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THE CONCEPT OF “REASONABLE ACCOMMODATION” AS A BARRIER TO THE RIGHTS OF PERSONS WITH DISABILITIES IN INTERNATIONAL LAW

SUMMARY: 1. Introduction. – 2. The concept of “Reasonable Accommodation” in the CRPD. – 3. “Reasonable Accommodation” and Equality in International Human Rights Law: an Overview. – 4. “Reasonable Accommodation” as an in-built Obstacle for the Enjoyment of Human Rights. – 5. Concluding Remarks.

1. *Introduction*

«We are sorry, but it is not possible» is an expression that persons with disabilities hear with alarming frequency. In countless circumstances of everyday life, people who need support to perform certain tasks are left at the mercy of others, hoping that some adjustment or accommodation is provided to allow them to do something that, however trivial, may otherwise prove impossible. The use of the term “hope” is not accidental: there is no certainty that the necessary adjustment or accommodation shall be provided, because, notwithstanding domestic rules and international law dictating so, neither private entities nor states are under any effective obligation binding them to provide the said adjustments.

The UN Convention on the Rights of Persons with Disabilities (hereinafter referred to as “CRPD” or “Convention”)¹ is an international human rights instrument that was originally drafted with the aim of achieving substantive equality among all people regardless (and not in spite) of their mental and physical abilities, by setting up a number of obligations upon states to eliminate discrimination against disabled individuals and proactively engage towards their full integration in society.² While the CRPD notes that adjustments and

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¹ United Nations General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.

² E. FLYNN, *From Rhetoric to Action - Implementing the UN Convention on the Rights of Persons with Disabilities*, Cambridge, 2011, p. 18.

accommodations are necessary to allow disabled people to actually integrate in their communities, however, the Convention also affirms that such accommodations are only to be provided if there are reasonable – that is, they do not constitute «a disproportionate or undue burden». The concept of “reasonable accommodation” so intended is, sadly, not merely what I qualify in this article as a rather unfortunate provision in a single international human rights instrument: it is in fact quite recurrent in domestic legislation on the rights of disabled people, such as the Law 18/2009 in Italy,³ Equality Act in the UK⁴, the General Law on the Rights of Persons with Disabilities and their social inclusion in Spain,⁵ or the Americans with Disabilities Act in the US.⁶ Indeed, these instruments are consistent with their states’ obligations under international law: it is the CRPD itself, as it will be shown in this article, that leaves the decision on whether or not, and in what manner, to extend a certain right to disabled people to the states themselves upon assessment of whether it constitutes a tolerable burden.

In this article, I do not wish to entirely challenge the widespread enthusiasm that surrounds the CRPD. From a political standpoint, as it will be seen in the following pages, the CRPD undoubtedly represents a monumental achievement of disability rights movements, as it finally codified in international law the rights of persons with disabilities and the responsibilities of the international community in ensuring that persons with disabilities can enjoy their rights and freedoms as every human being. From a legal perspective, however, I will argue that the CRPD is not a suitable instrument to reach that equality so vigorously demanded by persons with disabilities and disability rights movements and listed in the CRPD as its main purpose. The thesis addressed in this article is that the principle of “reasonable accommodation”, rather than aiding the achievement of the substantive equality between persons with and without disabilities declared as the primary goal of the CRPD, frustrates in fact the very objective of the Convention by depriving the obligation to provide accommodation of its actual binding force. Furthermore, by subjecting the obligation to provide accommodation to considerations of proportionality and financial burdensomeness, the CRPD effectively establishes a definition of “persons with disabilities” in international law that separates those individuals who diverge from the able-bodied paradigm from the common concept of “person”. In other words, by subjecting the rights and freedoms of disabled individuals to the whims of the states called to protect and promote them, the CRPD codifies a limitation to the personhood of disabled individuals: whilst persons, for the sole reason of existing, enjoy human rights and fundamental freedoms,

³ Legge 3 marzo 2009, n. 18, Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell'Osservatorio nazionale sulla condizione delle persone con disabilità, Gazzetta Ufficiale Serie Generale n. 61 del 14 marzo 2009. See D. AMOROSO, *La posizione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità nell'ordinamento italiano*, in C. TARANTINO (a cura di), *Equal. Studio per l'attuazione dell'uguale diritto di tutte le persone con disabilità a vivere nella comunità con la stessa libertà personale e di scelta delle altre persone - Rapporto alla Presidenza del Consiglio dei Ministri – Dipartimento per le politiche in favore delle persone con disabilità*, Versione beta del 30 giugno 2023, Università della Calabria, p. 414 ff.

⁴ Equality Act 2010, UK Public General Acts, 2010, c. 15.

⁵ Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social, 289 *Boletín Oficial del Estado* 95635 – 95673 (3 December 2013).

⁶ Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

persons with disabilities can have those same rights and freedoms limited if the adjustments necessary to enjoy them prove to be a disproportioned and unfair burden.

This article is structured as follows: section 2 addresses the concept of “reasonable accommodation” as defined in the CRPD; section 3 explores the consistency of “reasonable accommodation” with the core principles of international human rights law; section 4 discusses the effect of “reasonable accommodation” on the overall aims of the CRPD, and questions the very notion of “persons with disabilities” under the CRPD from the standpoint of equality; finally, section 5 shall provide some concluding remarks.

2. The concept of “Reasonable Accommodation” in the CRPD

Article 5(3) of the CRPD states that «in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided». The Committee on the Rights of Persons with Disabilities (hereinafter referred to as “CRPD Committee”)⁷ considers “reasonable accommodation” as a core element of the obligation of non-discrimination that the CRPD places upon state parties.⁸ The concept of “reasonable accommodation” is a direct emanation of the social model of disability,⁹ which distinguishes between disability and impairment positioning disability as a manifestation of social exclusion, and impairment as a physical constraint. Within the context of the social model, disability is delineated as «the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities».¹⁰ The social model of disability is explicitly recognized in the CRPD. Although the CRPD does not provide a definition of disability, it offers insightful direction in Article 1, which characterizes disability as «long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder [a person’s] full and effective participation in society on an equal basis with others».¹¹ Article 5(3) represents thus a clear departure from the medical model of disability, which focussed instead on the deficit caused by one’s impairment, and underscores instead «the inherent

⁷ The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States Parties. See J. E. LORD, M. A. STEIN, *The Committee on the Rights of Persons with Disabilities*, in F. MÉGRET, P. ALSTON (eds.), *The United Nations and Human Rights – A Critical Appraisal*, Oxford, 2020, pp. 547-578; United Nations, Monitoring the Convention on the Rights of Persons with Disabilities, Guidance for human rights monitors, *Professional training series* No. 17.

⁸ CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para. 23.

⁹ See generally J. D. CANTOR, *Defining Disabled: Exporting the ADA to Europe and The Social Model of Disability*, in *Connecticut Journal of International Law*, 2009, pp. 399-434; R. TRAUSTADÓTTIR, *Disability Studies, the Social Model and Legal Developments*, in O. M. ARNARDÓTTIR, G. QUINN (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Leiden, 2009, pp. 3-16; A. WIESBROCK, *Disability as a Form of Vulnerability under EU and CoE Law: Embracing the ‘Social Model’?*, in F. IPPOLITO, S. IGLESIAS SANCHEZ, *Protecting vulnerable groups: the European human rights framework*, Oxford, 2015, pp. 71-94.

¹⁰ Union of Physically Impaired Against Segregation (UPIAS), *Fundamental Principles of Disability*, UPIAS (1976), cited in T. SHAKESPEARE, *The Social Model of Disability*, in L. J. DAVIS (ed.), *The Disability Studies Reader*, Abingdon (2013), at 197. See also M. BERGHS, K. ATKIN, C. HATTON, C. THOMAS, *Do disabled people need a stronger social model: a social model of human rights?*, in *Disability & Society*, 2019, pp. 1034-1039.

¹¹ Convention on the Rights of Persons with Disabilities, Preamble (c).

fragility of the human condition» which can be eliminated or alleviated by means of the necessary assistance.¹² The definition of what constitutes this necessary assistance is to be found in Article 2 of the CRPD, in which the heart of the paradox within the Convention unfolds, embodying the notion of “reasonable accommodation”. On one hand, the accommodation is defined as any «necessary and appropriate modification and adjustments [...] where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms»; on the other hand, it is specified that such modifications and adjustments are to be provided only insofar as they are «not imposing a disproportionate or undue burden». It has been noted that the concept of “reasonable accommodation” has a greater scope than mere accessibility as defined in Article 9 of the CRPD.¹³ Indeed, Article 9 underscores the necessity for access «to the physical environment, to transportation, to information and communications». This access should not merely be conferred in response to individual requests but should be proactively addressed through the creation of a more inclusive societal framework.¹⁴ Article 5, instead, attends to the unique needs of individuals within specific contexts, acknowledging that distinct disabilities – and even identical disabilities at times – may necessitate varied measures and accommodations.¹⁵ Instances of “reasonable accommodation”, therefore, might extend beyond merely facilitating access to environments, information, or communication as stipulated in Article 9. They could also encompass modifications to tools and workspaces, tailored medical or administrative procedures, suitable arrangement and orchestration of activities, provision of support, and any other measures conducive to enabling individuals with impairments to enjoy human rights and fundamental freedoms on an equal basis with others.¹⁶ In other words, taking into account that the social model of disability emphasizes the obstructions posed by society impeding the enjoyment of such rights by individuals with disabilities, it became clear to those drafting the Convention that such enjoyment would necessitate proactive measures by states and duty holders to dismantle these barriers – be they physical, environmental, administrative, legal, and so forth.¹⁷ From this perspective, the term “reasonable” should be construed as

¹² G. QUINN, A. ARSTEIN-KERSLAKE, *Restoring the “Human” in “Human Rights”: Personhood and Doctrinal Innovation in the UN Disability Convention*, in C. GEARTY, C. DOUZINAS (eds.), *The Cambridge Companion to Human Rights Law*, Cambridge, 2012, p. 38.

¹³ J. L. CORSI, *Article 5: Equality and Non-Discrimination*, in I. BANTEKAS, M. A. STEIN, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities – A Commentary*, Oxford, 2018, p. 164.

¹⁴ A. NILSSON, *Article 2: Definitions*, in I. BANTEKAS, M. A. STEIN, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities*, cit., p. 79. See also CRPD Committee, *Fiona Given v Australia*, Communication No 19/2014, 16 February 2018, para. 8.5.

¹⁵ This is also confirmed by Article 5(4) which states that «[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention». See R. CERA, *Article 5: Equality and Non-Discrimination*, in V. DELLA FINA, R. CERA, G. PALMISANO, *The United Nations Convention on the Rights of Persons with Disabilities – A Commentary*, Heidelberg, 2017, p. 167; A. POWER, J. E. LORD, A. DEFRANCO, *Active Citizenship and Disability – Implementing the Personalisation of Support*, Cambridge, 2013, esp. pp. 441 ff.

¹⁶ United Nations, Report of the Office of the United Nations High Commissioner for Human Rights to the General Assembly, *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities*, A/HRC/34/26, 9 December 2016, para. 28.

¹⁷ A. NILSSON, *Article 2: Definitions*, cit., p. 78.

characterizing an adjustment that responds to a genuine need and proves effective in addressing the specific requirement.¹⁸

However, a delve into the drafting history of the CRPD reveals that numerous states fervently resisted linking the concepts of “equality” and “reasonable accommodation”. The apparent concern of these states was that this association might bind them to broader redistributive obligations, guarantee substantive justice, and respect the social, economic, and cultural rights of individuals.¹⁹ Indeed, this uneasiness with the obligation to ensure the actual establishment of a level playing field in the enjoyment of human rights and fundamental freedoms is evident from the letter of Article 2, which underscores that the “reasonable” nature of required adjustments could also imply that the accommodation must not pose a «disproportionate or undue burden». The measures that must be taken to cater to the needs of disabled individuals must thus «be proportionate in view of their costs and benefits, non-pecuniary costs and benefits included»²⁰. As the subsequent sections of this article will illustrate, one could contend that this provision might effectively nullify the obligation to provide accommodation, or at the very least, significantly restrict its sphere of application.

It merits emphasis that while the CRPD Committee has highlighted the necessity for proportionality, it has remained somewhat ambiguous regarding the factors to consider when evaluating such proportionality. Nevertheless, the Committee has further underscored that «when assessing the reasonableness and proportionality of accommodation measures, States parties enjoy a certain margin of appreciation».²¹ The concept of “margin of appreciation” in the sphere of human rights, however, is notably fraught with complexities. The European Court of Human Rights (hereinafter referred to as “ECHR”) has embraced the concept widely, often leading to decisions more favourable to duty holders and partially sacrificing the rights of the person concerned. The Human Rights Council, instead, has typically disavowed the idea of a margin of appreciation, frequently resulting in the scales of probability being tipped in favour of the individual holding the rights.²² Indeed, factoring in the so-called margin of appreciation could undermine the very essence of “reasonable accommodation” and even compromise the intended objectives of the CRPD itself.²³ However, the case law established by the CRPD Committee concurs with that of the European Court of Human Rights (ECHR), distinctly asserting that states hold this margin of appreciation in evaluating the adoption of a measure.²⁴ What the jurisprudence of the

¹⁸ *Ibid.*, p. 80. See CRPD Committee, *Gemma Beasley v. Australia*, Communication No 11/2013, 1 April 2016, paras. 4.1 and 8.5; CRPD Committee, *Marie-Louise Jungelin v. Sweden*, Communication No 5/2011, 2 October 2014, Joint dissenting opinion, para. 4.

¹⁹ J. L. CORSI, *Article 5: Equality and Non-Discrimination*, cit., p. 164, citing Equal Rights Trust, *Promoting a Paradigm Shift*, in *Equal Rights Review*, 2008, p. 83.

²⁰ A. NILSSON, *Article 2: Definitions*, cit., p. 81.

²¹ CRPD Committee, *Gemma Beasley v. Australia*, cit., para 8.4.; *Marie-Louise Jungelin v. Sweden*, cit., para. 10.5.

²² D. MCGOLDRICK, *A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee*, in *International and Comparative Law Quarterly*, 2016, pp. 49-50; S. FAVALLI, *La Convenzione ONU sui diritti delle persone con disabilità nella giurisprudenza di Strasburgo: considerazioni a margine della sentenza “Guberina c. Croazia”*, in *Diritti umani e diritto internazionale*, 2017, pp. 623-642; Human Rights Committee, *Bikramjit Singh v. France*, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (2013); S. OUALD CHAIB, *Freedom of Religion in Public Schools: Strasbourg Court v. UN Human Rights Committee*, 14 February 2013, available at <http://strasbourgobservers.com/2013/02/14/freedom-of-religion-in-public-schools-strasbourg-court-v-un-human-rights-committee/> (last visited 1 July 2023).

²³ J. L. CORSI, *Article 5: Equality and Non-Discrimination*, cit., p. 165.

²⁴ CRPD Committee, *Marie-Louise Jungelin v. Sweden*, cit., para. 10.5.; *Gemma Beasley v. Australia*, cit., para. 8.4; *Michael Lockrey v. Australia*, Communication No 13/2013, 30 May 2016, para 8.4.

CRPD Committee does not explain, however, is how the margin of appreciation test should be applied. This vagueness presents a dangerously broad leeway for states, allowing them to independently delineate the scope and applicability of this margin of appreciation: as submitted by Austria, «the Convention does not comprise an absolute prohibition of difference in treatment, and while ‘the obligation to implement accessibility is unconditional [...] the duty of reasonable accommodation [...] exists only if implementation constitutes no undue burden on the entity».²⁵ While this latitude afforded to states may align with the overarching principle of consent intrinsic to international law, it is debatable whether such a margin of appreciation truly harmonizes with the principle of equality fundamental to human rights law and the very aims of the CRPD itself.²⁶

3. “Reasonable Accommodation” and Equality in International Human Rights Law: an Overview

By confirming the existence of a margin of appreciation, the CRPD Committee openly admitted that the rights of persons with disabilities may be subject – and at times forfeit – to considerations of cost and benefit. It is, however, doubtful that conceding such margin of appreciation to states, and allowing them to decide if and how to implement the rights of persons with disabilities, can be acceptable in the global context of international human rights.

According to the Universal Declaration of Human Rights (hereinafter referred to as “UDHR”), «all human beings are born free and equal in dignity and rights».²⁷ Even though the UDHR is not a binding instrument, and it represents the outcome of a compromise between the various views of world, humanity and society that came out of the atrocities of World War II,²⁸ it nonetheless establishes the foundational pillars of international human rights law.²⁹ The Preamble of the UDHR clarifies that the subject matter of the Declaration,

²⁵ CRPD Committee, *F v. Austria*, Communication No 21/2014, 21 August 2015, para. 4.5.

²⁶ CRPD Committee, General comment No. 6 (2018), cit., para. 5: «Equality and non-discrimination are among the most fundamental principles and rights of international human rights law. Because they are interconnected with human dignity, they are the cornerstones of all human rights». See also A. LAWSON, *Disability and equality law in Britain: The role of reasonable adjustment*, Oxford, 2008, p. 19; J. WALDRON, *One Another's Equal: the Basis of Human Equality*, Cambridge (MA), 2017, p. 1; A. HENDRICKS, *The significance of equality and non-discrimination for the protection of disabled persons*, in T. DEGENER, Y. KOSTER-DREESE (eds.), *Human rights and disabled persons: Essays and relevant human rights instruments*, Leiden, 1995, pp. 40–53; B. G. RAMCHARAN, *The Foundations: Articles 1 and 2*, in C. FERSTMAN, A. GOLDBERG, T. GRAY, L. ISON, R. NATHAN, M. NEWMAN (eds.), *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, Abingdon, 2020, p. 29; S. MOYN, *Not Enough: Human Rights in an Unequal World*, Cambridge (MA), 2018.

²⁷ United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1.

²⁸ J. MORSINK, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Philadelphia, 1999, p. 12; R. BURCHILL, S. CAVANDOLI, *The Contribution of the Universal Declaration of Human Rights to the Promotion and Protection of Democracy in International Law*, in M. ODELLO, S. CAVANDOLI (eds.), *Emerging Areas of Human Rights in the 21st Century – The Role of the Universal Declaration of Human Rights*, Abingdon, 2014, p. 47; M. BADERIN, M. SSENIONJO, *Development of International Human Rights Law Before and After the UDHR*, in M. BADERIN, M. SSENIONJO (eds.), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Abingdon, 2016, p. 3.

²⁹ C. FOCARELLI, *International Human Rights “in Crisis” and the Neoliberalization of the Human Person*, in *Chinese Journal of International Law*, 2020, p. 54.

as reaffirmed in the Charter of the United Nations,³⁰ are the rights of the human person.³¹ It is worth noting, however, that whether the definition of human person under the UDHR includes disabled individuals is questionable: Article 2 establishes the entitlement of every human person «to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status»: whilst the use of “such as” in the provision suggests that the list is not exhaustive, it is a rather long list that does not explicitly exclude that the rights and freedoms set up in the Declaration may be limited or denied to disabled individuals; and whilst this may look like an overstretched reading, it is worth underscoring that, in the decades prior to the beginning of the *travaux préparatoires* of the CRPD (and even during its negotiations), persons with disabilities were seen as objects of the law (rather than the subjects of rights) by virtually the entire international community.³²

Questions of the same kind can be raised with regard to other provisions in the Declaration. Upon perusal of Article 3, which affirms that «[e]veryone has the right to life, liberty and security of person», Article 6 («[e]veryone has the right to recognition everywhere as a person before the law») or Article 7 («[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law»), it becomes evident that the pervasive employment of “everyone” and “all” within the UDHR signifies an indisputable assertion that these rights are inherent to every human being, irrespective of any personal characteristic. The shadow of the list in Article 2 looms large, though, and it seems to be made darker by Article 16, according to which «[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family»: it seems thus that the UDHR itself identifies rights that belong to “everyone” and “all”, and rights that may be limited by states as long as such limitations are not based on reasons such as those listed in Article 2 or 16. In fact, Article 16 does prevent states from limiting marriage on the basis of race, nationality or religion, but not on the basis of sexual orientation and mental or physical ability: and indeed, it is a common practice among states to impose

³⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

³¹ «Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom».

³² T. DEGENER, A. BEGG, *From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations*, in V. DELLA FINA, R. CERA, G. PALMISANO, *The United Nations Convention on the Rights of Persons with Disabilities*, cit., p. 23. See also C. DE BHAILIS, E. FLYNN, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, in *International Journal of Law in Context*, 2017, pp. 6-21; A. ARSTEIN-KERSLAKE, E. FLYNN, *The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities*, in *International Journal of Law in Context*, 2017, pp. 22-38; M. SABATELLO, *A Short History of the International Disability Rights Movement*, in M. SABATELLO, M. SCHULZE (eds.), *Human Rights and Disability Advocacy*, Philadelphia, 2013, p. 13.

prohibitions on same-sex unions,³³ as well as marriages involving individuals with disabilities, whether between two disabled persons or a disabled and an able-bodied individual.³⁴

Equality, as stated beforehand, is indeed one of the founding principles of the core instruments of international human rights law.³⁵ The ICCPR, at Article 16, provides that «everyone shall have the right to recognition everywhere as a person before the law».³⁶ The legal quality of “person”, with its essential rights, is therefore an inherent quality of every human being.³⁷ It is under this perspective that provisions such as Article 2(3)(a), according to which state parties must undertake «[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity», can be understood as applicable to any human being regardless of their qualities;³⁸ and the same understanding should be extended to Article 14 («[a]ll persons shall be equal before the courts and tribunals»)³⁹ It is also worth underscoring that Article 8 of the ICCPR confirms that neither a state of detention in consequence of a lawful order of court affect the personhood of the detainee, nor that persons deprived of their liberty lose their right to «be treated with humanity and with respect for the inherent dignity of the human person».⁴⁰ Therefore,

³³ See *ex multis* F. HAMILTON, *The Case for Same-Sex Marriage Before the European Court of Human Rights*, in *Journal of Homosexuality*, 2018, pp. 1582-1606; P. JOHNSON, S. FALCETTA, *Same Sex Marriage and Article 12 of the European Convention on Human Rights*, in C. ASHFORD, A. MAINE (eds.), *Research Handbook on Gender, Sexuality and the Law*, Cheltenham, 2002, pp. 91-103; J. D. MUJIZI, *The Absolute Prohibition of Same-sex Marriages in Uganda*, in *International Journal of Law, Policy, and the Family*, 2009, pp. 277-288; A. THOMAS, *Utah's prohibition of same-sex marriages - will the statute stand or evolve?*, in *Journal of Law & Family Studies*, 2004, pp. 419-428; G. ZUKAITE, *Does the Prohibition of Same-Sex Marriages Violate Fundamental Human Rights and Freedoms?*, in *International Journal of Baltic Law*, 2005, pp. 1-25.

³⁴ See *ex multis* A. S. AMIN, A. H. SHAARI, K. F. KHAIRUDDIN, *Barriers to marriage and motherhood: the experiences of disabled women in Malaysia*, in *The History of the Family*, 2020, pp. 246-264; A. KUSTERS, “The Gong Gong Was Beaten” – *Adamorobe: A “Deaf Village” in Ghana and Its Marriage Prohibition for Deaf Partners*, in *Sustainability*, 2012, pp. 2765-2784; C. PETA, *The “Sacred” Institution of Marriage: The Case of Disabled Women in Zimbabwe*, in *Sexuality and Disability*, 2017, pp. 45-58; V. RISPLER-CHAIM, *Islamic Law of Marriage and Divorce and the Disabled Person: the Case of the Epileptic Wife*, in *Welt des Islams*, 1996, pp. 90-106; M. A. CHURCHILL, *Marriage Laws Discriminate against the Disabled*, in *Michigan Bar Journal*, 2001, p. 12.

³⁵ CRPD Committee, General comment No. 6, cit., para. 5.

³⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, at 171. See P. M. TAYLOR, *A commentary on the International Covenant on Civil and Political Rights: the UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge, 2020, pp. 445 ff.; S. JOSEPH, M. CASTAN, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford, 2013, pp. 791 ff.; P. HODGKINSON, D. NELKEN, *Capital Punishment: New Perspectives*, Abingdon, 2013, pp. 198-215.

³⁷ As convincingly argued by U. VILLANI, *Spunti di riflessione sulla convenzione delle Nazioni Unite sui diritti delle persone con disabilità*, in *Ordine internazionale e diritti umani*U, 2021, p. 1172.

³⁸ P. M. TAYLOR, *A commentary on the International Covenant on Civil and Political Rights*, cit., p. 58; S. JOSEPH, M. CASTAN, *International Covenant on Civil and Political Rights*, cit., p. 277; Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment No 31[80], CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15.

³⁹ P. M. TAYLOR, *A commentary on the International Covenant on Civil and Political Rights*, cit., p. 369; S. JOSEPH, M. CASTAN, *International Covenant on Civil and Political Rights*, cit., p. 977; E. SCHMID, *A Few Comments on a Comment: the UN Human Rights Committee's General Comment no. 32 on Article 14 of the ICCPR and the Question of Civilians tried by Military Courts*, in *The International Journal of Human Rights*, 2010, pp. 1058-1071; Human Rights Committee, *Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, General Comment No. 32, CCPR/C/GC/32, August 2007.

⁴⁰ P. M. TAYLOR, *A commentary on the International Covenant on Civil and Political Rights*, cit., p. 218; S. JOSEPH, M. CASTAN, *International Covenant on Civil and Political Rights*, cit., p. 777.

personhood appears to be not just a characteristic inherent to every individual, but also a quintessential quality of human existence that remains invulnerable to any situation or circumstance. Furthermore, the ICERD at Article 2(1)(a) establishes an obligation upon states to not engage in any «act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation»;⁴¹ the CAT refers to «the equal and inalienable rights of all members of the human family» in its preamble;⁴² the ICMW, instead, affirms that migrant workers shall enjoy equal treatment as the nationals of the state where they work in employment contracts,⁴³ before courts and tribunals,⁴⁴ in terms of urgent medical care,⁴⁵ access to education for themselves⁴⁶ and their children.⁴⁷ The principle of equality for every human being can thus be understood as one of the fundamental bases of international human rights law.

Considering this context, the concept of “reasonable accommodation” engenders an obligation that proves complex to articulate. It is not an obligation of means, as states are free to adopt any measure they deem appropriate to remove the barriers that disabled individuals face in the enjoyment of their rights and freedoms. It is, however, not an obligation of result either: the obligation binds states to adopt the said measures only insofar as they do not constitute a «disproportionate or undue burden». It has been contended that

⁴¹ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, at 195. See also I. DIACONU, *Racial Discrimination: Using Special Measures for Promoting Equal Human Rights*, in *East African Journal of Peace & Human Rights*, 2012, pp. 1-17; K. BOYLE, A. BALDACCINI, *A Critical Evaluation of International Human Rights Approaches to Racism*, in S. FRIEDMAN (ed.), *Discrimination and Human Rights: The Case of Racism*, Oxford, 2001, pp. 135-191; P. THORNBERRY, *Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice*, in S. ALLEN, A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011, pp. 61-92; F. IPPOLITO, *La non discrimination en droits européens et international: approche compare*, in F. FINES (ed.), *La non discrimination entre les européens*, Paris, 2012, pp. 37-50; P. MATHEW, *Reworking the Relationship Between Asylum and Employment*, Abingdon, 2012, pp. 135-138.

⁴² UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, at 85. See M. NOWAK, M. BIRK, G. MONINA (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary*, Oxford, 2019, pp. 15-20.

⁴³ UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, Article 25. See also R. HANSEN, *Labor Migration and International Mobility: Normative Principles, Political Constraints*, in *Columbia Journal of Transnational Law*, 2018, pp. 289-295; A. PÉCOUD, *The Politics of the UN Convention on Migrant Workers' Rights*, in *Groningen Journal of International Law*, 2017, pp. 57-72; S. SIVAKUMARAN, *The Rights of Migrant Workers One Year on: Transformation or Consolidation?*, in *International Law and Migration*, 2016, pp. 85-125; A. DESMOND, *The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review*, in *European Journal of Migration and Law*, 2015, pp. 39-69; L. A. NESSEL, *Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention*, in V. CHETAİL, C. BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham, 2014, pp. 329-345; N. BOSCHIERO, *Lo sfruttamento economico dei lavoratori migranti: vecchie o nuove forme di schiavitù nell'era della "private economy"?*, in *Diritti Umani e Diritto Internazionale*, 2010, pp. 344-366.

⁴⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, cit., Article 18.

⁴⁵ *Ibid.* Article 28.

⁴⁶ *Ibid.* Article 43.

⁴⁷ *Ibid.* Article 30.

the obligation to provide “reasonable accommodation” is not one of immediate effect;⁴⁸ one may also argue that it is merely an obligation to try and assess whether or not it is feasible, from a cost/benefit standpoint, to put the necessary actions in place.⁴⁹ This, however, entails that the concept of “reasonable accommodation” does not guarantee that disabled individuals shall be treated equally as non-disabled persons. In fact, it guarantees the very opposite: persons with disabilities can enjoy their rights and freedoms if such enjoyment does not require any accommodation. Should such accommodation become necessary, however, the fact that the needs of persons with disabilities may indeed be accommodated remains a possibility – but only as long as the state, according to the margin of appreciation they are allowed, consider that such accommodation does not prove too costly, or that it does not constitute an undue burden on the duty holder. In the latter case, persons with disabilities are left with rights that are bereft of substance, devoid of actual enjoyment.

This, however, hardly aligns with the principles enshrined in international human rights law. As seen in the brief overview of core human rights instruments above, any human being is a person, and any person, under international law, enjoys the same rights and freedoms. Such rights may be temporarily limited (such as the right to freedom, or the right to movement), but these limitations depend on circumstances external to the inherent characteristics of the right-holding person, and can be applied to anyone should such circumstances occur. Persons with disabilities, instead, see their rights fundamentally limited because of their personal characteristics; and the concept of “reasonable accommodation” makes such limitations even more subjective, as they depend on a number of factors such as the type of impairment causing their disability, or the state in which the person happens to be in a determined moment.

4. “Reasonable Accommodation” as an in-built Obstacle for the Enjoyment of Human Rights

The issues raised by the choice of the drafters of the CRPD to define “reasonable accommodation” as «not imposing a disproportionate or undue burden» do not concern solely the consistency of the CRPD with international human rights law. Equality is explicitly listed as an objective of the CRPD in its Article 1, something that is rather peculiar in international human rights law: virtually all the other core instruments simply lay down their object and purpose in the preamble.⁵⁰ One can therefore infer that the achievement of equality is not merely a background principle as in other international human rights instruments, but it is rather to be considered as one of the main objectives against which the provisions of the CRPD and their implementation must be tested. It is doubtful, however, whether the inclusion of the concept of “reasonable accommodation” is consistent with such explicit goal, as it is in fact capable of frustrating it altogether.

⁴⁸ J. E. LORD, R. BROWN, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: the UN Convention on the Rights of Persons with Disabilities*, in M. H. RIOUX, L. A. BASSER, M. JONES (eds.), *Critical Perspectives on Human Rights and Disability Law*, Leiden, 2011, p. 280.

⁴⁹ The various reservations and declarations attached to the CRPD can be consulted on the UN Treaty Collection website, at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4 (last visited 2 July 2023).

⁵⁰ E. KAKOULLIS, Y. IKEHARA, *Article 1: Purpose*, in I. BANTEKAS, M. A. STEIN, D. ANASTASIOU (eds.), *The UN Convention on the Rights of Persons with Disabilities*, cit., p. 48, noting that «the inclusion of such a provision in the CRPD is in line with environmental law treaty drafting practice».

It is important to underscore that the CRPD, on paper, is not merely aimed at equality intended as equal treatment: the objective of the CRPD is the achievement of substantive equality, namely equal access and benefits for persons with disabilities and without disabilities alike.⁵¹ Such equal distribution of benefits among the members of a society – or, in the case of the CRPD, the global human community – requires a transformation of the «unequal power relations between persons that may inhibit equal access to human rights».⁵² In order to achieve this objective, it becomes imperative to transcend the notion of uniform treatment and discern those circumstances that necessitate a distinct, tailored approach. Persons with disabilities, in a nutshell, do not merely require equal treatment and anti-discrimination provisions, the effectiveness of which is debatable: they require to be put in a position to access places and opportunities and enjoy benefits on an equal basis with persons without disabilities; and to do so, states must take positive action to provide the necessary adjustments. On paper, the concept of “reasonable accommodation” fulfils precisely this need for positive obligations, and acts as a bridge among the different human rights at play in ensuring that disabled individuals can access and enjoy the same rights and freedoms of every other person.⁵³ Undoubtedly, the establishment of the mandate for both public and private entities to offer accommodation to individuals with disabilities lays the groundwork for the successful implementation of several other provisions outlined in the CRPD, such as Article 7 on children with disabilities,⁵⁴ Article 9 on accessibility⁵⁵ or Article 13 on access to justice.⁵⁶

In practical terms, the notion of “reasonable accommodation” and the discretionary power it grants to states in determining the implementation and extent of adjustments, paradoxically undermines the fundamental intent of the CRPD.⁵⁷ While the Convention may proclaim substantive equality as its ultimate objective, it is nonetheless contingent upon the condition specified in Article 2, allowing states to escape from the beam of their obligation to accommodate the needs of disabled individuals by conducting what is ultimately a cost-

⁵¹ A. LAWSON, *Disability and equality law in Britain*, cit., p. 19.

⁵² J. E. LORD, R. BROWN, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities*, cit., p. 276, also citing S. LIEBENBERG, B. GOLDBLATT, *The Interrelationship between Equality and Socio-economic Rights under South Africa’s Transformative Constitution*, in *South African Journal of Human Rights*, 2007, p. 342.

⁵³ A. LAWSON, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: a Catalyst for Cohesion?*, in O. M. ARNARDOTTIR, G. QUINN (eds.), *The United Nations Convention on the Rights of Persons with Disabilities*, cit., p. 103.

⁵⁴ See *ex multis* A. BRODERICK, *Article 7: Children with Disabilities*, in V. DELLA FINA, R. CERA, G. PALMISANO, *The United Nations Convention on the Rights of Persons with Disabilities*, cit., p. 195; B. BYRNE, *Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities*, in M. FREEMAN (ed.), *Law and Childhood Studies: Current Legal Issues vol 14*, Oxford, 2012, pp. 419-437.

⁵⁵ See among others F. SEATZU, *Article 9: Accessibility*, in V. DELLA FINA, R. CERA, G. PALMISANO, *The United Nations Convention on the Rights of Persons with Disabilities*, cit., p. 225; A. BALL, *Equal Accessibility for Sign Language under the Convention on the Rights of Persons with Disabilities*, in *Case Western Reserve Journal of International Law*, 2010, pp. 759-798; M. J. ZIEGLER, D. SLOAN, *Accessibility and Online Learning*, in J. LAZAR, M. A. STEIN, J. BREWER (eds.), *Disability, Human Rights, and Information Technology*, Philadelphia, 2017, p. 158 ff.; A. LAWSON, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takács v Hungary*, in *South African Journal on Human Rights*, 2014, pp. 380-392.

⁵⁶ See *ex multis* M. SCHEININ, *Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights*, in F. FRANCONI (ed.), *Access to Justice as a Human Right*, Oxford, 2007, p. 135; A. LAWSON, *Disability and Access to Justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities*, in L. WADDINGTON, G. QUINN, E. FLYNN, *European Yearbook of Disability Law*, 2013, pp. 7-44.

⁵⁷ See *supra*, section 2.

benefit analysis. From a formalistic perspective, the definition of “reasonable accommodation” in Article 2 of the Convention may even be found redundant, as international law already provides a way out from unwanted obligations by allowing reservations and declarations to be attached to ratifications of treaties.⁵⁸ There are, however, limitations. Indeed, Article 19(c) of the Vienna Convention on the Law of Treaties (hereinafter referred to as “VCLT”) does not allow for the formulation of reservations should they be «incompatible with the object and purpose of the treaty».⁵⁹ The compatibility test, often characterized by ambiguous application criteria, predominantly revolves around the crucial consideration of the treaty’s object and purpose: should a reservation cover a provision the application of which is crucial for the application of the treaty according to its object and purpose, such reservation would be inadmissible.⁶⁰ This could be problematic for “constitutional” conventions, which encompass such a vast array of aspects that discerning their precise object and purpose beyond the overarching subject matter they seek to regulate becomes challenging; however, the task of identifying the object and purpose becomes more manageable as the focus narrows down. Reservations, it has been noted, are particularly problematic in the context of human rights treaties, as they not only create obligations towards other states, but also (and foremost) with regard to the treatment of persons.⁶¹ In the context of a narrow and specialised convention such as the CRPD, reservations may be admissible on very specific issues: one example is Greece’s reservation to Article 27, which excludes the Convention’s rules on work and employment of disabled individuals from application to employment in certain bodies of the armed forces.⁶² Reservations on core provisions such as Article 5 on non-discrimination, on the other hand, would certainly go against the object and purpose of the CRPD, and would therefore not be admissible.

Article 2 of the CRPD, however, goes a step beyond reservations with regard to its effect on the application of Article 5 and all the other provision in the CRPD that implicitly require positive action from states and other duty holders. In fact, Article 2 of the CRPD undermines the fundamental obligations outlined in Article 5. Article 5 indeed affirms the equality of all persons «before and under the law», the obligation of non-discrimination on grounds of disability, the entitlement of persons with disabilities «to the equal protection and

⁵⁸ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Articles 2(1)(d) and 19-23. See F. HORN, *Reservations and Interpretative Declarations to Multilateral Treaties*, Amsterdam, 1988; A. AUST, *Modern Treaty Law and Practice*, Cambridge, 2013, pp. 114 ff.; B. JURATOWITZ, A. VAN DER MEULEN, *Les reserves aux clauses restrictives*, in *Revue Générale de Droit International Public*, 2018, pp. 329-352.

⁵⁹ Article 19(c) VCLT is a provision of residual application, as it is intended to cover the situation in which the treaty is silent on the matter of reservation, thus Article 19(a) («the reservation is prohibited by the treaty») and Article 19(b) («the treaty provides that only specified reservations may be made») do not apply.

⁶⁰ R. HIGGINS, *Human Rights: Some Questions of Integrity*, in *Commonwealth Law Bulletin*, 1989, pp. 598-614; W. SCHABAS, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, in *Canadian Yearbook of International Law*, 1994, pp. 39-81.

⁶¹ A. AUST, *Modern Treaty Law and Practice*, cit., p. 147; I. ZIEMELE (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, Heidelberg, 2004.

⁶² «The provisions of Article 27 paragraph 1 of the Convention on the Rights of Persons with Disabilities shall not apply with respect to employment and occupation in the armed and security forces in so far as it relates to a difference of treatment on grounds of disability concerning the service thereto, as provided in Article 8 paragraph 4 of the Law 3304/2005 for the implementation of the principle of equal treatment, adopted pursuant to Articles 3 paragraph 4 and 4 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation». For other examples may I refer the reader to B. JURATOWITZ, A. VAN DER MEULEN, *Les reserves aux clauses restrictives*, cit., and W. SCHABAS, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, cit.

equal benefit of the law», and the obligation to take «all appropriate steps to ensure that reasonable accommodation is provided [...] in order to promote equality and eliminate discrimination». As stated beforehand, a reservation to this provision would go against the object and purpose of the treaty, which - as previously mentioned - is defined in Article 1 as «to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities». States that do not intend to be bound by Article 5 are not necessarily required to include a reservation concerning it: Article 2 enables a consideration of proportionality and burdensomeness, which ultimately grants the same state bound by the obligation the authority to decide whether to accommodate the needs of individuals with disabilities. In essence, the application of Article 2 undermines the fundamental intent of the CRPD, thereby impeding its intended purpose.

The incorporation of the concept of “reasonable accommodation” in the CRPD, however, carries an additional implication that is, to some extent, more worrisome. The principle that the provision of necessary accommodations for persons with disabilities is contingent upon considerations of proportionality and financial fairness is now enshrined in an international legal instrument, while there exists no equivalent principle or rule in international law that restricts the human rights of non-disabled individuals based on questions of proportionality or burdensomeness. This suggests one hardly acceptable inference: under international law there are persons, and there are persons with disabilities. Persons, on one hand, enjoy freedom and dignity in rights, as stated by the UDHR and the preambles to the core instruments of international human rights. Persons with disabilities, on the other hand, have their personhood qualified – as under the law they are “persons with disabilities” rather than simply “persons” - and the enjoyment of their rights and dignity must not translate into an inconvenience for the state when enforced or protected.

Ultimately, one could argue that this does not appear entirely incongruous with international human rights principles: the UDHR and other previous instruments seem to disregard the very existence of individuals with disabilities and the historical discrimination they have endured. The enthusiasm that the CRPD aroused and keeps arousing is not unjustified, as stated beforehand: the case-law of domestic and international bodies and the scholarship on disability rights show that the CRPD has indeed improved, to a certain extent, the respect and promotion of the human rights of persons with disability.⁶³ I would like to suggest, however, that such enthusiasm is probably disproportionate, to use a term consistent with the discourse, and perhaps solely due to the fact that, as Don Quixote would have said, «something is better than nothing».⁶⁴ As previously noted, prior to the introduction of the CRPD persons with disabilities were merely objects of international human rights, and only a handful of jurisdiction recognized their subjectivity. Therefore, the CRPD represents a positive stride forward by introducing this subjectivity at the international law level and

⁶³ See *ex multis* J. E. LORD, R. BROWN, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities*, cit., pp. 280 ff.; T. MINKOWITZ, *CRPD and Transformative Equality*, in *International Journal of Law in Context*, 2017, pp. 77-86; P. HARPUR, R. BALES, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, in *Northern Kentucky Law Review*, 2010, pp. 363-388; R. KAYESS, P. FRENCH, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, in *Human Rights Law Review*, 2008, pp. 1-34; P. HARPUR, *Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities*, in *Disability & Society*, 2012, pp. 1-14; A. BRODERICK, *The long and winding road to equality and inclusion for persons with disabilities: the United Nations Convention on the Rights of Persons with Disabilities*, Cambridge, 2015.

⁶⁴ M. DE CERVANTES SAAVEDRA, *Don Quixote de la Mancha*, translated by C. Jarvis, Oxford, 1992, p. 155.

granting a measure of agency.⁶⁵ At the same time, however, the CRPD does not entirely bridge the gap, in terms of substantive rights and freedoms, between persons without disabilities and persons with disabilities. Indeed, just as the CRPD imposes a duty on states to adopt requisite measures for ensuring equal standing for all individuals, it simultaneously acknowledges the existence of this disparity and emphasizes that individuals with disabilities must rely on those without disabilities to exercise their rights and freedoms; and because such help is needed, it should not constitute “a disproportionate and undue burden”. Like Don Quixote, therefore, disabled individuals are left fighting windmills: equality seems to be the elusive goal of a rigged game, as international law on one hand sets the rules aimed at making the game fair, and on the other it provides the route to avoid such rules if following them proves to be too costly. However, is it really equality if it is left to someone else’s decision?

5. *Concluding Remarks*

Because of its significance from both a political and an activist standpoint, it is difficult to question the value of the CRPD from a purely legal perspective. The mainstream opinion is that the CRPD, in spite of its limitations and the compromises that affected its drafting, is the dam that protects persons with disabilities from discrimination on the basis of their mental and physical abilities. Questioning it is made even more difficult when the scholar approaching the problem is a person with a disability themselves – that is, someone who gets reminded on a daily basis by its surroundings that life would be much more difficult without the CRPD. A reasonable accommodation is certainly better than no accommodation at all, as the principle of “reasonable accommodation” creates at least the possibility to be provided adjustments that, without the obligations set by the CRPD, would be mere concessions by states or other subjects that the CRPD identifies as duty holders. Moreover, if one wishes to question the CRPD from the angle proposed in this article, intellectual honesty requires them to make the effort to suggest a better alternative. Having established that terminating the CRPD would certainly not improve the living conditions of persons with disabilities, however, reason would suggest to look for a suitable model in some other international, regional or domestic instruments on the rights of persons with disabilities.

The solution, however, may lie within the provisions of the CRPD itself. As stated multiple times in this article, the purpose of the Convention is the promotion, protection and securing of the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities. Such enjoyment of rights and freedoms is blocked by one’s impairments «in interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others».⁶⁶ Since the path indicated by the CRPD to achieve substantial equality is the removal of barriers, however, the solution may be right before our eyes – that is, removing the internal barriers in the CRPD itself. The problem with the CRPD lies in the fact that its purpose can be fulfilled only by requiring states and other duty holders to provide the necessary accommodation, but the threshold for such

⁶⁵ A. S. KANTER, *The Development of Disability Rights under International Law: From Charity to Human Rights*, Abingdon, 2015, p. 89. See also R. ROSSANO, *Diritti delle persone con disabilità, autonomia dell’individuo e nuove forme di tutela*, in G. GIOFFREDI (a cura di), *Studi su bioetica e diritto internazionale*, Napoli, 2016, pp. 177-207.

⁶⁶ CRPD, Article 1.

requirement is rather low, as duty holders are only bound to provide what is “reasonable”. I use the term “requirement” reluctantly and for lack of a better word, because the provision in Article 5(3) as qualified by Article 2 of the CRPD is hardly an obligation. An effective alternative to “reasonable accommodation”, therefore, would be replacing it with an actual obligation of result: one that would bind the states parties to the CRPD to ultimately achieve that substantive equality predicated by Article 1 of the Convention.

Such a radical proposal would likely raise a number of objections based on the undoubtedly significant cost – not only in financial terms but also inconvenience – for each state party. It would be pricey indeed, and it may in fact require changes in habits and compromising on some living standards. Deeming this impossible, however, unveils the inherent ableism of contemporary society. In the end, it is expected that persons with disabilities accept not only that some things are made impossible by their impairments, but also that other things must remain impossible because they constitute «a disproportionate and undue burden». I would like to underscore that the CRPD is not responsible for this view of necessary adjustments: in fact, the CRPD simply established under international law the mainstream view of society that, since persons with disabilities need support, they should be grateful for what they get and not be too demanding. In theory, therefore, persons with disabilities have the same rights as persons without disabilities; in practice, some rights merely exist on paper, as the daily life of a person with a disability is hardly the same as that of a person without disabilities.⁶⁷ Arguing that persons with disabilities are second-class persons may sound extreme, but would it be factually wrong?⁶⁸ From a legal standpoint, as stated beforehand, it is indeed arguable that persons with disabilities and persons without disabilities are two different categories. The latter may simply be defined as “persons”, without further qualifications, as the mere fact of being human and alive confers them all human rights and fundamental freedoms; such rights may be denied or violated, as it happens way too often notwithstanding the efforts of the United Nations and the international community, but the very fact that they are violated entails that they exist. Persons with disabilities, on the other hand, have traditionally had their agency denied, their identity imposed, their rights limited and subject to conditions as a group simply because they do not conform to a specific able-bodied paradigm. Sadly, the Convention on the Rights of Persons with Disabilities seems to embrace this approach to disability and society.

⁶⁷ See the excellent collection of essays in A. WONG (ed.), *Disability Visibility: First-Person Stories from the Twenty-First Century*, New York City, 2020; see also F. RYAN, *Crippled – Austerity and the Demonization of Disabled People*, Brooklyn, 2019; S. RAU BARRIGA, *We need to stop treating people with disabilities as less than human*, in *The Guardian*, 20 June 2016, available at <https://www.theguardian.com/global-development-professionals-network/2016/jun/20/we-need-to-stop-treating-people-with-disabilities-as-less-than-human>; A. SOLOMON, *The Dignity of Disabled Lives*, in *The New York Times*, 2 September 2019, available at <https://www.nytimes.com/2019/09/02/opinion/disabled-human-rights.html> (last visited 4 July 2023).

⁶⁸ D. PETTINICCHIO, *Why disabled Americans remain second-class citizens*, in *The Washington Post*, 23 July 2019, available at <https://www.washingtonpost.com/outlook/2019/07/23/why-disabled-americans-remain-second-class-citizens/> (last visited 4 July 2023).