on the Rights of Persons with Disabilities General Comment 1: Article 12 Equal Recognition before the Law’ (2014) 03120 1, para 15

<sup>63</sup> Report of the Special Rapporteur on the rights of persons with disabilities, Council, Human Rights Session, Thirty-seventh, 2018, 26 February–23 March para 26.

<sup>64</sup> Favalli 517.

<sup>65</sup> UN Declaration on the Rights of Mentally Retarded Persons

subsequent detention in mental institutions.”<sup>66</sup> This is scrutinised through the prism of the right to liberty and security<sup>67</sup> of persons while requiring existence of guarantees of “adequate procedural and substantive safeguards established by law.”<sup>68</sup> In instances when a person is not deinstitutionalized, articles guaranteeing the right to health are applied.<sup>69</sup> Second area of protection is linked to the “neglectful or abusive conditions in mental hospitals and harmful or intrusive forms of medical treatment.”<sup>70</sup> Identification of instances of such violation is mainly done through monitoring of existence of practices of torture, inhuman and degrading treatment in specialized institutions.<sup>71</sup> Third direction is looking from the lance of prohibition of discrimination and how the rights such as privacy, marriage, freedom association are realized.<sup>72</sup>

More specific regulations are given in the United Nations Principles for the Protection for Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles).<sup>73</sup> MI Principles do not have the binding power, they are soft law instrument, however, they represent an important tool for the interpretation of the obligations towards the persons with psychosocial disability. MI Principles although highlight the importance of consent for treatment or hospitalisation, are recognising the possibility of treatment and placement of persons in mental health facility when they lack legal capacity.<sup>74</sup> In case of restriction of legal capacity on the ground of “mental illness” MI principles are setting the procedural guarantees such as fair trial, right to counsel and right of revision of the decision in “reasonable intervals.” for the process of appointment the personal representative.<sup>75</sup>

In terms of involuntary admission of a person in mental health facility for non-consensual treatment, MI Principles set standards and procedures, excluding the necessity of consent for the “plan of treatment when held as an involuntary patient.”<sup>76</sup> It looks at the following aspect: (a) the existence of “mental illness” determined by a qualified mental health practitioner; (b) whether there exists a serious likelihood of immediate or imminent harm to a person or to other persons and (c) person’s refusal on placement “will likely lead to a serious deterioration in his or her condition.”<sup>77</sup>

---

<sup>66</sup> O Gostin Lawrence and Lance Gable, ‘The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health’ (2004) 1 Maryland Law Review 63 25.

<sup>67</sup> Article 9 of the ICCPR, Article 5 of ECHR

<sup>68</sup> For example, General Comment No.35 on Article 9 (Liberty and Security) of the UN Human Rights Committee (HRC) para 19

<sup>69</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights, which is looking whether highest attainable standard of health is available for persons with psychosocial disability, moreover as explained in General Comment No14 on the Right to health, coercive medical treatments are allowed “on an exceptional basis for the treatment of mental illness” (para 34

<sup>70</sup> Lawrence and Gable (n 20). 25

<sup>71</sup> Except from General treaties, such as ICCPR, ECHR, the prohibition of torture, inhuman and degrading treatments in specialized institutions is also monitored by specialized regimes such as UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment” and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

<sup>72</sup> Lawrence and Gable .25

<sup>73</sup> Principles for the protection of persons with mental illness and the improvement of mental health care Adopted by the General Assembly resolution 46/119, 17 December 1991.

<sup>74</sup> Principle 6 Ibid

<sup>75</sup> Principles for the protection of persons with mental illness and the improvement of mental health care (n 23) principle 1, para 6.

<sup>76</sup> ibid principle 11, para 6 (a).

<sup>77</sup> ibid Principle 16.

Moreover MI Principles contain general limitation clause<sup>78</sup> which sets restrictions for the safeguards enshrined in the document in situations when: (a) limitations are prescribed by law; (b) is necessary to protect health or safety of a person concerned or others and (c) for protection public safety, order, health or morals or other fundamental rights and freedoms of others.

The standard of legal capacity and approach to involuntary treatment and/or placement was drastically changed after the adoption of the UN Convention on the Rights of Persons with Disabilities in 2006 – the first human rights treaty of the 21<sup>st</sup>. Century.<sup>79</sup> The Convention was the result of the struggle of the international disability rights movement,<sup>80</sup> which became famous for its slogan “nothing about us without us.”<sup>81</sup> The disability rights movement was even considered to be the last among “long series of liberation movements.”<sup>82</sup> With the involvement of more than 400 NGO and DPO representatives, the drafting process of the Convention was exceptional. <sup>83</sup> As highlighted by Degener, it was not only the fight of human rights lawyers, activists and DPOs but rather the “individual struggle of disabled people for recognition and respect.”<sup>84</sup>

Another breakthrough achieved during the drafting process of the CRPD, was the negotiated social model of disability,<sup>85</sup> which sees disability as a result of social construction. The model shifted the focus from individual to society and introduced the differences between impairment and disability. According to the social model, impairment is related to the “condition of the body or the mind” while the disability is a result of discrimination and social oppression, and how it constructs the environmental and social barriers around the persons with disabilities.<sup>86</sup>

CRPD is complex treaty covering the wide range of rights. It represents the “paradigm shift” in disability policy.<sup>87</sup> Some scholarship states that with its innovative concepts, CRPD went beyond the social model and introduced new, Human Rights model of disability.”<sup>88</sup>

One of the most innovative and still debatable provisions of the CRDP is Article 12, which prescribes equal recognition before law. Inclusion of this right into the text of the document was one of requests from disability

---

<sup>78</sup> MI principles Ibid

<sup>79</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (Martinus Nijhoff Publishers 2013) 12.

<sup>80</sup> Degener (n 6) 8.

<sup>81</sup> Callus Anne-Marie, Camilleri-Zahra “Nothing About Us Without Us”: Disabled People Determining Their Human Rights Through The UNCRPD” Mediterranean Review of Human Rights vl 1

<sup>82</sup> Callus Anne-Marie, Camilleri-Zahra p3

<sup>83</sup> Oomen Barbara, 'Fragmentation/Integration of Human Rights Law- a Users' Perspective on the CRPD' in Brems Eva and Ouald\_Chaid Salla (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018).p.90

<sup>84</sup> Degener (n 6).

<sup>85</sup> Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 *Laws* 35, 24.

<sup>86</sup> Retief M. and Letsosa .

<sup>87</sup> The Conventions approach to disability is considered as “paradigm Shift” by majority of authors such as Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: "From Zero to Hero"' (2018) 18 *Human Rights Law Review* 520. , Degener Theresa, Disability in a Human Rights Context, Oomen Barbara, 'Fragmentation/Integration of Human Rights Law- a Users' Perspective on the CRPD' in Brems Eva and Ouald\_Chaid Salla (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018

<sup>88</sup> Degener (n 6).

rights activists and the World Net-work of Users and Survivors of Psychiatry (WNUSP).<sup>89</sup> Article recognises that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>90</sup> In combination with other articles enshrined in the CRPD, Article 12 has led to the absolute prohibition of involuntary placement and non-consensual treatment of persons with psychosocial impairments, which will be discussed in the next sub-chapter.

*b. Prohibition of Involuntary Placement and Non-consensual treatment – Standard of CRPD*

The CRPD is one of the most ratified treaties in history. As of today, it has 180 States Parties,<sup>91</sup> out of forty-seven Council of Europe member States forty-six has ratified the Convention, the only state which has not ratified it, is Liechtenstein.<sup>92</sup> It is also the first UN treaty ratified by European Union (EU). The Convention contains a wide range of civil and political, as well as social economic and cultural rights.<sup>93</sup> It has introduced several core principles such as “autonomy” non-discrimination, inclusion, respect for difference, equality of opportunity, accessibility, equality of men and women and respect for the evolving capacities of children with disabilities.<sup>94</sup> As it was already mentioned, it was a drastic transition from the paternalistic disability approach to recognition of autonomy of persons with disabilities<sup>95</sup> and as active citizens eligible fully participate in the life of society.<sup>96</sup>

The CRPD is the first international treaty which introduced absolute prohibiting of the involuntary placement and non-consensual treatment of persons with psychosocial impairments. The prohibition derives from two articles, article 12 (equal recognition before the law) and 14 (right to liberty and security). It is also closely related to Article 5 (equality and non-discrimination), Article 17 (the right to physical and mental integrity) and article 25 (right to health), which enshrines the principle of free and informed consent.

Article 12 can be interpreted as the right to be not only recognized before the law, but also to be able to enjoy and exercise the rights. This includes the right persons with psychosocial impairments to make decisions about their medical treatment. Although existing regulations and practices are recognising the importance of informed and free consent for medical interventions, they include circumstances when consent of substitute decision-maker or existence of certain factors can justify treatment and placement of persons

---

<sup>89</sup> Mahomed Faraaz, Stein Michael Ashley (n 11) 2.

<sup>90</sup> Article 12 CRPD

<sup>91</sup> ‘Information Is Available on the Following Web Page’ <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

<sup>92</sup> ‘Information about State Parties Please See’: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec)>.

<sup>93</sup> Barbara (n 31).

<sup>94</sup> *Ibid.* p 90

<sup>95</sup> Individual autonomy is explained as “to be in charge of one’s own life and to have the freedom to make one’s own choices Office of The United Nations High Commissioner for Human Rights, ‘Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors - Professional Training Series No.17’ (2010) 17.

<sup>96</sup> *ibid* 520.

with psychosocial impairment. The CRPD does not recognise such exceptions and states that any treatment based on the consent of substitute decision-makers should be considered as non-consensual.<sup>97</sup> Moreover, whereby person may be detained on the grounds of their actual perceived impairment, [...] if additional factors or criteria are also used to justify the deprivation of liberty, <sup>98</sup> such as “risk of dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis.”<sup>99</sup>

If such danger exists States should act according to “criminal or other laws in place to deal with those matters.”<sup>100</sup> This position was reaffirmed by the Office of the High Commissioner who stated that “persons with disabilities may be lawfully deprived of their liberty (only) for committed a crime or violated the law.”<sup>101</sup>

As clarified by the Committee the standard derives from Article 3 of the Convention which guarantees the “respect for the inherent dignity, individual autonomy – including the freedom to make one’s own choices – and, independence of persons”;<sup>102</sup> As highlighted by authors the approach of the Committee towards the equal recognition before the law is a statement that rights” are acquired via birth and are universal, i.e., every human being is a human rights subject.<sup>103</sup> Although rights can be restricted, “they do not require a certain health status or a condition of functioning.”<sup>104</sup>

Of course, the CRPD Committee recognises that in some cases persons with psychosocial impairments might face the difficulty to express their will. Thus, the article 12 requires States to introduce and provide supported decision-making options instead of supporting decision-making which should give “primacy to a person’s will and preferences.”<sup>105</sup>

The importance of Article 12 was reaffirmed by UN Special Rapporteur on the Rights of Persons with Disabilities, stating that due to the central role of article for realisation and enjoyment of other rights, all declarations and reservations made by the States Parties should be seen as incompatible with the object and purpose. The Rapporteur called states to act according to the article 19 of the Vienna Convention on the Law of Treaties (VCLT),<sup>106</sup> and withdraw them. <sup>107</sup>

---

<sup>97</sup> UN Committee General Comment No.1 para 41

<sup>98</sup> UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 *ibid* para 7.

<sup>99</sup> *ibid* para 13.

<sup>100</sup> *ibid* para 14.

<sup>101</sup> Office of The United Nations High Commissioner for Human Rights, Justice and Dignity for Detainees Week, Information Note No.4, Persons with Disabilities 2008.

<sup>102</sup> United Nations Convention on the Rights of Persons with Disabilities, ‘Committee on the Rights of Persons with Disabilities General Comment 1: Article 12 Equal Recognition before the Law’ (2014)

<sup>103</sup> Degener (n 6).

<sup>104</sup> Degener (n 6).4

<sup>105</sup> General Comment no.1 para. 29.

<sup>106</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969

<sup>107</sup> adopted by Human Rights Council A/HRC/37/56, ‘Report of the Special Rapporteur on the Rights of Persons with Disabilities’ para 37.

The standard adopted by the CRPD, on the absolute legal capacity of disabled people (article 12) and its General Comment No.1 has been criticized for not having consultations with the “clinicians”<sup>108</sup>. As it was already mentioned it was one of the most argued and controversial standards which led to the reservations to this principle. In particular out all States parties of the Convention thirteen States made Declarations and reservations on Article 12, some of them together with articles 14 and 25. Amongst them seven are members of the Council of Europe.<sup>109</sup>

The majority of States Parties according to Concluding Observations of the Committee are not in compliance with this standard.<sup>110</sup> Moreover, controversy of standard can be also seen on the UN level where the fragmentation of the standard on prohibition of non-consensual treatment and involuntary placement of persons with psychosocial impairment can be observed within human rights treaty bodies. The recent study prepared under the Essex Autonomy Project is an evidence for this.<sup>111</sup> As study illustrated, although several human rights treaty bodies, such as UN Committee on the Elimination of Discrimination against Women (CEDAW) and UN Committee on the Rights of the Child tend to harmonise their position with CRPD standard,<sup>112</sup> other treaty bodies, UN Committee against Torture (CAT) the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), Un Committee on Economic, Social and Cultural Rights and most importantly the UN Human rights Committee (CCPR) “allow” non-consensual treatment or, involuntary placement of persons with psychosocial impairments.<sup>113</sup> The main inconsistency with the standards on non-consensual treatment and involuntary treatment of persons with psychosocial impairments occurs between the CRPD and the UN Human Rights Committee (CCPR).<sup>114</sup> It is worth noting that both general comments - the General Comment No.1 (CRPD)<sup>115</sup> and General Comment no. 35 on article 9 on Liberty and security of persons<sup>116</sup> (CCPR) were adopted in 2014. The General Comment No.1 was adopted 9th of May, and the General Comment no.35, (which replaced the General Comment no. 8 on the same article), was adopted on the 16th of December. This leads to the conclusion that CCPR when working on the document was aware of the position of the CRPD on absolute prohibition of involuntary placement. Although CCPR in its General Comment called upon the States Parties “to revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention,”<sup>117</sup> it referred to its case-law and clarified the exceptional circumstances when the deprivation of liberty can be justified if it is “necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing

---

<sup>108</sup> Melvyn Colin Freeman and others, 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 The Lancet Psychiatry 844.

<sup>109</sup> 'Georgia, Estonia, France, Ireland, Netherlands, Norway, Poland. for Official Information Please See': [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en).

<sup>110</sup> For detail information on States Parties compliance with CRPD standard please see chapter: 4

<sup>111</sup> Sandor Gurbai and Wayne Martin Is Involuntary Placement and Non-Consensual Treatment Ever Compliant with UN Human Rights Standards? A Survey of UN Reports (2006-2017) 9 January 2018;

<sup>112</sup> Sandor Gurbai and Wayne Martin 10-11

<sup>113</sup> Sandor Gurbai and Wayne Martin

<sup>114</sup> Ibid

<sup>115</sup> General Comment No.1 (CRPD)

<sup>116</sup> UN Human Rights Committee, 2014: General Comment No.35. Article 9 (Liberty and security of person CCPR/C/GC/35,

<sup>117</sup> General Comment 35. para 19

injury to others.”<sup>118</sup> The Committee identified main criteria for considering the measures as lawful such as: a. least resort, b. shortest appropriate period of time, c. measures should be accompanied by adequate procedural and substantive safeguards established by law;<sup>119</sup> Although the CRPD has widely influenced the human rights discourse on PWDs not only in UN level, but also at CoE level the approach of latter is differs from the standard on non-consensual treatment and involuntary placement of persons with psychosocial impairments.

c. *CoE standard for involuntary placement and non-consensual treatment*

Unlike the UN, The CoE never adopted a special instrument for the protection of the rights of persons with disabilities. As previously mentioned, the rights of persons with psychosocial impairments are addressed through ECHR and European Court of Human Rights (ECtHR) case-law, ESC, other specialized treaties<sup>120</sup> and the policy documents.<sup>121</sup> Though the involuntary placement and non-consensual treatment is regulated by ECtHR and Convention on Human Rights and Biomedicine (hereinafter Oviedo).<sup>122</sup> Standard enshrined in both treaties, conflicts with the CRPD requirements, which is not surprising due to the fact that both instruments were adopted before CRPD.

The main reason of conflict is the approach to legal capacity of persons with psychosocial impairments. While CRPD, as already discussed, prohibits restriction of legal capacity, both treaties, ECHR and Oviedo Convention recognize the lawfulness of interference in the right when certain criteria are satisfied.

In particular, ECtHR mainly looks at the involuntary placement and non-consensual treatment through Article 5 (Right to liberty and security) and Article 8 (Right to private and family life). One of the main factors, which is assessed by ECtHR, in cases concerning the violations of Article 5, is the lawfulness.<sup>123</sup> However, in cases concerning persons with psychosocial impairment, due to the fact that article 5 explicitly allows deprivation of liberty on the ground “unsound mind” approach is different.<sup>124</sup> The Court grants a Margin of Appreciation to

---

<sup>118</sup> General Comment 35 para 19

<sup>119</sup> General Comment 35 para 19

<sup>120</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), the Convention against trafficking and in Human Beings and the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, contain the general provisions on disability

<sup>121</sup> Favalli (n 9) 517. also please see

:Committee of Ministers Recommendation 2004) 10 Concerning the protection of human rights and dignity of persons with psychosocial impairment

<sup>122</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted 4.IV.1997

<sup>123</sup> European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, updated on 31 August 2019, 11

<sup>124</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine Article 5.1 (e).

states in deciding whether individual should be detained as a “person of unsound mind,” (...) since it is in the first place for the national authorities to evaluate the evidence adduced before the in a particular case.”<sup>125</sup>

When considering whether the deprivation of liberty of persons with psychosocial impairment was “lawful” the ECtHR looks at the following criteria:<sup>126</sup>

- a. Individual must be reliably shown to be of “unsound mind” by objective medical expertise otherwise the ECtHR will find the violation.<sup>127</sup>
- b. “Mental disorder” must be of a kind or degree warranting compulsory confinement; - in such cases the ECtHR recognises that the involuntary placement of persons with psychosocial impairments is possible when a person “needs control or supervision to prevent him, for example, causing harm to himself and others.”<sup>128</sup>
- c. The validity of continued confinement must be conditional upon the persistence of such a disorder - when applying this test ECtHR looks whether the compulsory treatment was necessary.<sup>129</sup>

For satisfying the test of “lawfulness” in case of “involuntary hospitalisation,” person with psychosocial impairment should have right of seeking judicial review<sup>130</sup> and assistance of council during the court proceedings.<sup>131</sup>

Due to the fact, that mental health by the ECtHR is considered to be part of the private life,<sup>132</sup> refusal to medical treatment falls under the protection of Article 8. <sup>133</sup> The right to private and family life is the qualified right, which contains the limitation clauses and if satisfied allows interference. In particular, the interference should satisfy the test of:

- a. Prescribed by law;
- b. has a legitimate aim;
- c. is necessary in a democratic society;

---

<sup>125</sup> Luberti v. Italy, Judgment of 23 February 1982, A 75, para. 27, Cited in Arai-Takahashi, Yutaka, The Margin of Appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, 2002, p 23 please also see Pleso v. Hungary para 61, H.L.v. the United Kingdom

<sup>126</sup> Guide on Article 5, p 24; please also see: Arai-Takahashi, Yutaka, The Margin of Appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, 2002, p 23

<sup>127</sup> Ruiz Rivera v. Switzerland para 59 Winterwerp v. the Netherlands, No 6301/73, 24 October 1979, para 39

<sup>128</sup> Hutchison Reid v. the United Kingdom, No. 50272/99, 20 February 2003, para. 52; Inseher v. Germany GC para 133, N. v. Romania para 151

<sup>129</sup> Inseher v. Germany GC para 129, Petschulies v. Germany, para 76

<sup>130</sup> ECtHR, Gorshkov v. Ukraine, No.67531/01, 8 November 2005 para 44-45 M.S. V Croatia (no2) para 114,

<sup>131</sup> V.K. v. russia

<sup>132</sup> Bensaïd v. the United Kingdom, para 47 ECtHR, Y.F.v.Turkey, No.24209/94, 22 July 2003, para.33

<sup>133</sup> Guide on Article 8 of the European Convention on Human Rights, Rights to respect for private and family life, home and correspondence, Updated on 20 April 2019, 23

As in case of Article 5, ECtHR grants Margin of Appreciation to the states in regulation the legal grounds for involuntary treatment of persons with psychosocial impairments. For example the legislation envisaging the coercive treatment of persons with social impairment on the ground of necessary for achieving the legitimate aim such as protection of the “patient and/or others”<sup>134</sup> the Court considered involuntary treatment justifiable.

Oviedo Convention is the only international legally binding instrument on the protection of human rights in the biomedical field<sup>135</sup> on regional level. It builds its standards on the principles already established by the ECHR, aiming at protection dignity and identity of human beings, guaranteeing the respect for the integrity without discrimination in the field of biology and medicine.<sup>136</sup>

The Convention Explicitly allows the non-consensual treatment on the ground of “mental disability”<sup>137</sup>. When defining the consent, it refers to the domestic legislations and states that: “it is for domestic law in each country to determine, in its own way, whether or not persons are capable of consenting to an intervention and taking account of the need to deprive persons of their capacity for autonomy only where it is necessary in their best interests.”<sup>138</sup> In such cases, as an exception from the general rule on consent, the medical intervention can be carried out with the consent of the persons “representative or an authority or a person or body provided for by law.”<sup>139</sup> According to article 7 non-consensual, involuntary treatment, can be undertaken only when certain conditions are satisfied, such as:

- a. person must be suffering from “mental disorder”;
- b. Intervention should be necessary;
- c. Without treatment persons “mental disorder, serious harm is likely to result to the person’s health;
- d. The respective procedures enshrined in domestic legislation should be observed.<sup>140</sup>

One more possibility for subjecting persons to a measure of confinement or involuntary treatment without consent is defined by Article 26, which states that it is possible when person represents a “possible source of serious harm to others.”<sup>141</sup>

The approaches between ECHR and the Oviedo are identical. It is clear that the Oviedo convention took the approach ECtHR and integrated it in its text. The close interrelation of Oviedo Convention with the ECHR is also illustrated in the Article 29 which sets rules for interpretation. The article recognises the possibility of the

---

<sup>134</sup> Guide on Article 8. 23; *Schneiter v. Switzerland*, No 63062/00, 31 March 2005

<sup>135</sup> The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No 164) was opened for signature on 4 April 1997 in Oviedo (Spain)

<sup>136</sup> <https://www.coe.int/en/web/bioethics/oviedo-convention>.

<sup>137</sup> Oviedo, article 6, para 3

<sup>138</sup> Explanatory report to Oviedo. para 42

<sup>139</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997 Article 6, para 3.

<sup>140</sup> European treaty series -No 164 (n 76) paras 51-52; 54-55.

<sup>141</sup> *ibid* para 151.

committee (DB-to seek an advisory opinion from the court for the “legal questions concerning the interpretation of the Convention.”<sup>142</sup>

CRPD, after its adoption was integrated into CoE human rights system.<sup>143</sup> The Council of Europe Strategy on Disability 2017-2023 explicitly refers to CRPD. It states that “the interpretation of the priority areas (of the Strategy) will be done in line with the CRPD, the evolving body of decisions, guidelines and General Comments of the CRPD Committee.”<sup>144</sup>

In 2012, Commissioner of Human Rights of the Council of Europe issued a study<sup>145</sup> which analysed the new standard of CRPD on legal capacity of persons with psychosocial disability. He recommended states to ratify the CRPD and its Optional Protocol and review domestic legislation on legal capacity for further harmonisation with the CRPD standard making the emphasis on identification and remedying “flaws and gaps depriving persons with disabilities of their human rights in relation to legislation concerning, inter alia, guardianship (...) compulsory psychiatric care and treatment.”<sup>146</sup> He also highlighted the importance of ending “the practice of “voluntary” placements of persons in closed wards and social care homes against their will with consent of guardians or legal representatives”, as such placement was a deprivation of liberty.”<sup>147</sup>

ECTHR has also cited the CRPD in its case-law.<sup>148</sup> Though, the standard on legal capacity with regards to free and informed consent and involuntary placement and non-consensual treatment as it was already illustrated differs from the standard enshrined in CRPD. Nevertheless, already existing fragmentation and the clash between CRPD and CoE became even more problematic after 2013, when the Committee on Bioethics of the Council of Europe (DH-BIO) started the process of drafting of Draft Additional Protocol to the Oviedo Convention.<sup>149</sup> Its explicit aim is the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment.<sup>150</sup> The preamble of the draft document highlights that: “Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which this aim is pursued is the maintenance and further realisation of human rights and fundamental freedoms”<sup>151</sup> and it is based on the ECHR articles 5 and

---

<sup>142</sup> Explanatory report to the Oviedo Convention Article 29, para. 164

<sup>143</sup> Silvia Favalli, ‘The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: “From Zero to Hero” (2018) 18 Human Rights Law Review 517, 525.

<sup>144</sup> ‘Human Rights: A Reality for All, Council of Europe Disability Strategy 2017-2023’.

<sup>145</sup> ‘Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities’ [2012] Commissioner for Human Rights 38 <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1908555&direct=true>>.

<sup>146</sup> *ibid* Recommendation 2.

<sup>147</sup> *ibid* recommendation 6.

<sup>148</sup> For detail information please see the following chapter 3

<sup>149</sup> Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment; The text of Draft Additional protocol is available at:

<https://www.coe.int/en/web/bioethics/-/frequently-asked-questions-on-draft-additional-protocol-concerning-the-protection-of-human-rights-and-dignity-of-persons-with-mental-disorder-with-reg>

<sup>150</sup> Preamble of the Draft Protocol;

<sup>151</sup> *ibid*

8. Although the preamble explicitly is highlighting that it builds upon CRPD, it contradicts the latter document. In particular articles 10 and 11 of the draft protocol define the criteria for involuntary placement and involuntary treatment, which are similar to those criteria given in the explanatory Report of Oviedo Convention.<sup>152</sup>

The text of the Draft Protocol and its explanatory report reflects some developments in the field. For example, it recognises the importance of alternative measures, and highlights that in cases when the person is subject to involuntary measures “the attempts shall continue to be made to seek their consent to all aspects of their therapeutic programme.”<sup>153</sup> However, the mere fact that it allows the possibility of non-consensual treatment and placement puts its standard in contradiction to CRPD.

As rightly mentioned by the rapporteur Magradze, the adoption of the draft protocol sounds “severe, especially considering that the rationale behind these instruments and the draft Additional Protocol is the protection of people with psychosocial impairments from human rights abuses. However, one should not forget that these instruments date back to the pre-CRPD and thus reflect the medical model of disability prevalent at the time of their adoption.”<sup>154</sup>

As discussed in the first chapter, the fragmentation in human rights law is more related to the different interpretations of specific human rights by its adjudicative and monitoring bodies rather than to the existence of colliding substantive norms.<sup>155</sup> Though, if the Optional Protocol adopted, conflict between CRPD norms and the Optional Protocol is inevitable. Taking into account, that, out of forty-seven CoE member states, forty-six are States Parties of the CRPD, adoption of the Protocol will have a negative effect on the obligations of states under the CRPD.

The Committee on Bioethics of the Council of Europe (DH-BIO) published the draft text of the Protocol for open consultations, in June 2015. As a result, DH-BIO received more than forty responses.<sup>156</sup> UN Special Rapporteur on the Rights of Persons with Disabilities, OHCHR, National Human Rights Institutions (NHRI), number of non-governmental organisations (NGO), the CRPD Committee expressed concerns due to non-compliance of the Draft Protocol with CRPD standard and asked DH-BIO to withdraw the Protocol.<sup>157</sup>

---

<sup>152</sup> COMMITTEE ON BIOETHICS(DH-BIO), Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment para 62.

<sup>153</sup> COMMITTEE ON BIOETHICS(DH-BIO) Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (n 83).

<sup>154</sup> Committee of Ministers (n 68).

<sup>155</sup> Erik Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8 Global Policy 119, 120.

<sup>156</sup> DH-BIO/INF 20, 'Compilation of Comments Received during the Public Consultation. Additional Protocol on the Protection of the Human Rights and Dignity of Persons with Mental Disorders with Regard to Involuntary Placement and Involuntary Treatment'.

<sup>157</sup> Ibid

Despite this, DH-BIO decided to continue work on the Draft Protocol. The process of opposition to the protocol is continuing as of today. In 2017, four representatives of UN Special Procedures, Vice-Chair of the Working Group on Arbitrary Detention, Chair of the Committee on the Rights of Persons with Disabilities, Special Rapporteur on the Rights of the Highest Attainable Standard of physical and Mental Health, sent a joint letter to Secretary General of CoE, and reaffirmed the concerns about the collision of universal and regional standards.<sup>158</sup>

One of the most critical towards the document of course was Committee on the Rights of Persons with Disabilities (CRPD Committee). As a response to the decision to continue work on the Draft Protocol, in 2018, the CRPD Committee published statement where once again highlighted existence of the “blunt conflict” between CRPD and the Protocol. It reaffirmed its position and “strongly” recommended to States Parties to the CRPD to “explicitly oppose” the adoption of the Protocol.<sup>159</sup>

In the same year, The European Network of National Human Rights Institutions (ENNHRI)<sup>160</sup> and Human Rights Watch (HRW), issued the statement addressing the states to oppose to the Draft Protocol.<sup>161</sup>

It is noteworthy that the draft of the Protocol was criticized within CoE as well. Commissioner for Human Rights of the Council of Europe, referred to the decision on adoption of the Optional Protocol, as to the “wrong direction” for the Council of Europe and recommended the withdrawal of the Protocol.<sup>162</sup> Parliamentary Assembly of the Council of Europe (PACE recommended the Committee of Ministers to instruct DH-BIO to withdraw the Draft Protocol, emphasising, that the Protocol would “undermine the Council of Europe’s credibility (...) it would also risk creating and explicit conflict between international norms.”

The fact that text of the Protocol conflicts the standard enshrined in CRPD is not questionable. As recognised in opinions mentioned above, the adoption of the Protocol will result in fragmented “conflicting” framework towards the standard on Involuntary Placement and Non-consensual treatment of persons with psychosocial impairments.<sup>163</sup> Moreover, Taking into account that the standard introduced by CRPD is relatively new, adoption of the Draft Protocol will “hinder the efforts of Member States”<sup>164</sup> to harmonise domestic legislations and “prolong the status quo.”<sup>165</sup> While international human rights is regulated by international and regional human rights instruments and supervised by relevant treaty bodies, the principle of

---

<sup>158</sup> The letter is available at: '<https://Rm.Coe.Int/Letter-Un-Bodies-to-Sg/16808e5e28>'

<sup>159</sup> Statement by the Committee on the Rights of Persons with Disabilities calling States parties to oppose the draft Additional Protocol to the Oviedo Convention, adopted during the Committee’s 20th session, held, from 27 August 21 September 2018.

<sup>160</sup> Statement of the European Network of National Human Rights Institutions (ENNHRI) on the Draft Additional Protocol to the Oviedo Convention’.

<sup>161</sup> Statement is available at: '<https://www.hrw.org/news/2018/11/21/council-europe-threat-rights-people-disabilities>'.

<sup>162</sup> DH-BIO/INF 20 (n 185).

<sup>163</sup> Permanent Secretariat, ‘Statement of the European Network of National Human Rights Institutions ( ENNHRI ) on the Draft Additional Protocol to the Oviedo Convention’ (2014) 32.

<sup>164</sup> Permanent Secretariat, ‘Statement of the European Network of National Human Rights Institutions ( ENNHRI ) on the Draft Additional Protocol to the Oviedo Convention’ (2014) 32 0.

<sup>165</sup> The opinion of the Council of Europe Commissioner on Human rights, DH-BIO/INF 20 (n 185).

subsidiarity considers that the States are the primary guarantors of human rights.<sup>166</sup> As stated by Jack Donnelly, “the struggle for human rights will be won or lost at the national level.”<sup>167</sup>

The question is whether the Draft Protocol can be considered to be the only factor which leads to the fragmentation between the CRPD and the CoE standards on involuntary placement and non-consensual treatment. This thesis tends to believe that even if the Draft Protocol is withdrawn, the tension between two human rights regimes will not cease to exist.

As illustrated above, the Oviedo Convention and hence the Draft Protocol are mainly reflecting the standards enshrined in the case-law of ECtHR. Moreover, the fact that the Draft Protocol reaffirms the position of ECtHR on involuntary placement and non-consensual treatment is illustrated in the response<sup>168</sup> of CoE Director General of Human Rights and Rule of Law, to a letter of UN Special Rapporteurs. The letter explicitly refers to the standard of ECHR according to which involuntary measures are justified only in exceptional situations. As highlighted further, the Draft Protocol can be “an effective tool to ensure that in all circumstances, involuntary measures are embedded with the guarantees required”<sup>169</sup> by ECHR.

The influence of ECtHR case law on formation of domestic standards of States parties is immense. It is the strong, widely recognised judicial body with mandatory enforcement mechanism.<sup>170</sup> On the contrary, UN treaty bodies are quasi-judicial bodies offering concluding observation of advisory character to the member states under the State reporting mechanism.<sup>171</sup> CRPD has Optional Protocol<sup>172</sup> which establishes individual complaint mechanism. Out of forty six CoE member states, which are simultaneously States parties of CRPD, only seven states have not ratified the Optional Protocol. Although it is promising that Optional Protocol has been widely ratified by CoE States, the case-law of the CRPD Committee is not yet developed, thus it cannot compete with the ECtHR.

Thus, the thesis argues that even if the Draft Protocol is withdrawn, without changing the approach of ECtHR, the risk of fragmentation among States practices will remain. Reluctance of States to comply with the CRPD standard will have vast negative effect on the realisation and enjoyment of rights of persons with psychosocial impairments. As rightly pointed out by Brams, at the end of the day it is the individuals (right

---

<sup>166</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (Martinus Nijhoff Publishers 2013) 19; also please see; Vienna Declaration and Programme of Action 1993, para 1

<sup>167</sup> Jack Donnelly, *Post-Cold War Reflections on the Study of International Human Rights* (Carnegie Council for Ethics in International Affairs ed, 1994).117

<sup>168</sup> Response letter is available at: '<https://Rm.Coe.Int/Response-to-Un-Bodies/16808e5e29>'.

<sup>169</sup> *ibid.*

<sup>170</sup> Erik Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8 *Global Policy* 119, 120.

<sup>171</sup> *ibid.*

<sup>172</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted 2006.

holders) and the States which are affected by the existence of conflicting norms.<sup>173</sup> The next chapter will discuss the possibilities of overcoming the problem of fragmentation between the CoE and CRPD standards on involuntary placement and non-consensual treatment through enhancement of domestic legislation.

### **Chapter 3. Harmonisation of domestic legislations as a solution.**

Even though several International organisations requested the withdrawal of the draft protocol, as mentioned in the previous chapter, the work and consultations on the document are ongoing. Even if withdrawal of the Protocol is achieved the existed fragmentation between the CRPD and ECHR and its case-law will not be resolved. Thus, this thesis argues that the most effective way to overcome the conflict is the harmonisation of the national legislations with CRPD standard. Accordingly, main effort of the international human rights community and national actors should be focused on this process. CoE member states, especially those who already initiated the reforms for harmonisation of domestic legislation with CRPD standard, can also play the positive role in this process.

Harmonisation of the legislation on one hand will eradicate the risk of further fragmentation of standard on involuntary placement and non-consensual treatment for the certain States. At the same time if harmonisation of the standard on national levels is achieved on big scale, it will commence the process which is known as "European consensus." The practice has shown, the existence of such consensus has led to the modification of the lower human rights standard to higher and strict one. This thesis recognises that harmonisation of domestic legislation cannot be considered as the only solution to the fragmentation. Though argues that with the mechanisms enshrined in the CRPD it is possible it can be successfully realized.

#### *a. Importance of domestic legislation in Oviedo Convention and the Draft Additional Protocol*

As illustrated in the previous chapter, and highlighted by Lawrence and Gable, the main feature of international human rights, before adoption of CRPD was "leaving domestic governments with a wide range of discretion in relation to those rights and freedoms."<sup>174</sup> This approach can be read in the texts of Oviedo Convention and the Draft Protocol. It is not surprising in case of Oviedo, as it was adopted long before the adoption of CRPD. Draft Protocol, although in the preamble<sup>175</sup> recognises importance and takes into

---

<sup>173</sup> Eva Brems, 'We Need to Look at International Human Rights Law (Also) as a Whole' (*EJIL:Talk!*).

<sup>174</sup> O Gostin Lawrence and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2004) 1 Maryland Law Review 63.

<sup>175</sup> Draft Additional Protocol

account "the work carried out at international level on the protection of dignity and rights of persons with "mental disorders," in particular the CRPD, still conflicts with its standards.

The Oviedo Convention is the core document which gives the series of main principles, which are clarified, strengthened and supplemented by additional protocols regulating specific issues.<sup>176</sup> Accordingly, the rules enshrined in the Draft Protocol should be read and implemented according to the main concepts of Oviedo Convention.

Both Oviedo and the Draft Additional Protocol are stating that involuntary placement and non-consensual treatment, should be used according to domestic legislation.<sup>177</sup> As clarified in the Explanatory Report,<sup>178</sup> this is reflection of the standard given in ECHR (articles 5 and 8) and the case-law of the ECtHR, which requires that the measures should be "prescribed by law," and by it, both mean the domestic regulations.

Another principle which is also taking in account the domestic law, is the regulation concerning the consent of the person on medical treatment and limitations of their legal capacity.

In particular articles 10 and 11, state that involuntary placement and treatment can be used when the following criteria are met:

- i. a. The person's mental health condition represents a significant risk of serious harm to his or her health, and his or her ability to decide on placement is severely impaired, or
- b. The person's mental health condition represents a significant risk of serious harm to others;
- ii. The placement has a therapeutic purpose; and
- iii. Any voluntary measure is insufficient to address the risk(s) referred to in paragraph

The Draft Protocol, when referring to the "person's ability to decide on placement," according to its explanatory report, "follows the approach" of the Oviedo Convention regarding consent.<sup>179</sup> As already illustrated in previous chapter, Oviedo recognises the non-consensual coercive interventions when person has "mental disorder", the intervention is necessary and when without treatment, serious harm "is likely to result to a person's health," and the protective conditions enshrined in the domestic legislation are followed. Moreover, the explanatory report highlights that due to the diversity of legal systems in Europe dealing with

---

<sup>176</sup> European treaty series -No 164, 'Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' (1997) (7).

<sup>177</sup> Article 4 of the Draft Protocol;

<sup>178</sup> COMMITTEE ON BIOETHICS(DH-BIO), Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment 37.

<sup>179</sup> *ibid* 66.

the "incapacitation" of the persons, the Oviedo Convention relies on the domestic law of the state to determine "whether or not persons are capable of consenting to an intervention."<sup>180</sup> Accordingly, in the words of ECtHR "margin of appreciation"<sup>181</sup> is granted to the states when regulating the "incapacitation" of persons with psychological impairment.

Another article referring to domestic legislation is of particular interest for this thesis. In particular, the revised text of the draft Additional Protocol, in Article 1.2 states that the provisions of Protocol "do not limit or otherwise affect the possibility for a Party to grant a wider measure of protection than is stipulated in this protocol;"<sup>182</sup> The explanatory report of the Draft Protocol specifies that the main aim of the paragraph is to give states the right to provide wider protection than provided by the protocol.<sup>183</sup> Although the report does not refer to the CRPD standard explicitly, the existing criticism around the text of the draft gives the reason to believe that the article was included in the protocol to mitigate the conflict between the standards and leave it up to state parties to decide which treaty to follow.

The fact that the draft protocol leaves a possibility to follow the higher standard and links the regulation of the most crucial definitions (such as legal capacity and regulation of involuntary placement/treatment) up to the national legislations, means that member states of the Oviedo even if they adopt the protocol cannot justify their in compliance with the CRPD based on the existence of the protocol. Moreover, all 28 member states of the Oviedo, simultaneously are the state parties of the CRPD, accordingly, have the obligation to give effect and translate the Conventional standards on legal capacity, in good faith.<sup>184</sup> If from an international perspective the CRPD and the Oviedo and its protocol are the treaties which are parts of the parallel systems, creating obligations for the member states simultaneously, after the ratification of both treaties, they become the part of one particular national legislature. Accordingly, when reading the obligations together, and taking into account article 1.2 of the draft protocol, it cannot be considered as an obstacle for the states for following the higher standard of CRPD and ensure the - absolute character of 1. legal capacity and 2. prohibition of involuntary placement.

This argument of course should be examined from the Constitutional law perspective as well. It should be recognised that realisation on abovementioned theory depends on several factors which have impact on implementation of international human rights treaties in domestic law. As identified by the European

---

<sup>180</sup> *ibid* 42.

<sup>181</sup> Doctrine reflecting that: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements (of morals) as well as on the "necessity" of a "restriction" or "penalty" intended to meet them." First described in the *Handyside v the United Kingdom*, no 5493/72, 7 December 1976.

<sup>182</sup> Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment, As revised by the 13th DH-BIO, Strasbourg, 23-25 May 2018. Article 1, para 2.

<sup>183</sup> COMMITTEE ON BIOETHICS(DH-BIO) Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (n 3) para 16.

<sup>184</sup> Justin Malbon, Charles Lawson and Mark Davison, 'Vienna Convention on the Law of Treaties' (2014) 1155 The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 23, Article 26.

Commission for Democracy Through Law (Venice Commission),<sup>185</sup> the implementation of the international treaties mainly is influenced by the “conceptualisation of the relation between international and domestic law”<sup>186</sup> which is more known as monism ad dualism; by hierarchy of human rights treaties within domestic legislation,<sup>187</sup> and what is the effect of interpretation clauses in domestic constitutions.<sup>188</sup> The theory represented above will have more advantages in the monist systems, where international and domestic law are considered as “unified legal order.”<sup>189</sup> In this systems international law does not need incorporation is domestic legal acts, it is directly applicable and can be adjudicated by courts.<sup>190</sup> While in dualist systems, which believes that domestic law and international law are two separate systems<sup>191</sup> the harmonisation will depend on additional factors such as will of state, resources, level of democracy and whether the rights of persons with disabilities is on the agenda of the state.

As stated by De Wet, at the end of the day all states have the “legal tools with which to give effect to international obligations.”<sup>192</sup> How to ensure the implementation of CRPD standards on domestic levels will presented in the last chapter of this thesis. Meanwhile it is obvious that today, the Draft Protocol and Oviedo are in the middle of the gap between the national standards and the standards enshrined in CRPD. Thus, from a practical point of view, as soon as the CRPD requirements will be fulfilled by the state and more restrictive regulations will be placed on national levels, the need of the draft protocol will be eradicated automatically.

*c. Creation of European consensus as a tool for changing the ECtHR case law.*

To understand how the approach of the CoE can be changed through ECtHR case-law several aspects should be taken into account. First, the ECHR is the most influential human rights treaty on the regional level. Second, the ECHR looks at the member states as representatives of the “common heritage of political traditions, ideals, freedom and the rule of law.”<sup>193</sup> According to established ECtHR case-law, the ECHR is a

---

185 Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the basis of comments by Ms Veronika BILKOVÁ Ms Anne PETERS Pieter van DIJK

186 Ibid para 16

187 Ibid para 25

188 Ibid para 29

189 Erika De Wet The Constitutionalization of Public International Law, The Oxford handbook of Comparative Constitutional Law, edited by Rosenfield Michel and sajo Andras Publisher: Oxford University Press 2012 p1212

<sup>190</sup> Ibid

<sup>191</sup> Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the basis of comments by Ms Veronika BILKOVÁ Ms Anne PETERS Pieter van DIJK para 22

<sup>192</sup> Constitutionalization of Public International Law, Erika De Wet The Oxford handbook of Comparative Constitutional Law, edited by Rosenfield Michel and sajo Andras Publisher: Oxford University Press (2012) p. 353

<sup>193</sup> David . Harris and others, ‘The European Convention on Human Rights in Context’, *Law of the European Convention of Human Rights* (2nd edn, Oxford University Press 2009) 2.

living instrument,<sup>194</sup> and thus uses the “evolutive interpretation” of the convention<sup>195</sup> for ensuring that the “meaning of the rights (enshrined in the Convention are) both contemporary and effective”.<sup>196</sup>

As Rachovista highlights, “The idea of European consensus is seminal to the Court’s reasoning.”<sup>197</sup> The doctrine of European Consensus was first used by the Grand Chamber in *Demir and Baykara* case<sup>198</sup>, when the ECtHR stated that “taking into account interpretation of PIL norms is based on the existence of a European consensus, namely the common international and/or domestic law standard accepted by the vast majority of states<sup>199</sup>.” The concept always works together with the doctrine of margin of appreciation and dynamic/evolutive interpretation.<sup>200</sup> In defining whether the wide or narrow margin should be granted to states, the court looks at various factors, such as “sensitivity of the issue, the right involved, public interest and the existence of the European consensus on the matter.” When European Consensus is achieved, The Court is restricting the Margin of Appreciation of the States.<sup>201</sup>

The European consensus was the reason for the ECtHR to modify its practice towards the legal recognition of the sex change. In the case of *Christine Goodwin*,<sup>202</sup> a transsexual woman, was claiming the alleged violation of the Article 8 (the right to private and family life) due to fact that it was impossible to recognise her sex change. The Court, while in other identical cases was reluctant to find the violation<sup>203</sup>, used the “emerging consensus” in European states to change its standard and stated that “the respondent Government can no longer claim that the matter falls within their margin of appreciation”.<sup>204</sup>

Another example when the Court used the “emerging European consensus’ for condemning the margin of appreciation is the standard on the “prohibition of physical punishment in schools”.<sup>205</sup>

---

<sup>194</sup> *Tyrer v. United Kingdom* para 183

<sup>195</sup> ‘According to the Interpretation of the Court the Convention and Its Protocols Must Be Interpreted in the Light of Present-Day Conditions. Please See *Marckx v. Belgium*, 13 June 1979, § 41, Series A No. 31, and Many Subsequent Cases, Such as *Vo v. France* [GC], no 53924/00, § 82, ECHR 2004-VIII, and *Emonet and Others v. Switzerland*, no. 39051/03, § 66, 13 December 2007; *Glor v Switzerland*(GC) no 13444/04, para 53, 30 April, 2009.

<sup>196</sup> Kanstantsin Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12 *German Law Journal* 1730. Emphases added.

<sup>197</sup> Adamantia Rachovitsa, ‘Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from the Case Law of the European Court of Human Rights, *Leiden Journal of International Law*’ [2015] *Leiden Journal of International Law* 868.

<sup>198</sup> *Demir and Baykara*

<sup>199</sup> *Ibid*

<sup>200</sup> *Dzehtsiarou* (n 13) 1733.

<sup>201</sup> *Benashvili Sophio*, Assignment for the European Convention on Human Rights

<sup>202</sup> *Case of Christine Goodwin v The United Kingdom* no 28957/95, 2002.

<sup>203</sup> *Rees v United Kingdom*, (also concerning the legal recognition of sex change), held that there was no violation of applicants rights due to the fact that the States had a margin of appreciation to regulate this issue

<sup>204</sup> *Ibid* para 84-96.

<sup>205</sup> Andreas Follesdal, ‘Foreword’, *Fragmentation in International Human Rights Law-Beyond Conflict of International Courts in a State of Nature* (2015) 8.

In particular, in the case *Tyrer v. The United Kingdom*, the ECtHR stated that: “The Convention is a living instrument which (...) must be interpreted in the light of present-day conditions. The Court cannot but be influenced by the developments and commonly accepted standards in (...) the Member States of the Council of Europe[1].<sup>206</sup>”

As already discussed in the previous chapter, in defining the legal capacity and its restriction, the Court leaves the margin of appreciation to the states. It at the involuntary placement [SQ2]and non-consensual from the formal procedural perspective such as: whether the domestic legislations, and proportionality and necessity are met.

The possibility of creating a European Consensus amongst CoE states on the prohibition of involuntary placement and non-consensual treatment is possible due to several reasons. First, as it was already mentioned, out of 48 CoE member states, 47 have ratified the CRPD and, accordingly, all of them accepted an obligation to comply with the standards of absolute legal capacity and prohibition of involuntary placement and treatment. With extensive advocacy of NHRIs and civil society, most importantly DPO's, the harmonisation of domestic legislations is achievable.

If such standard is achieved in the majority of member states legislation, previously illustrated examples lead to the conclusion that there is a high possibility that ECtHR will change its attitude towards the standard and will alleviate it.

Another positive sign is the extensive use of CRPD in the case-law of. In general, the ECtHR is very open to external international human rights norms. As some authors state, the court systematically applies external norms “in light of their progressive development by their monitoring bodies,”<sup>207</sup> to avoid and lessen the possibility of conflicting interpretations.<sup>208</sup> It gives the possibility to the Court to detect and integrate evolving standards on the regional and international level.<sup>209</sup>

Although case law and the approach of the Court is not fully in compliance with the standards of CRPD in relation to other relevant standards, such as “equality matters”, the Court actively refers to the aforementioned UN Convention and uses it for the interpretation of ECHR.<sup>210</sup>

---

<sup>206</sup> *Tyrer v. United Kingdom* para 183

<sup>207</sup> *Rachovitsa* (n 14) 873.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid* 863.

<sup>210</sup> *ibid* 522. also see *Alajos Kiss v Hungary*<sup>44</sup> and *Jasinskis v Lithuania*

For example, in the case *S.H.H. V United Kingdom*, (para 94) “ECtHR affirmed that ‘the Convention does not apply in a vacuum but must be interpreted in harmony with the general principles of international law’, so that in the present case ‘the United Nations Convention on the Rights of Persons with Disabilities has to be read as informing the scope to be given to Article 3[3]’<sup>211</sup>”. In the case *Glor v. Switzerland*, where the applicant claimed to be a victim of discrimination on the ground of disability, the Court explicitly referred to the CRPD and stated that there was a European consensus regarding the “need to protect people with disabilities from discriminatory treatment.”<sup>212</sup>

*Stanev v. Bulgaria*<sup>213</sup> is another judgment of the Grand Chamber which is of particular interest for this subchapter. In this case, the Court presented the argument about the involuntary placement of a person with psychological impairment in a mental health institution. Although the Court maintained its position on restrictions of the persons capacity when necessary due to the person's life and health, it found a violation of Article 5 of the convention on the bases of inexistence of “immediate risk, or require the imposition of any special restrictions to protect his life and limb<sup>214</sup>. Unfortunately, here as well the Court never discussed the absolute nature of the Article 12 of the CRPD and found a violation on another ground. This judgement is important from another perspective. When assessing the merits of the case, the Court referred to the inexistence of a “uniform approach in Europe to the question of placement of legally incapacitated persons in specialized institutions.” This leads to the conclusion that if such consensus will emerge, the Court will take it into account.

“The margin of appreciation is a reflection of the principle of subsidiarity. Inconsistent application of the doctrine together with the principle of European consensus can be used “to ensure the consent of the States, convince the general public, and secure obedience”.<sup>215</sup> “When the Court sees the European Consent margin of appreciation narrows and together with the doctrine of consensus, it creates the new human rights safeguard which should be applied on the domestic level.”<sup>216</sup>

The raising number of concurring opinions of the judges in ECtHR case law also points to the growing importance of the CRPD standard. In case *Kuttner v Austria*<sup>217</sup> the claimant was the person with psychosocial impairment, convicted according to criminal law. The Court found a violation of Art 5.4 of the ECtHR due to the fact that a period of 16 months between the proceedings concerning the applicant’s request to be released from the institution did not fulfil the requirement of a speed review and that the delay

---

<sup>211</sup> Favvali528

<sup>212</sup> *Glor v Switzerland(GC) no 13444/04, para 53, 30 April, 2009* para 52.

<sup>213</sup> Ibid 93

<sup>214</sup> Ibid 128

<sup>215</sup> Marisa Iglesias Vila *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human Application no.7997/0816 July 2015, Grand Chamber Judgment rights*. Oxford University School of Law2017

<sup>216</sup> Benashvili Sophio, Assignment for European Court of Human Rights

<sup>217</sup> Application no.7997/0816 July 2015, Grand Chamber Judgment

in examining his request was attributable to the courts.” [SQ4] In his partly concurring and partly dissenting opinion, Judge Pinto De Albuquerque referred to the fact that the while adjudicating the Court did not take into account Article 14 of the CRPD, which states that “detention based on the perceived danger of mentally ill persons to themselves or to others breaches Article 14[SQ5]. Which rejected the approach enshrined in the 1991 MI principles. He drew attention to the fact that when persons with disabilities, including persons with psychosocial impairments, are arrested, detained or imprisoned, Article 14.2 of CRPD “guarantees non-discrimination, including by the provision of reasonable accommodation on an individualised basis. In other words, “the appropriate modification and adjustment to secure to each person with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms[SQ6]. Moreover, as he highlighted, “in criminal cases automatic and involuntary transfer to mental health facilities within or outside an ordinary prison facility, or the imposition of mental health treatment as a condition of probation, parole or a transfer to a softer or “normal” prison regime, cannot be consider a reasonable individualised accommodation for persons with disability. Thus, States parties should ensure that each detained person with disabilities has access to voluntary, timely health care[7][SQ8]. Based on these arguments, the Judge concluded that the Austrian Criminal Code, representing vague and disproportionate form of involuntary transfer of criminally responsible persons to mental health facilities, within or outside of an ordinary prison was discriminatory based on mental disability in the context of criminal sanctions and violates Article 14 of CRPD[9].”

Taking into consideration all above mentioned, the thesis tends to believe that, with the growing number of domestic legislations which are in accordance with CRPD standard and the importance of CRPD already recognised by the court in its case law, the evolution of the standard concerning the legal capacity and prohibition of involuntary placement is possible. Moreover, some authors stated that “ECtHR disability case law will produce a “spillover effect”<sup>218</sup> and the Court while following the standards enshrined in the CRPD will adopt its interpretation of Article 8 of the ECHR in compliance with Article 12 of the CRPD.<sup>219</sup>

One might argue that the presented discussion and arguments are purely theoretical and it will be very difficult to translate them into practice. But the position of CoE member states such as Bulgaria, Portugal and Former Yugoslav Republic of Macedonia can be considered as a positive sign in this direction.

Achieving the higher human rights standard through the States practices can be doubted. But following chapters will illustrate the possibilities and concrete mechanisms which can be

---

<sup>218</sup> Favalli (n 22) 535.

<sup>219</sup> Favalli 537.

The next chapter aims to illustrate the practical ways of achieving harmonisation of the domestic legislation with the CRPD. For this, article 33 of the aforementioned UN Convention is of crucial importance. It represents a unique mechanism, aiming at effective implementation – monitoring, promotion and protection – of CRPD on domestic levels.

#### **Chapter 4. The role of Article 33, practical tool in achieving coherence**

As suggested in the previous chapter, harmonisation of domestic legislations with CRPD standard will have two effects. First, it will eradicate the necessity of the Draft Protocol and overcome the conflict between it and CRPD. Second, the growing number of States with harmonised legislation will open up a wide perspective. It will jumpstart the process of creation of “European Consensus” on the subject matter, which will lead to (gamkacreba) at ECtHR level.

Although as demonstrated, in many states the legislation is not in compliance with the CRPD standard on legal capacity and prohibition of non-consensual placement and treatment, the thesis suggests that Article 33 could be used as a practical tool, that would immensely contribute in shifting the states’ position in favour of harmonisation.

As noted by Raley, during the drafting process of the CRPD, human rights community was aware of the fact that human rights treaties were facing the problem of implementation and were “failing to have the necessary impact on the politics and practices of the state parties.”<sup>220</sup> Root of the problem was ineffectiveness of UN human rights monitoring mechanisms.<sup>221</sup> Thus, to ensure utmost implementation of CRPD in domestic legislations,<sup>222</sup> CRPD shifted its approach from “two dimensional”<sup>223</sup> perspective of monitoring, which focuses on the relationship between States and treaty bodies to “pluri-dimensional,”<sup>224</sup> by introducing “unprecedented and innovative”<sup>225</sup> article 33.

The Article 33 is a practical tool, focusing on the “implementation gap” between the standards enshrined in CRPD and its implementation and impact on persons with disabilities.<sup>226</sup> It introduces the obligation of the States in three directions. First, requests from governments to “designate a focal point within the government,”<sup>227</sup> second, requires to “maintain, strengthen, designate or establish” the independent

---

<sup>220</sup> Raley Meredith, ‘Article 33 of the Convention on the Rights of Persons with Disabilities: Broader Implications for Human Rights Law’ (2016) 39 (1) Dublin University Law Journal 157.

<sup>221</sup> Meredith Raley 167.

<sup>222</sup> For Detail Information on this subject, please see: Michael Ashley Stein and Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential*, (2010) Faculty Publications.

<sup>223</sup> Oomen Barbara, ‘Fragmentation/Integration of Human Rights Law- a Users’ Perspective on the CRPD’ in Brems Eva and Ouald\_Chaib Saila (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018).

<sup>224</sup> Oomen Barbara .

<sup>225</sup> Gauthier De Beco, ‘Editorial Introduction’ in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (2013).

<sup>226</sup> Mental Disability Advocacy Center, ‘Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities’ 13.

<sup>227</sup> Article 33 (1).

mechanism for promotion, protection and monitoring of implementation of the convention;<sup>228</sup> and third, places responsibility on States to guarantee involvement and full participation of civil society in the monitoring process.<sup>229</sup>

Focal points should be designated within the government, and should coordinate the implementation of the convention by the national disability agenda as well as awareness raising of Ministries on the obligations enshrined in the CRPD.<sup>230</sup> This is the mechanism which is the guarantor that the activities and recommendations of the independent mechanisms and Civil society will be reflected in the process of domestic implementation of the CRPD.<sup>231</sup> While the importance of focal points cannot be underestimated, this chapter will focus on the activities of independent mechanisms and civil society which can play a crucial role in the harmonisation process of domestic legislations with Article 12 and 14 of CRPD.

a. *The role of independent mechanisms*

As already mentioned, article 33(2) of the CRPD requires the member states to put a framework “that will include one or more independent mechanisms.”<sup>232</sup> The main aim of the mechanisms should be the protection, promotion and monitoring the implementation of the CRPD. It should be highlighted that although the article does not necessarily requires the states to designate the National Human Rights Institutions (hereafter NHRI), the article makes highlights that when making the decision, States parties should adhere to the principles relation to the status and functioning of national institutions for the protection and promotion of human rights (Paris Principles).<sup>233</sup> As clarified later, although the states can designate more than one independent mechanisms, at least one of them should function according to the Paris Principles.<sup>234</sup> The crucial role of NHRI s role in improvement execution of human rights treaties have been highly recognised by the international community. <sup>235</sup>

In practice a lot of States nominated the NHRI as independent bodies. In Poland Public Defender was designated. In Georgia the Public Defender (ombudsman) of Georgia, For example in Denmark ,Danish

---

<sup>228</sup> Article 33(2).

<sup>229</sup> 'Article 33(3)'.

<sup>230</sup> Thematic study of the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities. A/HRC/13/29 paras 22-25.

<sup>231</sup> De Beco (n 6).

<sup>232</sup> United Nations General Assembly, 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (2009) 10455 1, para 37.

<sup>233</sup> General Assembly resolution 48/134, 'Principles Relating to the Status of National Institutions (The Paris Principles)'.

<sup>234</sup> United Nations General Assembly (n 13) 44.

<sup>235</sup> Office of The United Nations High Commissioner for Human Rights, 'National Human Rights Institutions, History, Principles, Roles and Responsibilities'.

Institute for Human Rights, Danish Disability Council and Parliamentary Ombudsman is designated as an independent mechanism,<sup>236</sup>

According to Accreditation on status as of 8 August 2018, it should be noted that out of 47 CRPD/ CoE member states only two States, Romania and Switzerland have C status, thus considered to be non-compliant with the Paris Principles, ten are holders of B status and twenty five States have the A status. Other States such as Andorra, Czech Republic, Estonia, Iceland, Italy, Malta Monaco San Marino and Turkey, do not have the National Human Rights Institutions.<sup>237</sup>

### *Reports and recommendations*

One of the responsibilities of NHRI enshrined in the Paris Principles is to “promote and ensure the harmonisation of national legislation with (...) international human rights instruments to which the State is a party.”<sup>238</sup> In practice this responsibility can be fulfilled with different techniques. One of them is addressing relevant branches of the State make proposals and recommendations on harmonisation of national legislation with the requirements enshrined in the Articles 12 and 14 of the CRPD and accordingly for adoption new or amending existing laws.<sup>239</sup> Often such recommendations are the part of the Special thematic reports or Annual Reports on Human rights situation presented by the NHRI.<sup>240</sup> For example, Public Defender of Georgia which was designated as an independent mechanism under article 33(2) has issued the special study report.<sup>241</sup> The report assessed the legal reform aiming at harmonisation of national legislation with regards to legal capacity of persons with psychosocial disability with Article 12 of CRPD. According to the findings, Georgian legislation “except for a few exceptions” is in line with the CRPD standard.<sup>242</sup> However, the implementation of new legislation was identified problematic thus the report formulates concrete recommendations for addressing the problem. Another example is the report of the Danish Institute of Human Rights, which together with the Danish Disability Council and the Danish Parliamentary Ombudsman is designated as independent mechanism under Article 33 (2). In its report,

---

<sup>236</sup> Maria Ventegodt Liisberg, 'Implementation of Article 33 CRPD in Denmark: The Sails Are Up, But Where Is The Wind' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (Martinus Nijhoff Publishers 2013) 82.

<sup>237</sup> <https://nhri.ohchr.org/en/documents/status%20accreditation%20chart%20%288%20august%202018.pdf>.

<sup>238</sup> General Assembly resolution 48/134 (n 14) principle 3(b).

<sup>239</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (Martinus Nijhoff Publishers 2013) 48.

<sup>240</sup> *ibid* 40.

<sup>241</sup> Public Defender (Ombudsman) of Georgia, 'LEGAL CAPACITY – LEGISLATIVE REFORM WITHOUT IMPLEMENTATION' Available at: <http://www.ombudsman.ge/eng/190308061623angarishebi/legal-capacity-reform-without-implementation>.

<sup>242</sup> *ibid* 9.

organisation recommended the reform of the Guardianship Act and promote assisted decision-making for achieving the harmonisations with CRPD.<sup>243</sup>

### *Facilitating implementation of Concluding Observations*

Another responsibility identified by Paris Principles, which can warrant the effectiveness of NHRI in process of harmonisation of national legislation with CRPD is the requirement to “contribute to the reports which States are required to submit” to treaty bodies and express their opinion.<sup>244</sup> In practice, as highlighted by Beco, NHRI's except for their involvement in the State reporting procedures can also facilitate the implementation of the Concluding Observations.<sup>245</sup> As of September 2019, out of 47 CoE member states, which are also the States Parties of the CRPD, Committee of CRPD issued Concluding Observations on thirty-one state reports. None of them is in full compliance with the CRPD standard on legal capacity and prohibition of involuntary placement and non-consensual treatment. Only in the case of Hungary, has the Committee appreciated the efforts and commitments of the state to harmonise its legislation according to Art 12 and 14, and in the case of Austria it “welcomed the launch of the model pilot project on supported decision-making, Under the National Disability Action Plan.” But expressed its concerns about implementation of art14. It should be also highlighted that in the States Reports of Albania and Andorra were expressed the commitment to harmonise domestic legislations according to CRPD standard with regards to legal capacity and prohibition of involuntary placement and non-consensual treatment. Taking this into consideration, the facilitation and the follow -up of the Committees recommendations by the independent bodies is of most importance. When Concluding Observations require the legislative reforms and changes, as illustrated this is the case, one of the techniques identified in countries which have the National Human Rights Action plan ensure that the Concluding Observations are incorporated in the Action Plan and regularly interact with the national legislature on implementation of COs.<sup>246</sup>

### *Applications to the Constitutional Courts*

As stated by the Venice Commission, the role of the Constitutional Courts in revision of compliance of domestic legislation with international human rights treaties is immense.<sup>247</sup> Of course, when considering this

---

<sup>243</sup> The Danish Institute for Human Rights, 'Human Rights in Denmark, Status 2015-2016, A Summary' available at:[https://humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/status/status\\_2016\\_uk\\_summary.pdf](https://humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/status/status_2016_uk_summary.pdf).

<sup>244</sup> General Assembly resolution 48/134 (n 14) Principle 3 (d).

<sup>245</sup> De Beco (n 6) 49.

<sup>246</sup> Amrei Muller, Frauke Seidensticker and German Institute for Human Rights, 'The Role of National Human Rights Institutions in the United Nations Treaty Body Process'.

<sup>247</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of

function as a practical tool for harmonisation, the hierarchy of human rights treaties within the domestic legal system should be taken into account. But as it was already mentioned in the previous chapter, in majority of CoE member States the constitutional courts are undertaking the “review of conventionality.”<sup>248</sup> Moreover, in some cases the Constitutions directly state that in case of the conflict between the human rights the state is a party to and the national law the former shall prevail and the Constitutional Courts have the power to “annul any piece of legislation (...) which conflicts with an international agreement.”<sup>249</sup> The examples can be found in the Constitutions of Romania and Hungary.<sup>250</sup>

Although Paris Principles is not referring to the function of NHRI to apply to Constitutional Courts, in practice this is considered as “desirable” function of the NHRI.<sup>251</sup> As European Commission for Democracy Through Law Venice Commission recommended in its study,<sup>252</sup> NHRIs should have the possibility to apply to the constitutional courts concerning constitutionality of laws when they negatively affect human rights and freedoms. Practice has shown that many NHRIs have the right to “launch actions in constitutional and other courts.”<sup>253</sup>

For example, In Hungary and Georgia NHRIs - Commissioner for Fundamental Rights, and the Public Defender (Ombudsman) of Georgia, which are also designated as an independent body under article 33(2), can bring the applications before the Constitutional Court, when domestic law is not in compliance with the States international obligations, including CRPD.<sup>254</sup> The NHRI of Spain (Ombudsman) can submit the cases before the Constitutional Court even for an abstract review.<sup>255</sup>

Thus, this power of NHRIs can be considered as one of the ways to achieve harmonisation of domestic legislation with the standard of CRPD on involuntary placement and non-consensual treatment. Although CRPD is relatively new treaty, the examples attempts to achieve higher standard on domestic level through Constitutional Courts already can be observed. For example, in Poland NHRI used this power and presented the claim before the Constitutional Court of Poland “to challenge a provision in mental health legislation that

---

Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4.

<sup>248</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4. para 4.

<sup>249</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session (n 29).

<sup>250</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4..

<sup>251</sup> European Commission For Democracy Through Law (Venice Commission) Compilation On the Ombudsman Institution (n 17) 21.

<sup>252</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4..

<sup>253</sup> Linda C Reif, 'Ombudsman Institutions and Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities.' (2014) 65 University of New Brunswick Law Journal 237.

<sup>254</sup> Linda C Reif, 'Ombudsman Institutions and Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities.' (2014) 65 University of New Brunswick Law Journal 237..

<sup>255</sup> Alex Stone Sweet, 'Constitutional Court', *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfield Michel and sajo Andras (Oxford University Press 2012) 825.

stated that only minors aged sixteen and older needed to consent to psychiatric treatment when civil law conferred limited legal capacity on children starting at the age of thirteen.”

### *Fighting taboo*

As already mentioned, independent mechanism except for protection and monitoring should also promote the implementation of the CRPD. According to the Paris Principles the NHRI should assist educational institutions in teaching of human rights, also they should take appropriate steps to combat discrimination through educational and awareness raising activities.

As Bartlett rightly points, the paradigm shift introduced by CRPD requires “ideological shift” and cannot be achieved through administrative activities.<sup>256</sup> Moreover, the process “is primarily a political, rather than a legal one.” This is particularly relevant in case of legal capacity and prohibition of involuntary placement and non-consensual treatment.

As highlighted by the Special Rapporteur on the rights of persons with disabilities, the causes of “disability - specific forms of deprivation of liberty” are social. Cultural, religious and social stigma leads to extreme isolation and “social rejection.” moreover as identified by the Rapporteur, one of the main prejudices towards persons with disabilities and persons with psychosocial disabilities are associated with violence and dangerous, which leads to “coercive practices.” not only society but “mental health professionals as well. Thus Rapporteur explicitly referred to the need of capacity-building and awareness raising activities. As stated in report “the Changes to legal and policy frameworks will not be sufficient, unless accompanied by a major shift in the societal perception of persons with disabilities” for “shifting the public narrative about violence and persons with psychosocial disabilities”

One of the reasons for resistance towards harmonisation of this particular principle can be seen in existing stereotypes and perceptions on psychological disability. Numerous studies, reports and researches all recognise the existing misperceptions about psycho-social disability, the need of persons to be protected and the risks identified to them. Educational function of the NHRIs can play additional role in the process of harmonisation. The Paris Principles also explicitly highlight the importance of such programmes and requires from NHRIs to assist universities and other education institutions and undertake activities to combat discrimination through education and awareness-raising. As argued by Andrea Brodrick the transformation

---

<sup>256</sup> p Bartlett, 'Implementing a Paradigm Shift; Implementing the CRPD in the Context of Mental Disability Law. In: Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report' [2014] Washington DC: Centre for Human Rights and Humanitarian Law, American University.

approach is necessary for achieving the equality. and it should “address the socially constructed barriers, stereotypes, negative customs and practices which hinder the full enjoyment of rights by marginalized groups,” The importance of combating the stereotypes and stigma for successful implementation of the CRPD is enshrined in its article 8 which requires from states to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities.”

The activities of NHRIs can be various in this direction, from training meetings and educational systems<sup>257</sup> promotional activities, such as collecting, producing and disseminating information and materials, organising public events and encouraging community initiatives<sup>258</sup>. All. These activities can be very useful in awareness raising on psychosocial and intellectual impairments and the consequences of the Involuntary treatment and the Non-consensual placement for persons. This activities can have an influence on “change of behaviour and will foster and acceptance of the values underlying which is necessary for its internalisation”<sup>259</sup> the paradigm shift in legal capacity.

As an advantage to the harmonisation should be also considered the existence of international Networks where the NHRI’s and Independent bodies have a contact point. for example the Coordinating Committee of NHRIs, which unites amongst representatives from other regional groups united NHRI’s from thirty-seven CoE member states.<sup>260</sup> Another network worth mentioning is the European Network of National Human Rights Institutions. The network established a special working group on UNCRPD (WG). The WG “brings together” NHRI’s which are designated as independent mechanisms under article 33(2) aiming at “provide a point of contact” and identify, develop and promotion of good practices for effective implementation of CRPD in member states. One of the aims identified by WG to undertake joint efforts to influence the implementation process and “development of jurisprudence” in States.

the position of the WG towards the involuntary placement and non-consensual treatment is in line with CRPD standard. It was reaffirmed in the Comments of the WG on the Draft Protocol, where the NHRIs expressed their concerns that the Draft Protocol was not inline with CRPD “implicitly or explicitly” Moreover they highlighted the problem of creation of the treaty which “does not accord with the obligations of the State Parties under the CRPD”

Check their connection with the Council of Europe and argue that they can influence the process there as well. – the importance and the role of NHRI's is highly recognised by the Council of Europe – At the Council of Europe level “ adopted recommendation No.R (97) 14 on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights and Resolution (97) 11 on Cooperation

---

<sup>257</sup> Mental Disability Advocacy Center (n 7) 42.

<sup>258</sup> De Beco and Hoefmans (n 21) 45.

<sup>259</sup> De Beko 41.

<sup>260</sup> De Beco and Hoefmans (n 21) 40.

Between National Human Rights Institutions of Member States and Between Them and The Council of Europe”<sup>261</sup> (sanakhavia)

*b. The role of civil society*

“The ratification of the treaty is not guaranteeing compliance with these rights, but it does offer new resources to those groups that can benefit from its implementation. It increases the chances of successful social mobilisation by providing citizens with additional arguments for their claims towards government. “<sup>262</sup> “it increases the range of strategies a social movement can use to secure policy change. It also provides a political opening for rights demanders in politics, it creates a room for strategies of “rightful resistance” or the ability of individuals and nascent social movements to use officially sanctioned levers in pressing their rights claims.<sup>263</sup>

Beth Simmons discusses the three mechanisms through which “treaties might have effects in domestic politics – altering the national agenda, leveraging litigation, and empowering political mobilization<sup>264</sup> ( caikithe da mere daamate) and article 33 of the Convention opens all these possibilities even more. It should be also mentioned that all these three possibilities can be easily tackled by the NHRI’s and CS and DPO representatives. “it gives those actors concerned with the promotion and protection of disability rights the unique opportunity to urge States to abide by their commitments through their participation in various bodies, thereby making the Convention a powerful tool for their action”<sup>265</sup>

Article 33 (3) demands that civil society should be fully involved in the monitoring process of CRPD implementation. As it was already mentioned in the previous chapter, persons with disabilities, and civil society representatives were actively involved in the drafting process of CRPD through the DPO’s with the slogan “Nothing about us without us.”<sup>266</sup> As highlighted by Dagener, more than 400 NGOs had been accredited to the Ad Hoc Committee, in the process of drafting of the treaty. This process resulted in recognition of the role of PwD’s and DPOs in the monitoring process of the CRPD.<sup>267</sup> As recognised by the Committee on the Rights of Persons with Disabilities (heirafter The Committee), the participation had a “positive impact on the quality” of CRPD. This at the same time showed the “force, influence and potential” of

---

<sup>261</sup> De Beco 35.

<sup>262</sup> A Beth Simmons, ‘A Domestic Politics Theory of Treaty Compliance’ in Cambridge University Press (ed), *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) 147–148.

<sup>263</sup> Simmons 147.

<sup>264</sup> Simmons 148.

<sup>265</sup> De Beco and Hoefmans (n 21) 20.

<sup>266</sup> Office of The United Nations High Commissioner for Human Rights, ‘Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors - Professional Training Series No.17’ (2010) 33.

<sup>267</sup> Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5 *Laws* 15.

PwD's. Another article which also insures the full participation of PwDs through DPO's in public life is Article 4(3) of the CRPD. According to the General Comment No 5, the Committee under the "representative organisations" clarified and referred to the following PDO's: The umbrella organisations, cross-disability organisations, self - advocacy organisations, organisations representing and established by family members or relatives of PwD's, organisations representing exclusively women and girls and organisation focusing on children and young persons rights with disabilities. the Committee also clarified its position regarding the involvement of NGOs and Civil society representatives in monitoring process. It highlighted that, although according to Article 33(3) in monitoring process all civil society organisations should have possibility to be involved, the states should give the priority to DPO's as to the representative and voice of PwD's. At the same time as indicated by the Committee, States Parties should have the continuous consultations with DPOs while introducing the legislation or designing the special project regarding the rights of PwDs. This should be achieved through the establishment of "permanent consultation mechanisms."

As indicated in the latest report of FRA Europe, although the participation of DPO's in monitoring process wishes for better, the gradual progress can be observed in EU countries on the involvement of persons with disabilities in decision making processes. there are several illustrations how the participation of DPO's led to the improvement of the process of implementation of the CRPD and had a result. For example in Denmark the DPO and other CS organisations together with the NHRIs of Denmark are advocating for creation of national Disability Action plan. In Finland, with active participation of DPO's the Advisory Board for the Rights of Persons with Disabilities which is designated as a focal point under article 33(1), prepared the "National Action Plan on the CRPD for 2018-2019."In Poland after extensive protests and advocacy for creation the support programs for persons with disabilities, the government drafted the program on support system for persons with disabilities and is in the process of consultations with DPOs.

Although none of the presented examples have an effect of equal recognition of legal capacity and prohibition of non-consensual placement and involuntary treatment, the fact that the states of CoE are becoming more open to the participation of DPO's in the monitoring gives hope that the same can be achieved on this rights as well.

Moreover the participation of PDO's in the process of CRPD monitoring was enhanced through the Independent monitoring mechanisms. For example, in Georgia the Public Defender, which is designated as independent mechanism under article 33(2) established Consultative Council. Out of fifteen members of the Council, nine are representatives of DPO's. The DPO's are actively involved in the process of designing the action plan of the independent mechanism. mechanisms like this opens the possibility of coordination between the two main actors designated for monitoring the implementation of the CRPD. It is a forum for

discussions on existing problems and consultations on future strategies for ensuring the state compliance with international treaty obligations. As stated by Dagher, it increases the “impact of their demands by channeling them through the NHRI.”<sup>268</sup>

Growing evidence as to the effectiveness of non-coercive support practices outside the health sector ( please see A/HRC/35/21, para 29) “Those practices need to be further researched, developed and implemented, and must be based on the principles set out above regarding supported decision-making.” the role of DPO’s can be crucial in this direction. together with participation possibility by focusing on the existing good practices and the examples they can facilitate evidence-based decisions from the States, in particular concerning the legal capacity and non-consensual placement and treatment.

Moreover the recent practice has shown that the DPO’s are actively involved in enhancing the process of harmonisation of national legislations with the Article 12 by representing relevant supporting decision making models.

In 2017, one of the biggest European non-governmental network organisations, “Mental Health Europe “ issued the position paper on article 12 of the CRPD to provide guidance to EU states how the persons with psychosocial disabilities can be supported to make the decisions. in Andalusia, the Human Rights and Mental Health Group developed the guide on “advanced care Planning in Mental Health” which aims to providing the guidelines the mental health care users and professionals in line with CRPD. Paper illustrates several successful projects initiated by the Civil Society. Among which it refers to andalusian practice of “Advance Care Planning” model which enables persons to officially express their will and preferences in advance, which should be included in the official medical record and will be used by healthcare professionals in case of person faces “inability to make decisions,” or express their preferences and will on treatment. The model was elaborated after adoption of the law on Patient Anatomy and aims harmonisation of national legislation and practice with the article 12 of CRPD. In case of successful implementation of this initiative the absolute legal capacity can be achieved which will have an effect on implementation of Article 14 as well.

“Article 33 is not designed for countries who do not implement treaties because they are hostile to human rights. Rather, it is designed for states that may be accepting of human rights in theory, but have trouble fully implementing human rights treaties because the treaties are a low legislative priority, or it’s unclear who is responsible for them, or they are simply forgotten amongst other state business. The Article 33 framework can address these problems.”<sup>269</sup>

---

<sup>268</sup> *ibid* 40.

<sup>269</sup> Raley (n 1) 168.

Of course the described functions and possibilities of NHRIs cannot be considered exhaustive. The thesis attempted to identify the most relevant and effective ways for achieving the compliance of national legislations with CRPD standard on articles 12 and 14. These activities should be combined with the functions of NHRI such as individual complaint handling. Cooperation with the Committee of CRPD, the function of monitoring of closed psychiatric institutions.

## Conclusion

On the role of best practices In particular with sharing best practices on alternatives to involuntary placement and non-consensual treatment, supportive decision-making models and identifying challenges faced during their implementation to tackle all identified problems with assistance of international community and expert groups in the timely manner.

<sup>1</sup> Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 *International Law and Politics*, 259, 261, 262 (2007).

<sup>1</sup>For discussion of what is understood by the concept of self-contained regimes, see Report of the Study Group on Fragmentation of International Law, International Law Commission, Fifty-Fourth Session, U.N. Doc. A/CN.4/L.628 (2002), p.86.

<sup>1</sup> UN General Assembly, International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification And Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' (2006).

<sup>1</sup> Commission (n 1).para 11

<sup>1</sup>Wilfried Jenks, *Conflict of Law-Making Treaties*, 30 *British Yearbook of International Law*, 401, 405 (1953)

<sup>1</sup> Marco Milanovic, 'Norm Conflict in International Law Wither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law*.p.68

<sup>1</sup>Ian Brownlie, 'Problems concerning the unity of international law', in 1 *LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: EDEDES EN L'HONNEUR DE ROBERTO AGO*, (A.Giuffre ed.,) (1987) p. 156.

<sup>1</sup> Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from the Case Law of the European Court of Human Rights, *Leiden Journal of International Law*' [2015] *Leiden Journal of International Law*.

<sup>1</sup> Svetlana Tyulkina, 'Fragmentation in International Human Rights Law: Political Parties and Freedom of Association in the Practice of the UN Human Rights Committee, European Court of Human Rights and Inter-American Court of Human Rights.' (2014) 32 *Nordic Journal of Human Rights* p.158

<sup>1</sup>Marjan Ajeovski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws' (2014) 32 *Nordic Journal of Human Rights* 87

<sup>1</sup>Rachovitsa (n 4). p 873

<sup>1</sup> Lorna McGregor, *The Relationship of the UN Treaty Bodies and Regional Systems* In *Routledge Handbook of International Human Rights Law* (Scott Sheeran and Sir Nigel Rodley, Taylor & Francis Group 2013).P 511

<sup>1</sup> Eva Brems, 'We Need to Look at International Human Rights Law (Also) as a Whole' (*EJIL:Talk!*). Available at: <https://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/>

<sup>1</sup> Lucas Lixinski, 'Choice of Forum in International Human Rights. Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Ahead' (2009) 23 ( U C Dublin L Rev. p.28

<sup>1</sup> Anne (n 15).p.676

<sup>1</sup>Ralf Michaels &Joost Pauwelyn *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law* " available at: [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2933&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2933&context=faculty_scholarship) p. 19.

<sup>1</sup>Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20.no.2 *The European Journal of International Law*.

<sup>1</sup> ILC Report at page 12

<sup>1</sup>Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from the Case Law of the European Court of Human Rights, *Leiden Journal of International Law*' [2015] *Leiden Journal of International Law* 868.

<sup>1</sup>Ajevski (n 6).P. 87

<sup>1</sup> Anne Peters (n 15).680

<sup>1</sup>

<sup>1</sup>J. Charney, 'The "Horizontal" Growth of International Courts and Tribunals: Challenges and Opportunities?' (2002) 96 *ASIL Annual Meeting Proceedings* 369 at 370; cited in Lorna McGregor (n 21). P. 515

<sup>1</sup>Mehrdad Payandeh (n 9).p.299

<sup>1</sup> Erik Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8 *Global Policy* 120.

<sup>1</sup> Lixinski (n 17).p.30

<sup>1</sup> Lorna McGregor (n 21).517

<sup>1</sup> Tyulkina (n 5).171

<sup>1</sup> Stephanie E Berry, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework' (2017) 24 *International Journal on Minority and Group Rights* 223.

<sup>1</sup> Andreas Follesdal (n 28).p.2

<sup>1</sup> Lorna McGregor (n 21).506

<sup>1</sup> Tyulkina (n 5).

It should be noted that all three human Rights treaties, The International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) contain the special article on the Freedom of Association.

<sup>1</sup> Framework Convention For the Protection of National Minorities and Explanatory, adopted 1994

<sup>1</sup> Berry (n 51).

<sup>1</sup> Stephanie E Berry, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework' (2017) 24 *International Journal on Minority and Group Rights* 228.

<sup>1</sup>Leila Sahin v. Turkey ( Application no.44774/98) 10 November 2005

<sup>1</sup>RaihonHudoyberganova v. Uzbekistan Human Rights Committee, 11 October 2004

<sup>1</sup>Lorna McGregor, *The Relationship of the UN Treaty Bodies and Regional Systems* In *Routledge Handbook of International Human Rights Law* (Scott Sheeran and Sir Nigel Rodley, Taylor & Francis Group 2013).P 511

<sup>1</sup> Peters 693, McGregor Lorna 517

<sup>1</sup> R Retief M. and Letsosa, 'Models of Disability: A Brief Overview' (2018) 74(1) *HTS Teologiese Studies*. also Mary Ann Jackson, 'Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale?' 7(1) *Laws*. 2018;

Silvia Favalli 520

<sup>1</sup>Article 5 ECHR

<sup>1</sup> Oviedo Convention Article 7

<sup>1</sup> Draft Convention

<sup>1</sup> Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: "From Zero to Hero"' (2018) 18 *Human Rights Law Review* 520.

<sup>1</sup> Patel Vikram Mahomed Faraaz, Stein Michael Ashley, 'Involuntary Mental Health Treatment in the Era of the United Nations Convention on the Rights of Persons with Disabilities' [2018] *PLoS Med* 2.

<sup>1</sup>Degener (n 6).

<sup>1</sup> 'For Example the World Programme of Action Concerning Disabled Persons, Adopted by the General Assembly on 3 December 1982, (Resolution 37/52) Highlights That "When people such as the severely mentally disabled may not be able to represent themselves adequately in decisions affecting their lives, family members or legally designated agents should take part in planning and decision-making." UN Declaration on the Rights of Mentally Retarded Persons, illustrates the biomedical approach towards the persons with Psychosocial disabilities. Out of 7 principles two principles – fifth and seventh were defining the right to "qualified guardian"# and the procedural guarantees of restriction their rights in certain cases."

<sup>1</sup> As explained in the report forms of substitute-decision making are different forms of "guardianship, judicial interdiction, curatorship, conservatorship and mental health laws that allow involuntary treatment and commitment." *ibid*. please also see: United Nations Convention on the Rights of Persons with Disabilities, 'Committee on the Rights of Persons with Disabilities General Comment 1: Article 12 Equal Recognition before the Law' (2014) 03120 1, para 15

<sup>1</sup>Report of the Special Rapporteur on the rights of persons with disabilities, Council, Human Rights Session, Thirty-seventh, 2018, 26 February–23 March para 26.

<sup>1</sup>Favalli 517.

<sup>1</sup>UN Declaration on the Rights of Mentally Retarded Persons

<sup>1</sup> O Gostin Lawrence and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2004) 1 *Maryland Law Review* 63 25.

<sup>1</sup> Article 9 of the ICCPR, Article 5 of ECHR

<sup>1</sup> For example, General Comment No.35 on Article 9 (Liberty and Security) of the UN Human Rights Committee (HRC) para 19

<sup>1</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights, which is looking whether highest attainable standard of health is available for persons with psychosocial disability, moreover as explained in General Comment No14 on the Right to health, coercive medical treatments are allowed "on an exceptional basis for the treatment of mental illness" (para 34

<sup>1</sup>Lawrence and Gable (n 20). 25

<sup>1</sup> Except from General treaties, such as ICCPR, ECHR, the prohibition of torture, inhuman and degrading treatments in specialized institutions is also monitored by specialized regimes such as UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment" and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

<sup>1</sup>Lawrence and Gable .25

<sup>1</sup> Principles for the protection of persons with mental illness and the improvement of mental health care Adopted by the General Assembly resolution 46/119, 17 December 1991.

<sup>1</sup> Principles for the protection of persons with mental illness and the improvement of mental health care (n 23) principle 1, para 6.

<sup>1</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*.(MartinusNijhoff Publishers 2013) 12.

<sup>1</sup>Degener (n 6) 8.

<sup>1</sup> Callus Anne-Marie, Camilleri-Zahra "Nothing About Us Without Us": Disabled People Determining Their Human Rights Through The UNCRPD" *Mediterranean Review of Human Rights* vl 1

<sup>1</sup>Callus Anne-Marie, Camilleri-Zahra p3

<sup>1</sup>Oomen Barbara, 'Fragmentation/Integration of Human Rights Law- a Users' Perspective on the CRPD' in Brems Eva and Ouald\_ChajibSaila (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018).p.90

<sup>1</sup>Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 *Laws* 35, 24.

<sup>1</sup> Retief M. and Letsosa .

<sup>1</sup>The Conventions approach to disability is considered as "paradigm Shift" by majority of authors such as Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: "From Zero to Hero"' (2018) 18 *Human Rights Law Review* 520. , Degener Theresa, Disability in a Human Rights Context, Oomen Barbara, 'Fragmentation/Integration of Human Rights Law- a Users' Perspective on the CRPD' in Brems Eva and Ouald\_ChajibSaila (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018

<sup>1</sup>Degener (n 6).

<sup>1</sup>Mahomed Faraaz, Stein Michael Ashley (n 11) 2.

<sup>1</sup> Article 12 CRPD

<sup>1</sup>'Information Is Available on the Following Web Page'

<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

<sup>1</sup> 'Information about State Parties Please See':

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec)>.

<sup>1</sup>Barbara (n 31).

<sup>1</sup> Individual autonomy is explained as "to be in charge of one's own life and to have the freedom to make one's own choices" Office of The United Nations High Commissioner for Human Rights, 'Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors - Professional Training Series No.17' (2010) 17.

<sup>1</sup> UN Committee General Comment No.1 para 41

<sup>1</sup>UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 *ibid* para 7.

<sup>1</sup> Office of The United Nations High Commissioner for Human Rights, Justice and Dignity for Detainees Week, Information Note No.4, Persons with Disabilities 2008.

<sup>1</sup> United Nations Convention on the Rights of Persons with Disabilities, 'Committee on the Rights of Persons with Disabilities General Comment 1: Article 12 Equal Recognition before the Law' (2014)

<sup>1</sup> Degener (n 6).

<sup>1</sup> Degener (n 6).4

<sup>1</sup> General Comment no.1 para. 29.

<sup>1</sup> Vienna Convention on the Law of Treaties, adopted on 23 May 1969

<sup>1</sup>adopted by Human Rights Council A/HRC/37/56, 'Report of the Special Rapporteur on the Rights of Persons with Disabilities' para 37.

<sup>1</sup> Melvyn Colin Freeman and others, 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 *The Lancet Psychiatry* 844.

<sup>1</sup> 'Georgia, Estonia, France, Ireland, Netherlands, Norway, Poland. for Official Information Please See': <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en)>.

<sup>1</sup> For detail information on States Parties compliance with CRPD standard please see chapter: 4

<sup>1</sup> Sandor Gurbai and Wayne Martin Is Involuntary Placement and Non-Consensual Treatment Ever Compliant with UN Human Rights Standards? A Survey of UN Reports (2006-2017) 9 January 2018;

<sup>1</sup> Sandor Gurbai and Wayne Martin 10-11

<sup>1</sup> General Comment No.1 (CRPD)

<sup>1</sup> UN Human Rights Committee, 2014: General Comment No.35. Article 9 (Liberty and security of person CCPR/C/GC/35,

<sup>1</sup> General Comment 35 para 19

<sup>1</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), the Convention against trafficking and in Human Beings and the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, contain the general provisions on disability

<sup>1</sup> Favalli (n 9) 517. also please see

: Committee of Ministers Recommendation 2004) 10 Concerning the protection of human rights and dignity of persons with psychosocial impairment

<sup>1</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted 4.IV.1997

<sup>1</sup> European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, updated on 31 August 2019, 11

<sup>1</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine Article 5.1 (e).

<sup>1</sup> Luberti v. Italy, Judgment of 23 February 1982, A 75, para. 27, Cited in Arai-Takahashi, Yutaka, The Margin of Appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, 2002, p 23 please also see Pleso v. Hungary para 61, H.L.v. the United Kingdom

<sup>1</sup> Guide on Article 5, p 24; please also see: Arai-Takahashi, Yutaka, The Margin of Appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, 2002, p 23

<sup>1</sup> Ruiz Rivera v. Switzerland para 59 Winterwerp v. the Netherlands, No 6301/73, 24 October 1979, para 39

<sup>1</sup> Hutchison Reid v. the United Kingdom, No. 50272/99, 20 February 2003, para. 52; Inseher v. Germany GC para 133, N. v. Romania para 151

<sup>1</sup> Inseher v. Germany GC para 129, Petschulies v. Germany, para 76

<sup>1</sup> ECtHR, Gorshkov v. Ukraine, No.67531/01, 8 November 2005 para 44-45 M.S. V Croatia (no2) para 114,

<sup>1</sup> V.K. v. Russia

<sup>1</sup> Bensaïd v. the United Kingdom, para 47 ECtHR, Y.F.v.Turkey, No.24209/94, 22 July 2003, para.33

<sup>1</sup> Guide on Article 8 of the European Convention on Human Rights, Rights to respect for private and family life, home and correspondence, Updated on 20 April 2019, 23

<sup>1</sup> Guide on Article 8. 23; Schneiterv.Switzerland, No 63062/00, 31 March 2005

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No 164) was opened for signature on 4 April 1997 in Oviedo (Spain)

'<https://www.coe.int/en/web/bioethics/Oviedo-Convention>'.

<sup>1</sup> Oviedo, article 6, para 3

<sup>1</sup> Explanatory report to Oviedo. para 42

<sup>1</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997 Article 6, para 3.

<sup>1</sup> Europeantreaty series -No 164 (n 76) paras 51-52; 54-55.

<sup>1</sup>Explanatory report to the Oviedo Convention Article 29, para. 164

<sup>1</sup>Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017-2023: "From Zero to Hero"' (2018) 18 Human Rights Law Review 517, 525.

<sup>1</sup>'Human Rights: A Reality for All, Council of Europe Disability Strategy 2017-2023'.

<sup>1</sup> 'Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities' [2012] Commissioner for Human Rights 38 <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1908555&direct=true>>.

<sup>1</sup> For detail information please see the following chapter 3

<sup>1</sup>Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment; The text of Draft Additional protocol is available at: <https://www.coe.int/en/web/bioethics/-/frequently-asked-questions-on-draft-additional-protocol-concerning-the-protection-of-human-rights-and-dignity-of-persons-with-mental-disorder-with-reg>

<sup>1</sup> Preamble of the Draft Protocol;

<sup>1</sup> COMMITTEE ON BIOETHICS(DH-BIO), Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment para 62.

<sup>1</sup> COMMITTEE ON BIOETHICS(DH-BIO) Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (n 83).

<sup>1</sup>Committee of Ministers (n 68).

<sup>1</sup>Erik Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8 Global Policy 119, 120.

<sup>1</sup>DH-BIO/INF 20, 'Compilation of Comments Received during the Public Consultation. Additional Protocol on the Protection of the Human Rights and Dignity of Persons with Mental Disorders with Regard to Involuntary Placement and Involuntary Treatment'.

<sup>1</sup>The letter is available at: '<https://Rm.Coe.Int/Letter-Un-Bodies-to-Sg/16808e5e28>'

<sup>1</sup>Statement by the Committee on the Rights of Persons with Disabilities calling States parties to oppose the draft Additional Protocol to the Oviedo Convention, adopted during the Committee's 20th session, held, from 27 August 21 September 2018.

<sup>1</sup>Statement of the European Network of National Human Rights Institutions (ENNHRI) on the Draft Additional Protocol to the Oviedo Convention'.

<sup>1</sup>Statement is available at: '<https://www.Hrw.Org/News/2018/11/21/Council-Europe-Threat-Rights-People-Disabilities>'.

<sup>1</sup>DH-BIO/INF 20 (n 185).

<sup>1</sup> Permanent Secretariat, 'Statement of the European Network of National Human Rights Institutions ( ENNHRI ) on the Draft Additional Protocol to the Oviedo Convention' (2014) 32.

<sup>1</sup>The opinion of the Council of Europe Commissioner on Human rights, DH-BIO/INF 20 (n 185).

<sup>1</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (MartinusNijhoff Publishers 2013) 19; also please see; Vienna Declaration and Programme of Action 1993, para 1

<sup>1</sup> Jack Donnelly, *Post-Cold War Reflections on the Study of International Human Rights* (Carnegie Council for Ethics in International Affairs ed, 1994).117

<sup>1</sup> Response letter is available at: '<https://Rm.Coe.Int/Response-to-Un-Bodies/16808e5e29>'.

<sup>1</sup>ibid.

<sup>1</sup> Erik Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8 Global Policy 119, 120.

<sup>1</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted 2006.

<sup>1</sup> Eva Brems, 'We Need to Look at International Human Rights Law (Also) as a Whole' (*EJIL:Talk!*).

<sup>1</sup> O Gostin Lawrence and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2004) 1 Maryland Law Review 63.

<sup>1</sup> Draft Additional Protocol

<sup>1</sup> European treaty series -No 164, 'Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' (1997) (7).

<sup>1</sup> Article 4 of the Draft Protocol;

<sup>1</sup> COMMITTEE ON BIOETHICS(DH-BIO), Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment 37.

Doctrine reflecting that: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements (of morals) as well as on the "necessity" of a "restriction" or "penalty" intended to meet them." First described in the *Handyside v the United Kingdom*, no 5493/72, 7 December 1976.

<sup>1</sup> Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment, As revised by the 13th DH-BIO, Strasbourg, 23-25 May 2018. Article 1, para 2.

<sup>1</sup> COMMITTEE ON BIOETHICS(DH-BIO) Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (n 3) para 16.

<sup>1</sup> Justin Malbon, Charles Lawson and Mark Davison, 'Vienna Convention on the Law of Treaties' (2014) 1155 The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 23, Article 26.

<sup>1</sup> Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the basis of comments by Ms Veronika BÍLKOVÁ Ms Anne PETERS Pieter van DIJK

para 16

para 25

para 29

<sup>1</sup> Erika De Wet The Constitutionalization of Public International Law, The Oxford handbook of Comparative Constitutional Law, edited by Rosenfield Michel and sajoAndras Publisher: Oxford University Press 2012 p1212

<sup>1</sup> Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the basis of comments by Ms Veronika BÍLKOVÁ Ms Anne PETERS Pieter van DIJK para 22

<sup>1</sup> Constitutionalization of Public International Law, Erika De Wet The Oxford handbook of Comparative Constitutional Law, edited by Rosenfield Michel and sajoAndras Publisher: Oxford University Press (2012) p. 353

<sup>1</sup> David .Harris and others, 'The European Convention on Human Rights in Context', *Law of the European Convention of Human Rights* (2nd edn, Oxford University Press 2009) 2.

<sup>1</sup> Tyrer v. United Kingdom para 183

<sup>1</sup> 'According to the Interpretation of the Court the Convention and Its Protocols Must Be Interpreted in the Light of Present-Day Conditions. Please See *Marckx v. Belgium*, 13 June 1979, § 41, Series A No. 31, and Many Subsequent Cases, Such as *Vo v. France* [GC], no 53924/00, § 82, ECHR 2004-VIII, and *Emonet and Others v. Switzerland*, no. 39051/03, § 66, 13 December 2007; *Glor v Switzerland*(GC) no 13444/04, para 53, 30 April, 2009.

<sup>1</sup> Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730. Emphases added.

<sup>1</sup> Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from the Case Law of the European Court of Human Rights, *Leiden Journal of International Law*' [2015] *Leiden Journal of International Law* 868.

*Demir and Baykarav. Turkey* (GC) 3403/97 para 84

Dzehtsiarou (n 13) 1733.

BenashviliSophio, The Margin of Appreciation doctrine significantly weakens the role of the European Court of Human Rights

Case of Christine Goodwin v The United Kingdom no 28957/95, 2002.

para 84-96.

Andreas Follesdal, 'Foreword', *Fragmentation in International Human Rights Law-Beyond Conflict of International Courts in a State of Nature* (2015) 8.

<sup>1</sup>Rachovitsa (n 14) 873.

.also see Alajos Kiss v Hungary<sup>44</sup> and Jasinskis v Lithuania

<sup>1</sup>*Glor v Switzerland*(GC) no 13444/04, para 53, 30 April, 2009 para 52.

<sup>1</sup> Marisa Iglesias Vila *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights*. Oxford University School of Law2017

<sup>1</sup>Favalli (n 22) 535.

<sup>1</sup>Favalli 537.

<sup>1</sup>Raley Meredith, 'Article 33 of the Convention on the Rights of Persons with Disabilities: Broader Implications for Human Rights Law' (2016) 39 (1) Dublin University Law Journal 157.

<sup>1</sup>Meredith Raley 167.

<sup>1</sup> For Detail Information on this subject, please see: Michael Ashley Stein and Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential*, (2010) Faculty Publications.

<sup>1</sup>Oomen Barbara, 'Fragmentation/Integration of Human Rights Law- a Users' Perspective on the CRPD' in Brems Eva and Ouald\_ChaibSaila (ed), *Fragmentation and Integration of Human Rights Law: Users Perspectives* (Edward Elgar Publishing Limited 2018).

<sup>1</sup> Gauthier De Beco, 'Editorial Introduction' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*. (2013).

<sup>1</sup> Mental Disability Advocacy Center, 'Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities' 13.

<sup>1</sup>Article 33 (1).

<sup>1</sup>Article 33(2).

<sup>1</sup>Article 33(3)'.  
<sup>1</sup>Thematic study of the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities. A/HRC/13/29 paras 22-25.

<sup>1</sup> De Beco (n 6).

<sup>1</sup> United Nations General Assembly, 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (2009) 10455 1, para 37.

<sup>1</sup>General Assembly resolution 48/134, 'Principles Relating to the Status of National Institutions (The Paris Principles)'.  
<sup>1</sup>United Nations General Assembly (n 13) 44.

<sup>1</sup>Office of The United Nations High Commissioner for Human Rights, 'National Human Rights Institutions, History, Principles, Roles and Responsibilities'.

<sup>1</sup> Maria VentegodtLiisberg, 'Implementation of Article 33 CRPD in Denmark:The Sails Are Up, But Where Is The Wind' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention*.(MartinusNijhoff Publishers 2013) 82.

<sup>1</sup><https://nhri.ohchr.org/en/documents/status%20accreditation%20chart%20%28%20august%202018.pdf>.

<sup>1</sup>General Assembly resolution 48/134 (n 14) principle 3(b).

<sup>1</sup> Gauthier De Beco and Alexander Hoefmans, 'National Structures for the Implementation and Monitoring of the UN Convention on The Rights of Persons With Disabilities' in Gauthier De Beco (ed), *Article 33 of the UN Convention on the*

*Rights of Persons With Disabilities, National Structures for the Implementation and Monitoring of the Convention.*(MartinusNijhoff Publishers 2013) 48.

<sup>1</sup> Public Defender (Ombudsman) of Georgia, 'LEGAL CAPACITY – LEGISLATIVE REFORM WITHOUT IMPLEMENTATION' Available at: <http://www.ombudsman.ge/eng/190308061623angarishebi/legal-capacity-reform-without-implementation>.

<sup>1</sup> The Danish Institute for Human Rights, 'Human Rights in Denmark, Status 2015-2016, A Summary' available at:[https://humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/status/status\\_2016\\_uk\\_summary.pdf](https://humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/status/status_2016_uk_summary.pdf).

<sup>1</sup>General Assembly resolution 48/134 (n 14) Principle 3 (d).

<sup>1</sup>De Beco (n 6) 49.

<sup>1</sup>Amrei Muller, FraukeSeidensticker and German Institute for Human Rights, 'The Role of National Human Rights Institutions in the United Nations Treaty Body Process'.

<sup>1</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4. para 4.

<sup>1</sup> European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session (n 29).

<sup>1</sup> European Commission For Democracy Through Law (Venice Commission) Compilation On the Ombudsman Institution (n 17) 21.

<sup>1</sup>European Commission For Democracy Through Law (Venice Commission) adopted by the Venice Commission at its 100th plenary session, 'Report On the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, on the Basis of Comments by Ms Veronika BÍLKOVÁ (Member, Czech Republic) Ms Anne PETERS (Substitute Member, Germany) Mr Pieter van DIJK (Expert, ' 4..

<sup>1</sup>Linda C Reif, 'Ombudsman Institutions and Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities.'(2014) 65 University of New Brunswick Law Journal 237.

<sup>1</sup> Alex Stone Sweet, 'Constitutional Court', *The Oxford Handbook of Comparative Constitutional Law, edited by Rosenfield Michel and sajoAndras* (Oxford University Press 2012) 825.

<sup>1</sup>p Bartlett, 'Implementing a Paradigm Shift; Implementing the CRPD in the Context of Mental Disability Law. In: Torture in Healthcare Settings:Reflections on the Special Rapporteur on Torture's 2013 Thematic Report' [2014] Washington DC: Centre for Human Rights and Humanitarian Law, American Univeristy.

<sup>1</sup>Mental Disability Advocacy Center (n 7) 42.

<sup>1</sup>De Beco and Hoefmans (n 21) 45.

<sup>1</sup> De Beko 41.

<sup>1</sup>De Beco and Hoefmans (n 21) 40.

<sup>1</sup> De Beco 35.

<sup>1</sup> A Bet Simmons, 'A Domestic Politics Theory of Treaty Compliance' in Cambridge University Press (ed), *Mobilizing for Human Rights:International Law in Domestic Politics* (2009) 147–148.

<sup>1</sup>De Beco and Hoefmans (n 21) 20

<sup>1</sup> Office of The United Nations High Commissioner for Human Rights, 'Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for Human Rights Monitors - Professional Training Series No.17' (2010) 33.

<sup>1</sup>Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 Laws 15.

<sup>1</sup>Raley (n 1) 168.