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The right to liberty of persons with psychosocial disabilities at the United Nations: A tale of two interpretations

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ABSTRACT

This article explores the current debate which exists within the United Nations human rights system regarding the right to liberty of persons with psychosocial disabilities. Article 14 of the UN Convention on the Rights of Persons with Disabilities states that the existence of a disability cannot be a justificatory ground for the involuntary detention of a person. In interpreting Article 14, the UN Committee on the Rights of Persons with Disabilities has called for States Parties to repeal legislation which provides for detention based on the existence of a psychosocial disability, either solely or in combination with other factors such as a perceived dangerousness or need for treatment – essentially requiring the abolition of mental health laws. However, a number of other human rights bodies within the UN, including the Human Rights Committee, have continued to affirm the lawfulness of deprivations of liberty under mental health legislation in certain circumstances. This article will set out the current state of this discourse and conclude by making a determination on the governing legal interpretation of the right to liberty of persons with psychosocial disabilities under international law.

1. Introduction

For the last number of years, a debate has been steadily brewing within the United Nations human rights mechanisms regarding the normative content of the right to liberty of persons with psychosocial disabilities. On one side, we have the Committee on the Rights of Persons with Disabilities (hereinafter 'the CRPD Committee'), the treaty body for the UN Convention on the Rights of Persons with Disabilities which has interpreted the right to liberty and security of the person under Article 14 of the UN Convention on the Rights of Persons with Disabilities (CRPD) as prohibiting detention on the basis of disability. This presents clear challenges to global mental health legislation which, generally, provides for the involuntary detention of persons with psychosocial disabilities on the basis of that disability in combination with other factors such as a perceived need for treatment or dangerousness to self or others. As will be shown later in this article, a number of other UN institutions have supported this reinterpretation of the right to liberty which seeks to ensure the realisation of true equality for persons with psychosocial disabilities and, in doing so, addressing the inequalities which currently exist within systems of involuntary detention.

However, disagreement has also emerged within the international order, insisting that scope must always remain for the detention of persons with psychosocial disabilities. In general, these bodies have focused on ensuring that procedural justice (e.g. the right to review of detention, the right to legal representation and the right to participate in proceedings) is enforced.

This internal division at the UN results in a confusing landscape of obligations for States Parties which are signatories to treaties and instruments which have been interpreted on both 'sides' of the normative argument. In interrogating this discord, this article will first examine the interpretation of Article 14(1)(b) which has been made by the CRPD Committee. It will then set out the two 'camps' which have emerged on this point within the United Nations system. The specific question of whether 'disability-neutral' legislation could be found to be compatible with the right to liberty of persons with disabilities will be analysed. Finally, a number of proposals regarding the means by which some normative unity might be arrived at within the UN human rights system will be examined based on principles of treaty interpretation.

Given the substantial discourse which continues to take place on the question of Article 12 of the CRPD and legal capacity (Arstein-Kerslake, 2016; De Bhailís & Flynn, 2017; Gooding & Flynn, 2015; Series, 2015; Szmukler, 2019), as well as the fact that many domestic mental health laws do not include an assessment of decision-making capacity or a 'capacity test' in their criteria for involuntary detention, the focus of this article will be on Article 14 of the CRPD and the debates surrounding its interpretation and implementation.

This analysis will ultimately conclude that, upon a strict reading

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under international law, the interpretation of the CRPD Committee must be deemed to hold normative sway on the parameters of the right to liberty of persons with psychosocial disabilities. But it will also be acknowledged that a body of work remains to be done by the CRPD Committee to engage with both State Parties and other UN bodies in order to ensure this transition to CRPD compliance.

2. Article 14 and its interpretation by the CRPD Committee

Prior to the adoption of the CRPD, the right to liberty of persons with psychosocial disabilities had been directly addressed in a number of 'soft law' instruments, e.g. The Declaration on the Rights of Mentally Retarded Persons,[1] Declaration on the Rights of Disabled Persons,[2] Principles for the Protection of Persons with Mental illness and the Improvement of Mental Health Care,[3] Standard Rules on the Equalization of Opportunities for Persons with Disabilities,[4] and the WHO Resource Book on Mental Health Human Rights and Legislation.[5] All of these instruments, to a greater or lesser extent, reflected a medical model of psychosocial disability. The CRPD, with its basis in the social model of disability and its requirement for equal legal personhood, stands apart from these previous instruments and requires the application of a model of inclusive, transformative equality for people with disabilities.

Article 14 of the CRPD states:

> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
> a. Enjoy the right to liberty and security of person;
> b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
> 2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Of the relevant provisions in Article 14, Article 14(1)(b), with its requirement that "the existence of a disability shall in no case justify a deprivation of liberty", presents the greatest challenge for States Parties. The authoritative interpretation of the requirements of Article 14 has been developed by the CRPD Committee[6] by way of Concluding Observations which it has been adopting since 2011,[7] individual communications under the Optional Protocol to the CRPD, General Comments on Articles 12 and 19 (adopted in 2014 and 2019 respectively) and its Guidelines on Article 14 (adopted in 2015). Arstein-Kerslake notes that General Comments are often created "when there is concern in the committee that States Parties are misinterpreting certain areas of human rights law or are not giving enough attention to certain areas" (Arstein-Kerslake, Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Recognition before the Law, 2017, p. 27). General Comments are not legally binding on States Parties, despite the fact that they are considered to be an authoritative interpretation of international human rights law and filter into the Concluding Observations of the relevant Committee. As such, while Concluding Observations provide States Parties with specific recommendations for reform in their jurisdictions, General Comments are an opportunity for UN Committees to expand on the normative principles which inform their interpretation of a particular provision and generally contain detailed guidance to State Parties on the requirements for full realisation of that right.

2.1. Initial Jurisprudence of the Committee on the Rights of Persons with Disabilities

Since the beginning of its examination of Country Reports, the CRPD Committee has consistently taken a literal reading of Article 14, requiring States to repeal legislation which provides for deprivations of liberty based on the existence of a disability. This was evident from its first Concluding Observation (Committee on the Rights of Persons with Disabilities, 2011) and the Committee has continued in this vein in a number of subsequent Concluding Observations (Committee on the Rights of Persons with Disabilities, 2012a; Committee on the Rights of Persons with Disabilities, 2012b; Committee on the Rights of Persons with Disabilities, 2012c; Committee on the Rights of Persons with Disabilities, 2013). Further, as will be set out in more detail below, the CRPD Committee has been keen to establish a link between the right to liberty and other rights in the CRPD, such as the right to equal recognition before the law – Article 12, the right to live independently and be included in the community – Article 19, and the right to health – Article 25.

The CRPD Committee has, to date, found a violation of Article 14(1)(b) in the only case which it has considered on the provision by way of the individual communication procedure under its Optional Protocol[8] – *Noble v. Australia*.[9] Rodley (2015, p. 89) suggests that the views adopted by UN human rights bodies in individual cases "are inevitably a more reliable and authoritative guide" to the opinion of the relevant UN Committee when compared with Concluding Observations due to the fact that a Committee "will generally take as much time as it needs to finalize a 'view' that reflects a careful examination of the facts and a conscientiously arrived at application of the law". *Noble* involved the detention of the complainant for 10 years without trial after a finding of unfitness to plead under Western Australia's Criminal Law (Mentally Impaired Defendants) Act 1996. The CRPD Committee, in the adoption of its views, found that both this detention and the complainant's conditional release were in contravention of Article 14(1)(b) as his detention was:

> … decided on the basis of the assessment by the State party's authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby converting his disability into the core cause of his detention. (Paragraph 8.7)

The CRPD Committee has therefore been unequivocal in its rejection of any detention based on disability/impairment and has framed Article 14 in the context of the normative value of equality and non-discrimination contained in Article 5 of the CRPD. This interpretation of Article 14 as requiring that all forms of disability-based detention be abolished by States Parties has also been endorsed by a number of commentators (Gooding, 2017; Minkowitz, 2007; Nilsson, 2014), with Bartlett (2009) suggesting that "it is difficult to see that any detention based on mental disability would be permitted" (p. 498). This has been underpinned by the CRPD Committee's Guidelines on Article 14, which will now be examined.

[1] Proclaimed by General Assembly Resolution 2856 (XXVI) of the 20th of December 1971.
[2] Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.
[3] Adopted by General Assembly resolution 46/119 of 17 December 1991.
[4] A/RES/48/96, 85th Plenary Meeting 20 December 1993.
[5] Geneva, World Health Organisation, 2005.
[6] The Committee was established in accordance with Article 34 of the CRPD.
[7] Further to Article 36 of the CRPD.
[8] A number of other pending individual communications include claims under Article 14.
[9] Committee on the Rights of Persons with Disabilities, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012 *Noble v. Australia*, CRPD/C/16/D/7/2012 (2 September 2016).

2.2. Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities (2015)

In September 2015 the CRPD Committee reached its apotheosis to date in relation to the right to liberty with its adoption of 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' (Committee on the Rights of Persons with Disabilities, 2015). Flynn (2016) notes that although the Guidelines do not have the status of a General Comment which is an authoritative interpretation of the text of a treaty provision by its monitoring body (although not legally binding in the same way as the treaty text), "they nonetheless represent the most up to date interpretation of Article 14 and give context for how the Committee will address States which come before it" (p. 83). The CRPD Committee's Guidelines can therefore be viewed as a form of soft law which seeks to clarify and codify the pre-existing interpretations which had been made of Article 14 but which fall below the authoritative status of a General Comment.[10] It is possible that consensus within the CRPD Committee on this issue was not sufficient to ensure the adoption of a General Comment and that the Guidelines were adopted as a form of internal compromise. This is to be contrasted with the Human Rights Committee's ability to adopt its General Comment on the right to liberty, which will be examined in more detail below.

The CRPD Committee (Committee on the Rights of Persons with Disabilities, 2015) stated that its decision to adopt these Guidelines, which were intended to replace its previous Statement on Article 14 (Committee on the Rights of Persons with Disabilities, 2014), was based on two factors. First, in a clear reference to the General Comment of the Human Rights Committee and the revised Basic Principles of the UN Working Group on Arbitrary Detention, which will be examined in more detail below, the CRPD Committee stated that "some United Nations bodies as well as inter-governmental processes have developed guidelines on the right to liberty and security as well as on the treatment of prisoners, which make reference to the deprivation of liberty of persons with disabilities" since the publication of the earlier Statement (Paragraph 2). Second, the CRPD Committee also noted that it had "further developed its understanding of article 14 while engaging in constructive dialogues with several States Parties to the Convention" (Paragraph 1).

Within the Guidelines the CRPD Committee confirms that Article 14 "is, in essence, a non-discrimination provision" (Paragraph 4) and as such provides evidence of the "close interrelation with the right to equality and non-discrimination (article 5)" (Paragraph 5). The CRPD Committee states clearly that detention on grounds of actual or perceived impairment[11] even where there are other reasons for the detention of an individual (including dangerousness to self or others or need for care/treatment) is incompatible with article 14 as it is discriminatory in nature and amounts to arbitrary deprivation of liberty (Paragraph 13). The CRPD Committee highlights the resolution of this point as early on as the Ad Hoc Committee stage of the CRPD negotiations (Paragraph 7).

Specifically on the question of dangerousness, the CRPD Committee points out that all individuals within a society (including persons with disabilities) can be prosecuted under the criminal law in cases where a harm is committed against another. The practice of diverting individuals with disabilities in such situations either to separate tracks within the criminal justice system or by way of mental health laws constitutes a breach of the right to due process and fair trial in accordance with Article 13 in conjunction with Article 14 (Paragraph 14). The Guidelines also reinforce the interconnected nature of the right to liberty and security of the person with other rights contained in the CRPD such as the right to equal recognition before the law under Article 12, as well as the right to live independently and be included in the community under Article 19.

The Guidelines have therefore clarified the interpretation of the CRPD Committee that the right of persons with disabilities not to be involuntarily detained based on the existence of their psychosocial disability is inextricably linked to, and in fact an extension of, the right of all individuals to recognition of their legal capacity (regardless of the requirement an individual might have for support in making or communicating that decision) as well as their right to access to justice and to live independently and be included in the community. It is arguable that the Guidelines have also established that even an apparently 'disability-neutral' criterion such as 'dangerousness' is not compatible with Article 14 as it is inherently discriminatory due to the potential for it to be applied disproportionately to persons with disabilities. However, no definitive conclusions can be drawn on this point and confirmation in either direction will likely emerge in future Concluding Observations and/or individual communications under the Optional Protocol. Given the ambiguity which still surrounds the CRPD Committee's position on 'disability-neutral' laws, a broader analysis of the compatibility of such potential legislation with the CRPD will now be undertaken.

2.3. The compatibility of 'disability-neutral' legislation with Article 14(1)(b) – an unsettled question

In its 2009 thematic study, the UNHCHR (United Nations High Commissioner for Human Rights, 2009) concluded that Article 14 should not be interpreted to mean that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, where the legal grounds for such a restriction of liberty are de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis (Paragraph 49). Yet, prior to the adoption of the Guidelines, the compatibility of a disability-neutral law providing for preventative detention which would apply to the entire population with Article 14 of the CRPD had not been clearly addressed by the CRPD Committee. Conclusions had, and continue to be, been drawn on both sides of this question by commentators.

Prior to the adoption of the Guidelines in 2015, Bartlett (2012b) had extrapolated from the UNHCHR statement that general preventative detention would be permissible under Article 14 and examined the potential of a disability-neutral 'dangerousness' standard as the basis for a system of involuntary detention. He highlighted the hazards inherent in such a formulation and, in doing so, demonstrated the inappropriateness of applying such a criterion in order to justify the detention to persons with psychosocial disabilities in the first place:

> While [the application of a dangerousness criterion for detention] might satisfy the problems of interpretation of Article 14, it is difficult to see that it is a good idea. It is difficult to see that it would be wise in human rights terms to encourage autocratic regimes to introduce laws allowing detention of people perceived as dangerous (whether mentally disabled or not), as such a law invites political abuse. At the same time, this re-phrases the question of discrimination that is at the core of the CRPD. If the law is open to abuse if applied to the general population, presumably because 'dangerousness' is such an unclear category and may be open to abuse or misuse, why would it be acceptable to apply it to people

[10] It is also instructive to examine similar documents adopted at a UN level such as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN. 4/2005/L. 48 (13 April 2005) which, in their Preamble, state that they do not constitute new international or domestic legal obligations but "identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms".

[11] This is an important inclusion in terms of ensuring that those individuals who do not self-identity as having an impairment (e.g. members of the 'mad' community) are still able to avail of the protections contained in Article 14 where their detention is based on a perceived impairment.

with mental disabilities? (p. 773)

A general consensus had also been discernible regarding the incompatibility of a dangerousness/risk/harm criterion to justify detention (Flynn & Arstein-Kerslake, 2017; Large, Ryan, Nielssen, & Hayes, 2008; McSherry & Keyzer, 2009; Yannoulidis, 2002). Bartlett (2012a, pp. 837–840) has set out the weak predictive power of predictions of dangerousness and Zuckerberg (2010) has also highlighted the increasing literature on "the unreliability of assessments about risks of harm" (p. 300) and has questioned the use of 'dangerousness' as an objective standard. Kanter (2014) has similarly concluded, based on the extensive available evidence, that "[i]t is beyond dispute that dangerousness is impossible to predict" (p. 145).

In Kanter's analysis of the compatibility of a framework of preventative detention, she opines that while disability-neutral laws may appear, at first, to comply with Article 14, upon further review, "they may be found to violate the language, if not the intent, of the CRPD, just as disability-specific laws have been found to do" (p.144). She bases this on the following factors, which are worthy of being set out in full.

First, Kanter suggests that a disability-neutral law which would authorize detention based on a factor such as perceived dangerousness would almost certainly result in persons subject to such a law being subject to detention by the criminal justice system. The mental health system would be reserved for voluntary treatment. She concludes that a disability-neutral law which results in the incarceration of more people with disabilities in the criminal justice system based on a dangerousness standard would seem to violate Article 14 as well as a number of other CRPD provisions (p. 144–145). It is important to note, however, that the CRPD Committee, in its 2015 Guidelines, has expressly pointed to the criminal justice system as the appropriate means by which to deal with breaches of an individual's obligation to do no harm. Second, Kanter opines that such a law would arguably be incompatible with States Parties' obligations under Article 19 of the CRPD to develop services and supports for persons with disabilities in the community (p. 145). Third, a disability-neutral law would have the potential to authorize the detention of persons with disabilities "based on the vague and unworkable standard of dangerousness" (p. 145) and could be criticised for being both too narrow and too broad in that such a law could not ensure that people who will actually hurt themselves or others would be detained but equally might result in punishing people who are not dangerous at all, but have only dangerous thoughts (p. 146). Kanter's fourth objection to such a framework arises out of the fact that such laws could have the potential to infringe on the right of all individuals to refuse treatment as it is not clear that a person detained under a disability-neutral law would still be entitled to exercise the right to consent to or refuse treatment. This has the potential to violate both Articles 12 and 25 of the CRPD (p. 147). The fifth problem that Kanter identifies is that disability-neutral laws could have a disparate impact on people with disabilities. Kanter concludes that if such laws resulted in the detention of more people with disabilities that those without disabilities, they could be found to violate Article 14 (p. 147). Nilsson's (2014) work on the non-discrimination aspects of the CRPD is also relevant here, particularly her observation that.

> Any piece of legislation the application of which results in a disparate use of compulsion against persons with disabilities falls within the ambit of the prohibition against discrimination. (p. 463)

Minkowitz (2011) has also concluded that:

> A law providing for involuntary care and treatment for the general population that was predominantly applied in the mental health context would violate Article 15. (p. 8)

Elsewhere (Minkowitz, 2015), she interprets Article 14(1)(b) to mean that:

> Detention that gives legal effect to the existence of a disability constitutes direct, de jure discrimination, because disability is a threshold criterion that qualifies the person for adverse treatment. Mental health detention, which is by definition based on an apparent psychosocial disability or psychiatric diagnosis, alone or in combination with other criteria, can never be disability-neutral, and always violates the first prong of Article 14, the prohibition of disability-based detention. (p. 450)

Kanter's sixth basis for the rejection of disability-neutral laws is that they would be incompatible with Article 5 of the ECHR[12] as no such exception under that provision exists to justify it, unlike the 'persons of unsound mind' category which is expressly set out as a lawful basis for detention under Article 5 (p. 148).

Ultimately, based on this analysis and the CRPD Committee's jurisprudence at the time of her writing in 2014, Kanter concluded that "the appropriate reading of Article 14 is to call for the repeal of all laws that authorize the treatment of and detention of people with disabilities, on the basis of disability, and not to replace them with disability-neutral laws" (p.151).

In its 2015 Guidelines, the CRPD Committee has not definitively clarified the acceptability of a 'disability-neutral' legal framework of involuntary detention. Indeed, it is possible to draw two distinct interpretations of the CRPD Committee's position on disability-neutral legislation based on the language used in the 2015 Guidelines. It is worth setting out paragraph 13 of the Guidelines for the sake of clarity and ease of reference (noting that the title of this section is '*Deprivation of liberty on the basis of perceived dangerousness of persons with disabilities, alleged need for care or treatment, or any other reasons')*:

> Throughout all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

On the one hand, this statement can be taken as a simple affirmation of the CRPD Committee's previous interpretations of Article 14 – that laws which seek to justify detention based on dangerousness or need for treatment in conjunction with impairment/disability grounds are contrary to Article 14.

Flynn (2016), however, characterises the rejection of such grounds, even when delinked from considerations of disability or impairment, as confirmation that the CRPD Committee "has now moved away from talking about disability-neutral criteria for detention" (p. 84) – although it is to be pointed out that, at least prior to the Guidelines, the CRPD Committee itself has never suggested disability-neutral laws as being compatible with Article 14. And it is equally possible to make such an interpretation of this passage, i.e. that even 'facially neutral' legislation based on dangerousness or need for treatment that is purported to apply to the general population is incompatible with Article 14. In other words, given the loose link that the CRPD Committee makes between disability and impairment in the passage, it is possible to read paragraph 13 as stating that even stand-alone preventative detention legislation "based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health

[12] Article 5(1) of the ECHR provides for lawful deprivation where a person is found to be 'of unsound mind'. Article 5(2) requires that the individual be informed of the reasons for their detention. Article 5(4) requires that such deprivations of liberty must be capable of being challenged by the detained individual. The European Court of Human Rights has developed other requirements which attach to detention on this ground, e.g. that the 'mental disorder' must be 'of a kind or degree warranting confinement' (*Winterwerp v Netherlands* 6301/73 [1979] ECHR 4), that the individual has a right to regular reviews of their detention (*Herczegfalvy v Austria* (1993) 15 EHRR 437).

diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty". It will require further elucidation of the point by the CRPD Committee in its future jurisprudence to clarify its exact position on disability-neutral legislation which provides for preventative detention. However, as will be set out below, the recent report of the UN Special Rapporteur on the Rights of Persons with Disabilities on disability-specific forms of deprivation of liberty indicates that such apparently 'disability-neutral' legislation would not be compatible with the requirements of Article 14 of the CRPD.

3. The interpretation of the right to liberty of persons with disabilities by other UN bodies post-CRPD adoption

The right to liberty of persons with disabilities is specifically addressed in Article 14 of the CRPD. But it stands amongst other UN instruments which address the right to liberty of the individual, as well as the work of a number of UN bodies that are tasked with monitoring issues which intersect with the right to liberty of the individual. While the CRPD Committee is responsible for interpreting the requirements of the CRPD and has made very clear the unlawfulness of involuntary detention based on the existence of a disability (while leaving the compatibility of 'disability-neutral' legislation less clear), there has been a divergence in opinion amongst other sections of the human rights structures of the United Nations. Examples of this will be examined in order to determine what this might mean for the reality of implementation of the right to liberty under the CRPD at the State Party level, as well as the relative force of these interpretations under international law in the specific context of persons with psychosocial disabilities.

3.1. Rejection of the CRPD Committee's interpretation of the right to liberty of persons with disabilities

3.1.1. The Human Rights Committee

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee (hereinafter 'HRC') is tasked with interpreting and monitoring, provides that:

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

Article 9(1) does not, therefore, grant an individual complete freedom from arrest or detention, preventative or otherwise. It instead acts as a guarantee that any such arrest or detention will not be arbitrary or unlawful.[13] In its 1982 General Comment No. 8 the (HRC, 1982) affirmed that the provisions of Article 9(1) applied to "all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness..." (Paragraph 1).

Pre-CRPD cases such as *A v. New Zealand*[14] and *Fijalkowska v Poland*[15] saw the HRC endorse the validity of involuntary detention (i.e that it could be justified based on the existence of a 'mental disorder' in conjunction with perceived dangerousness or need for care or treatment), albeit while also emphasising that procedural safeguards must be adhered to by States Parties to the ICCPR. To date, these appear to be the only cases in which the HRC has directly addressed the issue of the right to liberty of persons with psychosocial disabilities.

Post-CRPD, in December 2014, just 3 months after the publication of the CRPD Committee's initial Statement on Article 14 of the CRPD and only 6 months after the adoption by the CRPD Committee of its General Comment on Article 12, the HRC published its General Comment No. 35 on Article 9 (Human Rights Committee, 2014). While opening its position positively by calling on States Parties to revise "outdated laws and practices in the field of mental health in order to avoid arbitrary detention" and emphasising "the harm inherent in any deprivation of liberty and also the particular harms that may result in situations of involuntary hospitalization" (Paragraph 19), the HRC then retreated to the familiar legal territory of *Fijalkowska* by stating that:

> The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. … It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. (Paragraph 19)

The HRC also restated the need for procedural justice in the form of "initial and periodic judicial review of the lawfulness of the detention" (Paragraph 19).

While the General Comment was still at draft stage, the UN Special Rapporteur on Disability, Shuaib Chalklen, made a submission (Chalken, 2014) to the HRC. In this document he stated his position that the CRPD is the "authoritative guidance on the rights of persons with disabilities supplementing the Covenant [ICCPR] and other core human rights treaties" (p. 1). He called on the HRC to "revise its draft General Comment to ensure that it reflects the standards of the CRPD, in particular Article 14 on the right to liberty and security of the person, which corresponds to Article 9 of the Covenant" (p. 1). He stated:

> In accordance with the jurisprudence of the Committee on the Rights of Persons with Disabilities and with my own understanding of the right to liberty and security of the person, it is my opinion that mental health detention is never justified and must be abolished, and that laws permitting such detention, including laws that authorize institutional confinement or treatment based on the consent of a substitute decision-maker, must be repealed. (pp. 2–3)

As is evident from the adopted version of the General Comment, the Special Rapporteur's request was not accepted by the HRC.

The HRC's apparent endorsement of the concept of deprivation of liberty on the basis of disability in combination with a 'dangerousness to self or others' criterion is all the more curious in light of the facts that it specifically references (by way of a footnote) Article 14(1)(b) of the CRPD in doing so (Paragraph 19) and that the General Comment was adopted after the publication of the aforementioned Statement on Article 14 by the CRPD Committee. The basis upon which the HRC could have concluded that such a position is compatible with the CRPD Committee's current interpretation of Article 14(1)(b) is therefore difficult to understand. The only inference that can be drawn is that the HRC has taken it upon itself to arrive at an alternative interpretation of Article 14 of the CRPD.

As has been set out previously, 6 months after the HRC adopted its General Comment, the CRPD Committee adopted its Guidelines on Article 14 (Committee on the Rights of Persons with Disabilities, 2015). The Committee alluded to the position taken by "some United Nations bodies as well as inter-governmental processes" (Paragraph 1) since it had issued its Statement and made clear its position that Article 14(1)(b) of the CRPD prohibits detention on the grounds of disability. While clearly carrying authority as the interpretation of the treaty monitoring body of the CRPD, the fact that the CRPD Committee's most authoritative interpretation of the right to liberty of persons with disabilities is contained within Guidelines while the interpretation of that same right by the HRC is contained in a General Comment means that the latter is likely to carry more weight on those grounds, as well as the relative

[13] For a substantive analysis of the Human Rights Committee's interpretation of Article 9, see its General Comment No. 8 at http://www1.umn.edu/humanrts/gencomm/hrcom8.htm (last accessed 8 December 2018).

[14] Communication No. 754/97. Decision issued on 15 July 1999.

[15] Communication No 1061/2002: Poland. 04/08/2005. CCPR/C/84/D/1061/2002.

'hierarchy' of the respective Committees within the UN treaty body system.

More recently, the HRC has issued General Comment No. 36 on Article 6 of the ICCPR – the right to life (Human Rights Committee, 2018), within which it footnotes Article 14 of the CRPD in the context of the need to provide reasonable accommodation for persons with disabilities deprived of their liberty by the State, but appears to solidify its endorsement of the practice of involuntary detention on the basis of disability by noting the "heightened duty" to protect the right to life of "individuals quartered in liberty-restricting State-run facilities, such as mental health facilities …" (Paragraph 25).

3.1.2. Committee Against Torture

The HRC has not been alone in diverging from the interpretation given to Article 14 by the Committee on the Rights of Persons with Disabilities. The UN Committee Against Torture (CAT) has taken an approach which arguably grants even more discretion to States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[16] It has stated its concern regarding the high number of individuals held involuntarily in 'mental health care institutions' for extended periods and "at the frequent use of solitary confinement, restraints and forced medication which may amount to inhumane and degrading treatment" (Committee Against Torture, 2013, p. 21) as well as "the lack of focus on alternatives to hospitalization of persons with mental and psychosocial disabilities" (p. 21). However, it has also clearly endorsed detention on the basis of the existence of an impairment and has simply called on states to guarantee "all effective legal safeguards" (p. 21) regarding the decision to detain. As an example, in its most recent examination of Lithuania (Committee Against Torture, 2014), the CAT advised that State Party to:

> Ensure that the amended Law on Mental Health Care provides guarantees for effective legal safeguards for all persons with mental and psychosocial disabilities concerning civil involuntary hospitalization as well as concerning involuntary psychiatric and medical treatment in psychiatric institutions … (Paragraph 23)

This approach to the right to liberty of persons with disabilities by the CAT has remained unchanged despite the CRPD Committee's adoption of its 2015 Guidelines. For example, it has continued to recommend that States Parties ensure procedural safeguards while endorsing the practice of involuntary detention for 'medical reasons' (Committee Against Torture, 2017).

The CAT does not habitually adopt General Comments, having only done so on three occasions since the entry into force of the Convention in June 1987.[17] Its Concluding Observations are therefore the clearest indication of the CAT's position on the detention of persons with disabilities based on the existence of an impairment. The CAT's interpretation of the requirements of the Convention against Torture differ from those of commentators such as Minkowitz (2007) who has argued that forced psychiatric interventions meet the definition of torture contained in Article 1[18] of the Convention. The CAT's position also seems inconsistent with the requirements of Article 1(2) of the Torture Convention which, following the definition of what constitutes torture, states that:

> This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 15 of the CRPD contains a prohibition on torture or cruel, inhuman or degrading treatment or punishment and the CRPD Committee has included Article 15 in its considerations on the unlawfulness of involuntary detention in its General Comment No. 1 on Article 12 as well as in its 2015 Guidelines on Article 14. The CRPD Committee (2015) has pointed to the increased likelihood of torture or cruel, inhuman or degrading treatment or punishment in the form of forced treatment, seclusion and restraint (physical or chemical) where persons with disabilities are deprived of their liberty (Paragraph 12). The CRPD Committee's more expansive definition of torture in the context of disability has therefore not been incorporated into the CAT's jurisprudence to date.

3.1.3. Committee on the Elimination of Discrimination against Women

In addition to the rejection of CRPD jurisprudence by both the HRC and the CAT, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has been somewhat ambiguous in its approach to the issue. In its most recent examination of India (Committee on the Elimination of Discrimination against Women, 2015), the CEDAW Committee noted its concern that "women with intellectual or psychosocial disabilities can be denied legal capacity and committed to institutions without their consent and without recourse to any meaningful remedy or review" (Paragraph 36) and has called on India to "to repeal laws regarding and prohibit disability-based detention of women, including involuntary hospitalization and forced institutionalization" (Paragraph 37(a)). However, the CEDAW Committee's statements on this point have not been entirely consistent as, for instance, in its more recent Concluding Observations on Kuwait (Committee on the Elimination of Discrimination against Women, 2017) where the Committee welcomed "the steps taken by the State party to adopt mental health legislation to regulate the procedures of entry, exit, treatment and confinement of patients in mental health centres" but noted its concern regarding "[r]eported cases of arbitrary admission and detention of women in mental health facilities" (Paragraph 38) and recommended that Kuwait:

> Expedite the adoption of mental health legislation, in order to regulate mental health treatment, patients' rights, and internment and confinement in accordance with international standards, including obligatory court review of any decision on such confinement and its duration … (Paragraph 39)

CEDAW therefore seems both to endorse "international standards" on the right to liberty of persons with disabilities while also allowing States Parties to detain individuals on the basis of impairment, as long as standards of procedural oversight are deemed to be met. However, in an earlier Concluding Observation on India (Committee on the Elimination of Discrimination against Women, 2014), the CEDAW Committee had called on that State Party:

> To enact the bill on the rights of persons with disabilities without delay and incorporate a specific section … to repeal laws regarding and prohibit disability-based detention of women, including involuntary hospitalization and forced institutionalization. (Paragraph 37)

[16] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

[17] The Committee's three General Comments have addressed the issues of extradition, states' obligations to prevent torture generally and the right of victims to redress.

[18] Article 1 defines 'torture' as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

The CEDAW Committee's position on this question therefore seems to be in a state of flux. It remains to be seen whether its jurisprudence will fall more in line with that of the HRC or with the CRPD Committee.

3.1.4. UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

The SPT is the treaty monitoring body for the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and has generally focused on ensuring that the detention of persons with psychosocial disabilities is not arbitrary and has not deemed detention on the basis of disability to be unlawful. In 2016 it adopted a document entitled 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent' (Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2016) wherein it somewhat confusingly stated that 'involuntary confinement' could be judicially ordered "to provide timely access to appropriate expert care and specialist medical treatment" and that this "may be necessary to protect the detainee from discrimination, abuse and health risks stemming from illness" (Paragraph 8) but went on to state that:

> As specified in article 14 (b) of the Convention on the Rights of Persons with Disabilities, the existence of a disability should not be the justification for a deprivation of liberty. (Paragraph 8)

The SPT's reasoning on this point is difficult to follow, given its affirmation that involuntary detention in order to treat an 'illness' is permissible while also referring to and recognising that the CRPD does not permit detention based on the existence of a disability.

Special Rapporteurs are appointed by the Human Rights Council to both document country situations and to report on particular human rights themes. Within the UN infrastructure, Special Rapporteurs have not spoken with one voice on the right to liberty of persons with psychosocial disabilities, as will be shown here and in the following section.

3.1.5. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

In 2008, the UN's Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[19] Manfred Novak (Human Rights Council, 2008) recalled the negotiation history which led to the final version of Article 14 of the CRPD, highlighting in particular that deprivation of liberty based on disability when coupled with other grounds had been rejected during that process. He affirmed that "article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty" (Paragraph 64). But this position was receded from by Mr. Novak's successor, Juan E. Méndez. In Mr. Méndez's 2013 report (Human Rights Council, 2013) he rejected the validity of any deprivation of liberty on grounds of mental illness "if its basis is discrimination or prejudice against persons with disabilities" or solely on the basis of "the severity of the mental illness". However, he did conclude that such detention could be justified if it was shown to be "necessary to protect the safety of the person or of others" (Paragraph 69). Drawing on the jurisprudence of the European Court of Human Rights, particularly the *Winterwerp*[20] decision, in Mr. Méndez's opinion:

> Except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". (Paragraph 69)

Series (2013) has observed that basing deprivation of liberty solely on the existence of 'unsoundness of mind' is actually more permissive than the requirements set out by the European Court of Human Rights in *Winterwerp*. While written before the CRPD Committee's 2015 Guidelines, it is unfortunate that the Special Rapporteur's report is, at best, ambiguous on the question of the validity of involuntary detention based on disability, particularly in light of his predecessor's aforementioned clear position on this point. Mr. Méndez's successor, Professor Nils Melzer, who has been in post since November 2016, has not made any clear statement on the right to liberty of persons with psychosocial disabilities during his tenure. However, his most recent annual report (Human Rights Council, 2019) seems to indicate that he sees scope for the continued practice of involuntary detention of persons with psychosocial disabilities provided it is "lawful, strictly required and proportionate in the circumstances" (Paragraph 60).

3.2. Acceptance of the CRPD Committee's interpretation of the right to liberty of persons with disabilities

In contrast to the divergence outlined above, several UN bodies have been supportive of the CRPD Committee's interpretation of the right to liberty of persons with psychosocial disabilities.

3.2.1. Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights (CESCR)[21] has evolved its interpretation of the right to liberty of persons with disabilities in a manner consistent with the CRPD Committee's interpretation of Article 14. For example, in its 2017 Concluding observations in respect of Australia (Committee on Economic, Social and Cultural Rights, 2017) it stated its concern that "that mental health laws across many states and territories in the State party allow compulsory treatment …" (Paragraph 45). It went on to urge Australia to "revise its approach to mental health and ensure full respect for the human rights of persons with cognitive or psychosocial disabilities" and, in particular, "[r]epeal all legislation that authorizes medical intervention without the free, prior and informed consent of the persons with disabilities concerned" (Paragraph 46). This is of clear importance bearing in mind the established link between Articles 12, 14 and 25. The CESCR suggested that Australia "[t]ake effective measures to find alternative living solutions and prioritize community-based living settings for persons with cognitive or psychosocial disabilities" (Paragraph 46(c)).

3.2.2. Working Group on Arbitrary Detention

The UN Working Group on Arbitrary Detention has also taken an approach to this issue which is consistent with that of the Committee in its 'Basic Principles' (Working Group on Arbitrary Detention, 2015). This document contains a number of provisions relevant to the detention of persons with disabilities. Its Principle 20 'Specific measures for persons with disabilities' sets out States' obligation to "prohibit involuntary committal or internment on the ground of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as with their obligation to design and implement de-institutionalization strategies based on the human rights model of disability" (Paragraph 56). The Working Group therefore endorsed the inter-relational nature of the right to liberty with the right to live in the community. Within this Principle it also directly

[19] The role of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment was created by the UN Commission on Human Rights by way of Resolution 1985/33. The SR is tasked with examining questions relevant to torture. His/her remit is not restricted to countries which have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[20] *Winterwerp v. The Netherlands*, Application No. 6301/73 (1979).

[21] The CESCR monitors implementation of the International Covenant on Economic, Social and Cultural Rights by States parties to the Covenant.

references Article 14 of the CRPD where it states that "[p]ersons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of disability" (Paragraph 58). Guideline 20 of the Basic Principles also states unequivocally that:

> The involuntary committal or internment on grounds of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is prohibited. States shall take all necessary legislative, administrative and judicial measures to prevent and remedy involuntary committals or internments based on disability. (Paragraph 122)

However, the Working Group's position on this point has become more muddied recently in light of its consideration of a complaint by a 'Mr. N.' with respect to Japan (Opinion No. 8/, 2018 concerning Mr. N (whose name is known by the Working Group) (Japan), 2018) where it appears to have endorsed the position of the HRC that the existence of a disability in combination with a finding of risk to self or others provides a lawful basis for detention/deprivation of liberty. This conclusion is all the more curious in light of the Working Group's reference to Article 14 of the CRPD in that opinion.

Outside of the treaty monitoring bodies, the UN Human Rights Council and two of its Special Rapporteurs have also made statements indicating their agreement with the CRPD Committee's interpretation of the right to liberty of persons with psychosocial disabilities.

3.2.3. Human Rights Council

In 2017 the Human Rights Council adopted a resolution entitled 'Mental health and human rights' (Human Rights Council, 2017) in which it acknowledged the 'paradigm shift' that the CRPD represented specifically for mental health and the fact that it had.

> …created the momentum for deinstitutionalization and the identification of a model of care based on respect for human rights that, inter alia, addresses the global burden of obstacles in mental health, provides effective mental health and community-based services and respects the enjoyment of legal capacity on an equal basis with others … (Preamble)

The Council went on to call upon states to "abandon all practices that fail to respect the rights, will and preferences of all persons, on an equal basis, and that lead to power imbalances, stigma and discrimination in mental health settings" (Paragraph 8) and to "develop community-based, people centred services and supports" (Paragraph 9).

3.2.4. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Both the current Special Rapporteur, Dainius Pūras, and his predecessor Anand Grover, have made statements on the question of involuntary detention/placement. In his 2009 report (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2009), Mr. Grover highlighted that the CRPD "reaffirms that the existence of a disability is not a lawful justification for any deprivation of liberty, including denial of informed consent" (Paragraph 72). However, Mr. Grover then went on to state that:

> Policies and legislation sanctioning non-consensual treatments lacking therapeutic purpose or aimed at correcting or alleviating a disability …violate the right to physical and mental integrity and may constitute torture and ill-treatment. (Paragraph 73)

It is unclear whether the Special Rapporteur intended to make deliberate distinction between involuntary detention and forced treatment, with the former being unlawful but the latter permitted.

Mr. Grover was succeeded by Mr. Pūras in 2014. In his 2017 report to the Human Rights Council, (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2017) Mr. Pūras noted that the CRPD Committee emphasises the absolute prohibition of involuntary detention based on impairment but acknowledged that "not all human rights mechanisms have embraced the absolute ban on involuntary detention and treatment articulated by the Committee" (Paragraph 33). Somewhat optimistically, Mr. Pūras felt that those bodies' "interpretation of exceptions used to justify coercion is narrower, signalling ongoing discussions on the matter" (Paragraph 33). He ultimately concluded that, given that the right to health is now understood within the framework of the CRPD, "immediate action is required to radically reduce medical coercion and facilitate the move towards an end to all forced psychiatric treatment and confinement" (Paragraph 65).

It is notable that, in making this last statement, Mr. Pūras footnoted the CRPD Committee's Guidelines on Article 14. Within his conclusions he suggested that effective psychosocial interventions in the community should be scaled up and "the culture of coercion, isolation and excessive medicalization abandoned" (Paragraph 88), as well as recommending that States:

> Take targeted, concrete measures to radically reduce medical coercion and facilitate the move towards an end to all forced psychiatric treatment and confinement. (Paragraph 95(f))

3.2.5. Special Rapporteur on the rights of persons with disabilities

In December 2017 the Special Rapporteur on the Rights of Disabilities, Catalina Devandas, submitted a report to the Human Rights Council (Special Rapporteur on the rights of persons with disabilities, 2017) which included a thematic study on the right of persons with disabilities to equal recognition before the law. Perhaps unsurprisingly given that her role is to support the implementation of the CRPD, the Special Rapporteur strongly endorsed the CRPD Committee's interpretation of the right to liberty of persons with disabilities. She noted that a number of countries were currently or had recently adopted mental health legislation and stated that where such laws provided for inter alia the involuntary deprivation of liberty of persons with disabilities, they were contrary to the CRPD. She stated clearly:

> Mental health legislation as it exists today must be repealed, as it creates a separate legal regime for persons with psychosocial disabilities, contrary to the obligations of States under the [CRPD]. Regulation of the practice of mental health services should focus on acceptability and quality, while the rights and freedoms of persons with psychosocial disabilities must be the same as those of others in all areas of law, including legal capacity and liberty and security of the person. (Paragraph 52)

Ms. Devandas subsequently issued a report on the challenges faced by persons with disabilities to the enjoyment of their right to the highest attainable standard of health in July 2018 (Special Rapporteur on the rights of persons with disabilities, 2018). In this report she called on States Parties to the CPRD to:

> … immediately repeal all discriminatory legislation that allows the hospitalization and treatment of persons with disabilities without their free and informed consent, and/or when decided by a third party, including guardians, family members and health professionals. (Paragraph 50)

Most recently, in January 2019 the Special Rapporteur issued a thematic study on disability-specific forms of deprivation of liberty in the light of the standards set forth in the CPRD (Special Rapporteur on the rights of persons with disabilities, 2019). In this report she stated:

> States have an obligation to immediately repeal all legislation that allows for deprivation of liberty on the basis of actual or perceived impairment, whether in public or private settings. States must also repeal apparently disability-neutral legislation that has a

> disproportionate and adverse impact on the right to liberty of persons with disabilities. Mental health legislation, as long as it authorizes and regulates the involuntary deprivation of liberty and forced treatment of persons based on an actual or perceived impairment (i.e. diagnosis of "mental health condition" or "mental disorder"), must be abolished. For that purpose, States should initiate a comprehensive law review process, encompassing different areas of law, with the active participation of persons with disabilities and their representative organizations. (Paragraph 64)

This interpretation of even apparently disability-neutral legislation as not satisfying the requirements of the right to liberty as contained within the CRPD where it has a disproportionate and adverse impact on persons with disabilities is the clearest and most weighty opinion on this point to date. It remains to be seen whether this analysis of the requirements of Article 14 will filter into the future jurisprudence of the CRPD Committee.

4. Resolving the conflict of interpretation

The international legal framework with respect to the right to liberty of persons with psychosocial disabilities therefore paints a confused picture, with the UN Working Group on Arbitrary Detention, CESCR, the Human Rights Council and the relevant Special Rapporteurs according with the requirements of Article 14 of the CRPD in their interpretations. Conversely, the HRC, the CAT, the SPT and, to a less sure-footed extent, the CEDAW Committee, affirm alternative interpretations of the right to liberty and place their jurisprudence in contravention of the CRPD Committee's interpretation. Specifically referencing the approach of the HRC, Gooding (2017) questions whether this disjunction:

> … is perhaps indicative of tensions between the CRPD and approaches to disability in previous human rights instruments. Alternatively, the relative youth of the CRPD may mean that normative interpretations and theoretical coherence are still being established. (pp. 55–56)

The differing interpretations of this right are also emblematic of a broader phenomenon of fragmentation which has been observed within international law in recent decades (Fitzmaurice, 2013; Greenwood, 2015) but which falls outside the scope of this article. It is to be acknowledged that the CRPD represents a 'paradigm shift' with its move away from a medical model of disability towards the social model and arguably beyond that – towards a human rights based model of disability which requires transformative/inclusive equality. Yet the UN legal framework is capable of a high level of cohesion on this point. Of relevance here is the requirement, under Article 38(b) of the CRPD, for the CRPD Committee to:

> … consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

To date, there is little evidence of the CRPD Committee engaging in such consultation with either the HRC or any of the other human rights treaty bodies in order to facilitate a rapprochement, or at least a dialogue, on the normative parameters of the right to liberty of persons with disabilities.

Another source of resolution, at least in terms of the divergence between the ICCPR and the CRPD, lies within the ICCPR itself. Article 5(2) of that treaty states that:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

This provision therefore means that for States Parties to both treaties, the fact that the ICCPR does not recognize the right to liberty of persons with disabilities to the same extent as the CRPD does not absolve a State Party to the CRPD from its obligation to vindicate the right to liberty as interpreted by the CRPD Committee. There is therefore an arguable case for States Parties reforming their laws to give effect to the more expansive interpretation arrived at by the CRPD Committee rather than viewing themselves as limited by the jurisprudence of the HRC.

4.1. The principle of subsequent practice

Another potential source of reconciliation for the approaches of the HRC and the CRPD Committee, with the former evolving its understanding of the right to liberty of persons with disabilities in light of the latter's jurisprudence, is the principle of 'subsequent practice' which is set out in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT). This concept provides that the interpretation and application of a treaty can be modified by an established practice amongst the parties to that treaty (Buga, 2018; Liang, 2012). In this case, that would require that a sufficient number of States Parties to both the ICCPR and the CRPD would reform their laws in a manner compatible with the requirements of Article 14 in order to confirm a shift in understanding of the right to liberty under the ICCPR and the consequent obligations on States Parties to the ICCPR. In essence, Article 9 of the ICCPR would be understood and interpreted in the context of an international consensus which had arisen as a result of States Parties compliance with Article 14 of the CRPD.

However, the fact that divergence from the CRPD Committee's interpretation has not just been limited to the HRC but has also occurred within the jurisprudence of CAT, the CEDAW Committee and by the Special Rapporteur on Torture will mean that States will question the need to comply with the demands of the CRPD Committee. In reality there is an implied hierarchy of UN bodies, with the HRC, at least at this point in time, towering over the CRPD Committee in terms of its authority and standing as a human rights interpretation benchmark. This political versus legal reality may hamper the effective implementation and enforcement of the right to liberty of persons with disabilities as interpreted by the CRPD Committee. It also has potential ramifications for the approach of States Parties to the ratification process in terms of the lodging of reservations and/or interpretative declarations with respect to Article 14 of the CRPD. In essence, States Parties may feel justified and even emboldened in their refusal to amend or repeal their laws in accordance with the CRPD Committee's requirements given the protective shield provided by the HRC and others.

4.2. The applicability of the principles of lex specialis derogat legi generali and lex posterior derogat legi priori

In the absence of an internal initiative on the part of the UN bodies to ensure consistency in interpretation on this point, it is necessary to establish the legal 'hierarchy' where two international treaty bodies provide conflicting interpretations of a right. The principle of *lex specialis derogat legi generali* ('special law repeals general laws'), not expressly contained in the VCLT but acknowledged as forming part of *jus cogens*, requires that a more specific provision should take priority over a more general one. Lindroos (2005) suggests that, in the context of treaty interpretation, "the rationale behind the rule is clear: to apply the most specific rule is to give effect to the intentions of the parties and to take into account the particularities of the case" and as such, it is to be viewed as "an expression of consent" (p. 36) by states. On an application of the principle of *lex specialis* to the apparent conflict between Article 9 of the ICCPR and Article 14 of the CRPD, it seems clear that the CRPD Committee's interpretation of parameters of the right to liberty of persons with disabilities should take precedence over that of the

HRC, given the more specific, thematic focus of the CRPD.[22]

Article 30(3) of the VCLT states that an earlier treaty applies "only to the extent that its provisions are compatible with those of a later treaty" the relevance of this provision is limited due to the fact that, as is expressly stated, this is only the case where all the parties to the earlier treaty are parties also to the later treaty. This is not the case for the ICCPR and the CRPD, i.e. not all States which have ratified the ICCPR have also ratified the CRPD. In addition, not all states which have ratified the CRPD have ratified the VCLT. In such circumstances (i.e. where the parties to the ICCPR and CRPD are not identical) Article 30(4) of the VCLT requires that the principle of *lex posterior derogat legi priori* ('a later law repeals an earlier law') be applied to states who are parties to both treaties. As such, the ICCPR applies only to the extent that its provisions are compatible with those of the CRPD. In other words, the interpretation of Article 9 of the ICCPR only applies to states which have ratified both that treaty and the CRPD to the extent that it can be applied in a manner compatible with the requirements of the CRPD.

4.3. The forum for a determination

In the absence of an internal shift on the part of the HRC towards normative coherence with the requirements of Article 14 of the CPRD, the matter may, at some point in the future, fall to be determined by the ultimate arbiter of treaty disputes, the International Court of Justice (ICJ). This could conceivably arise by way of a request for an advisory opinion by the UN General Assembly under Article 96(1) of the UN Charter. Gowlland-Debbas notes that the ICJ has already endorsed the application of both the *lex specialis* and the *lex posterior* rule when faced with two separate instruments and that the Court has emphasised "the unity and indivisibility of human rights treaties" (Gowlland-Debbas, 2013, p. 47). This forms part of the ICJ's methodology of 'systemic integration' (Popa, 2018, p. 343) which seeks to ensure the coherence and unity of international law and can find its roots in Article 31(3)(c) of the VCLT which states that, in interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties" should be taken into account.

5. Conclusion

The right to liberty of persons with psychosocial disabilities matters – both to people with disabilities and to States who are seeking to comply with their human rights commitments – as its normative construction has radical implications for mental health legislation and the practice of involuntary detention. States therefore require clarity in relation to what their obligations are under international law, particularly given that the right is addressed in a number of international instruments. However, this article has outlined the normative divergence which has emerged across the UN treaty body system on this question in recent years, leading to conflicting interpretations and confusion for States Parties regarding what they are required and permitted to do within their domestic laws. In particular, the HRC's endorsement of the lawfulness of involuntary detention under Article 9 of the ICCPR where there is a perceived risk to the individual or to others stands in stark contrast to the CRPD Committee's interpretation of the requirements of Article 14 of the CRPD.

Further, within the jurisprudence of the CRPD Committee itself, the question of whether 'disability-neutral' legislation is compatible with Article 14(1)(b) of the CRPD remains undecided, with this article concluding that such legislation was likely to be both incompatible with the CRPD and unworkable on a number of grounds.

Upon engaging in an examination of the law of treaty interpretation, it was concluded that there was a likelihood that States Parties to the ICCPR and the CRPD would be required, perhaps by way of a future determination by the International Court of Justice, to ensure that domestic laws were in compliance with the CRPD Committee's interpretation of the latter, based on the principles of *lex specialis* and *lex posterior*, as well as the ICCPR's treaty requirement to ensure deference to more progressive interpretations of rights.

However, the *realpolitik* of UN hierarchy suggests that States Parties to both treaties are more likely to be cognisant of their obligations under the ICCPR than the CRPD, particularly in light of the fact that the ICCPR has not been the only human rights body to diverge from the CRPD Committee's interpretation on this point. While the HRC is not the treaty monitoring body charged with interpreting the CRPD, its relative position within the United Nations treaty body system means that any interpretation it places on UN treaties is likely to carry some weight. This goes to a point which Fennell and Khaliq (2011) have raised regarding the perceived legitimacy of the CRPD Committee when contrasted with other international legal bodies. They surmise:

> Among the community of international human rights lawyers, there is a perception that although all treaty bodies are legally equal, in reality some are more equal than others. It is not a coincidence that, in international law circles, the most respected of the treaty bodies has historically been the Human Rights Committee, whose members have included some of the most eminent and highly respected international lawyers of their generation(s) and the quality of the Committee's legal analysis has been vastly superior to that of some of the other treaty bodies. However regrettable this may be, a treaty body such as the Disability Rights Committee, which has a large number of service users as Committee members, will struggle to dispel doubts among states parties about the (il)legitimacy of how they carry out their functions. (p. 671)

While States Parties to the ICCPR are clearly not required to engage in practices of involuntary detention for persons with psychosocial disabilities under that treaty, the endorsement of the lawfulness of such practices by the HRC means that States are unlikely to feel compelled to engage in CRPD-compliant law reform. It seems probable that, regardless of treaty hierarchy, full realisation of the right to liberty of persons with disabilities under Article 14 of the CRPD – and consequent radical reform of domestic laws to provide for non-coercive mental healthcare – will remain a contentious issue within the UN rights infrastructure into the future, regardless of the fact that it is formally an obligation of immediate effect for States Parties.

After centuries of institutionalization and stigmatisation, people with psychosocial disabilities deserve the paradigm shift that the CRPD promises. But such an evolution lies in the gift of States who, in turn, look to the United Nations for clear guidance on law reform and implementation (or, on a more cynical interpretation, require the political pressure of the United Nations speaking with one voice in order to feel compelled to take action). Addressing this and achieving the requirements of Article 14 of the CRPD will require constructive dialogue within the UN human rights architecture, as required by the CRPD itself and as demanded by an international legal order which wishes to ensure consistency, coherence and fairness.

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[22] For more detailed examinations of the application of the *lex specialis* maxim within the international legal system, see Lindroos, Anja, 'Addressing Norm Conflicts in a Fragmented Legal System: the Doctrine of *Lex Specialis*' (2005) 74(1) Nordic Journal of International Law 27 & Chevalier-Watts, (2010)

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