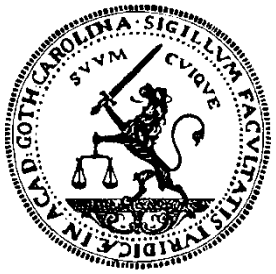

FACULTY OF LAW

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Reasonable Accommodation

- At what cost?

JURM02 Graduate thesis

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Table of contents

Summary

The United Nations Convention on the Rights of Persons with Disabilities is not only the main instrument of international disability law, but also connects the field with a multitude of other areas of international human rights law. In its 27th Article it guarantees the right to work for persons with disabilities, thereby bridging the gap between international disability- and international labour law. Adopting a respect-protect-ensure framework, the right to work for persons with disabilities is ensured through a right to reasonable accommodation. This right lacks a clear definition in the Convention but is not unlimited and accommodation measures can be denied where they would be unreasonable or impose an undue burden on the party responsible for implementing them. At the same time, the right to reasonable accommodation is extensive and accommodations can in-principle not be ruled out entirely. This thesis seeks to clarify the limits to reasonable accommodation in the labour market.

As the limitations are not further defined than excluding what would be unreasonable or impose an undue burden in the Convention itself, an interpretive method based in the Vienna Convention on the Law of Treaties is employed, consisting of a textual analysis of the relevant Articles of the UNCRPD in their context, supplemented and completed by General Comments and Communications of the United Nations Committee on the Rights of Persons with Disabilities as well as some published scholarly commentaries to the Convention.

Through this analysis it is found that no clear definition of the limits is discernible, but some themes can be identified. Reasonable accommodation can only justifiably be denied when it would present an undue burden or be unreasonable and the bar for this should be understood to be high. Essentially, the only factors which can be taken into account are material and financial costs, and when doing so a holistic view should be taken of the employer's resources, considering the employing organization as a whole, where those with greater resources are also expected to tolerate greater costs, and net-cost of the measure rather than any actual sum. As a common theme to all examined Communications, the CRPD Committee has declined to make statements on the material contents of the assessment, focusing instead on the need for procedural correctness through the performance of an objective reasonability test performed in accordance with the principles of the Convention.

However, common to all auxiliary sources used is also the emphasis on the existence of a margin of appreciation. This margin of appreciation only encompasses the how, and not the if, of reasonable accommodation, but it appears that it is within its width and definition that the answer to the question of where the limits to reasonable accommodation are is to be found.

Sammanfattning

FN’s konvention om rättigheter för personer med funktionsnedsättningar är inte bara det ledande instrumentet inom internationell funktionshindersrätt utan knyter även samman fältet med en rad andra områden inom den internationella människorättsjuridiken. I konventionens 27e artikel garanteras rätten till arbete för personer med funktionsnedsättningar, och därigenom kopplas den internationella funktionshindersrätten samman med den internationella arbetsrätten. Genom konventionens respektera-skydda-garantera-ramverk knyts rätten till arbete samman med rätten till skälig anpassning, genom vilken den garanteras. Denna rättighet är inte närmare definierad i konventionen men är inte obegränsad, och skålig anpassning kan nekas i fall där åtgärden skulle vara orimlig eller ålägga den som ska vidta den med en oskälig börda. Samtidigt är rätten till skälig anpassning mycket omfattande och anpassningar kan i princip inte uteslutas helt. Den här uppsatsen strävar efter att tydliggöra gränserna för skälig anpassning i samband med arbete och arbetsmarknad.

Eftersom begränsningarna inte preciseras bortom ett uteslutande av sådant som skulle vara orimligt eller skapa en oskälig börda i själva konventionstexten används en tolkningsmetod grundad i Wienkonventionen om traktaträtten. Denna består av en textanalys av relevanta delar av konventionen i sitt sammanhang, stödd och kompletterad genom FN’s Kommittee för rättigheter för personer med funktionsnedsättningars kommentarer till konventionen och kommunikationer, samt vissa akademiska kommentarer till konventionen.

Genom denna analys framkommer att inga klara begränsningar kan utläsas, men vissa teman kan ändock identifieras. Skälig anpassning kan bara nekas i fall där den skulle vara orimlig eller skapa en oskälig börda, och tröskeln för detta är hög. De faktorer som får tas hänsyn till är materiell och finansiell kostnad och när detta görs ska en helhetsbedömning av arbetsgivarens förutsättningar göras med hänsyn till organisationen i sin helhet och åtgärdens nettokostnad snarare än faktiska prislapp. Således kan större organisationer förväntas tåla större kostnader. I samtliga studerade kommunikationer har kommittén låtit bli att uttala sig om bedömningens materiella innehåll för att i stället fokusera på den processuella riktigheten genom utförandet av ett objektivt rimlighetstest i linje med konventionens principer.

Gemensamt för samtliga stödkällor är dock framhävandet av en ”margin of appreciation”. Denna bedömningsmarginal finns för hur, men inte om, skliga anpassningsåtgärder ska vidtas, men det framstår som klart att det är inom bedömningen av denna marginal som svaret på var gränserna för skälig anpassning går återfinns.

Preface

The landscape of public international law is ever evolving and has seen rapid expansion and deepening over the last century. From being the domain of states and sovereigns, regulating their relations and interactions, it has seen an increasing shift towards individual rights and freedoms and is today more than ever characterized by international human rights law. But even with this sphere, changes and developments are evident. Two clear examples of this shift towards individual rights can be found in the emergence of the fields of international labour and international disability law.

At a first glance, these areas may seem separate and often unrelated. But as is often the case, reality is not as simple as it may seem, and, while development has to an extent been parallel, it has also been synchronized and harmonious. While the two can still in many cases be entirely separate areas, they also overlap and intertwine, giving rise to a need for labour lawyers to have knowledge in disability law and disability rights lawyers and advocates to have knowledge of labour law. The apparent example of this is employment rights for persons with disabilities.

This thesis will take ai at this crossroads, and specifically at the right to reasonable accommodation for persons with disabilities in the labour market, particularly in hiring processes. What constitutes reasonable accommodation is not entirely evident as it lacks a universal legal definition, and the issue of cost can often be a factor in determining reasonableness. Therefore, this thesis will take aim specifically at that question – reasonable accommodation – at what cost?

Abbreviations

AU	African Union
CRC	1989 Convention on the Rights of the Child
CRPD Committee	(United Nations) Committee o the Rights of Persons with disabilities
ecosoc right	economic, cultural, and social right
GC	General Comment
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	1948 Universal Declaration of Human Rights
UNCRPD	2007 United Nations Convention on the Rights of Persons with Disabilities
VCLT	1969 Vienna Convention on the Law of Treaties

1 Introduction

1.1 Purpose

This thesis, as its aim and purpose, will seek to examine the current state of affairs, as can be understood through an interpretive assessment of the established normative content of the United Nations Convention of the Rights of Persons with Disabilities, as concerns the right to work for persons with disabilities under the Convention. More specifically, it will focus on the right to reasonable accommodation under the UNCRPD, and the limits to this right. In doing so, it seeks to accomplish multiple goals.

First, the examination and resulting conclusions will help grow the current body of academic work on the right to work of persons with disabilities in general, and reasonable accommodation in particular.

Second, by specifically focusing on the content and limits of the right to reasonable accommodation, it hopes to also be of use for practitioners and activists in the field. Even among these groups, detailed knowledge of specific aspects is sometimes limited, and readily accessible resources are not always easy to find. Therefore, a readily available, concise, and collected summary and analysis of the situation as it currently stands, not only considering the Convention text itself but also other auxiliary sources which help define international human rights law, can be hoped to prove useful.

Third, by highlighting the right to work as a fundamental right also of persons with disabilities and as a central part of the disability rights agenda, it aims to help raise awareness and stimulate continued debate and discussion. For a long time, persons with disabilities have been seen as persons in need of care and charity, rather than as coequal members of their societies. Yet at the same time value as a member of society is often tied to contribution. Those who work, and are therefore understood to contribute, are often valued higher than those who do not, and rights are more respected for persons who are also seen as duty bearers. By emphasising the realization of a right which is also intimately tied to duties, the aim is to help raise awareness of the potential labour market contributions of persons with disabilities, and the potential and ability to be full and equal duty bearers though having a fundamental right respected.

Additionally, merely highlighting the often-overlooked international human rights instrument that is the UNCRPD, and specifically its relation to labour helps contribute to raising awareness of the Convention and its content.

1.2 Resaerch question

Article 27 of the United Nations Convention on the Rights of Persons with Disabilities reiterates and cements the right to work for persons with disabilities, prohibiting discrimination in hiring practices and the labour market. However, it does so be requiring "reasonable accommodation" be made, leaving room for situations where a person with a disability can still be denied employment for reasons related to their disability where accommodations would not be reasonable. As the UNCRPD itself does not provide a clearly apparent definition of what constitutes reasonable accommodation[1] the question is left open as to where the line is to be drawn for what is reasonable. Therefore, the question to be answered in this thesis is precisely that;

"In the current state of affairs, what constitutes reasonable accommodation in the labour market?"

It can, however, be expected that this question cannot easily be answered as this is ultimately left to national legislators and may therefore differ across different jurisdictions. Similarly, the question may not have been exhaustively answered. Either way, for a study such as the one carried out in this thesis, focusing on international rather than national law and seeking to identify international norms applicable to all convention parties, national arrangements become of secondary importance. With this in mind, it becomes more appropriate to focus on what does not constitute reasonable accommodation, and therefore to seek its limits. This presents us with the negative inverse of the initial question as a more appropriate question to be examined;

"In the current state of affairs and strictly under the UNCRPD, what limits are there to the obligation to provide reasonable accommodation in the labour market?"

[1] See 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. Articles 5 & 27

1.3 Materials, scope, and limitations

In seeking to answer the research question, a varied material, comprising of the relevant sections of the text of the United Nations Convention on the Rights of Persons with Disabilities itself, the United Nations Committee on the Rights of Persons with Disabilities' relevant General Comments to the Convention, published academic comments to the Convention, and selected relevant Communications on cases presented in front of the CRPD Committee. Despite this breadth of material, chosen to align with the method presented below, it might appear limited in amount and length. However, the UNCRPD is a young instrument, and both the bodies of General Comments and jurisprudence, through CRPD Committee Communications, are still under development. The examined materials therefore still comprise a representation of the relevant material available at the point of writing. In the case of CRPD Committee Communications, this determination of relevance has been made by first filtering out those Communications that concern themselves with Article 27 of the UNCRPD, after which inadmissibility decisions have been excluded, leaving the Communications examined in this thesis as the remaining relevant ones.

As this thesis is situated in the realm of, and concerns, international law and seeks to clarify the current situation as applies to and in all State parties to the UNCRPD, only internationally relevant and applicable material has been examined and considered. Hence, any national legislation or practice has been omitted. While this represents a limitation in drawing precise conclusions about the situation in any specific country, it is consistent with an examination of international law universally applicable to the State parties to the Convention and allows a clearer view of the obligation to provide reasonable accommodation as it is to be understood to exist under it.

1.4 Method

To answer the research question, a mixed method will be applied. As this thesis is situated in the realm of public international law, the first step becomes that of discerning content of the relevant treaty, the United Nations Convention on the Rights of Persons with Disabilities[2], and treaty interpretation. Customs and norms of international law dictate that this be done using the method laid out in the 1969 Vienna Convention on the Law of Treaties[3].[4]

This method of treaty interpretation is laid out in Articles 31-33 of the Vienna Convention, with Articles 31-32 being pertinent for this examination (Article 33 concerning treaties established in multiple languages[5], and, although the UNCRPD is to be considered authentic in its Arabic, Chinese, English, French, Russian and Spanish versions,[6] translation related details can be presumed not to be relevant to this analysis), and guiding a three-step process. First, the UNCRPD will be analysed with emphasis on its content and the "ordinary meaning" of the terms used "in context an in light of their object and purpose"[7], taking a holistic view of the Convention, its content, and purpose, including as expressed through its preambles[8]. It should, however, be noted that the "ordinary meaning" of a term should be disregarded in such cases as where the parties to a treaty have intended for it to be another.[9] Most commonly, this would be the case either in areas of law where a term might have a technical meaning differing from the common language one, or where a treaty contains an explicit definition of a term. It is, however, also possible to show that a term was intended to have such a special meaning through convincing argument using other means, though it should be noted that in such cases the burden of proof lies strictly on the party making such a claim.[10]

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[2] 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.
[3] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331
[4] Shaw, M. (2021) International Law. 9th edn. Cambridge: University Press. pp. 787-789; 813-818
[5] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 33
[6] 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. Article 50
[7] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 31 (1)
[8] Ibid. Article 31 (2)
[9] Ibid. Article 31 (4)
[10] Dörr, O. & Schmalenbach, K. "Article 31. General rule of interpretation" in Dörr, O. & Schmalenbach, K. eds. (2012) Vienna Convention on the Law of Treaties A Commentary. Berlin, Heidelberg: Springer Berlin Heidelberg. pp. 568-569

Next, agreements and practice relating to the interpretation and implementation of a treaty may be taken into account.[11] For this study, the most relevant forms of such agreements or practice can be found in the General Comments issued by the Committee on the Rights of Persons with Disabilities, guiding the interpretation of the Convention and carrying the weight of the CRPD Committee behind them. However, it has been debated whether such General Comments issued by treaty bodies carry that weight under international law and the VCLT.[12] Although "subsequent practice" may be practice of an international organization concerned with a treaty[13], some national courts, such as the German Federal Constitutional Court, have explicitly expressed the view that they are not bound by the CRPD Committee's interpretations of the UNCRPD[14]. However, whatever view one subscribes to regarding the status of treaty bodies' General Comments under the VCLT scheme of interpretation, the view that they do hold certain authority as the direct expressions of interpretation by said treaty bodies, and should therefore be included in interpretation regardless, if not under the specific provisions discussed here then as part of a general good faith interpretation[15],[16] appears reasonable.

This also harmonizes with the view of treaty interpretation as a necessarily teleological endeavour.[17] That is, one where legal analysis seeks to determine not only the content of a legal provision but also its purpose, thereby providing for the solution to legal questions that may not fall entirely within the scope of a given provision or where the outcome is not given based solely on the provision itself.[18] The adoption of this view and corresponding broadening of the methodology also opens up for the inclusion of the next step of the analysis where, to more deeply ascertain the content and intention of the Convention, scholarly doctrine will be drawn on

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[11] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 31 (2)-(3)

[12] Keller, H. & Grover, L. "General Comments of the Human Rights Committee and their legitimacy" in Keller, H. & Ulfstein, G. eds. (2012) UN Human Rights Treaty Bodies Law and Legitimacy. Cambridge: University Press. pp. 128-133

[13] Dörr, O. & Schmalenbach, K. "Article 31. General rule of interpretation" in Dörr, O. & Schmalenbach, K. eds. (2012) Vienna Convention on the Law of Treaties A Commentary. Berlin, Heidelberg: Springer Berlin Heidelberg. pp. 558-560

[14] Sinha, R. & Talmon, S. (2020) Unconvincing and non-binding: The Federal Constitutional Court rejects the Committee on the Rights of Persons with Disabilities' interpretation of the CRPD. GPIL – German Practice in International Law [ONLINE: https://gpil.jura.uni-bonn.de/2020/02/unconvincing-and-non-binding-the-federal-constitutional-court-rejects-the-committee-on-the-rights-of-persons-with-disabilities-interpretation-of-the-crpd/ retrieved 28 December 2022]

[15] *as required by* United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 31 (1)

[16] Keller, H. & Grover, L. "General Comments of the Human Rights Committee and their legitimacy" in Keller, H. & Ulfstein, G. eds. (2012) UN Human Rights Treaty Bodies Law and Legitimacy. Cambridge: University Press. p. 129

[17] Shaw, M. (2021) International Law. 9th edn. Cambridge: University Press. p. 813

[18] Zetterström, S. (2012) Juridiken och dess arbetssätt – en introduktion. Uppsala: Iustus. pp. 88–90

to complement the views expressed by the CRPD Committee itself. While this does represent a step away from the strictly outlined method found in Article 31 of the VCLT, it is arguably not as much of a deviation from the VCLT method as it may at first seem. The Vienna Convention specifically permits the use of "[s]upplementary means of interpretation" when necessary to "confirm the meaning resulting from the application of Article 31" (the method discussed above) or to "determine the meaning" when it is left "ambiguous or obscure".[19] Thus condoning the use of a broader teleological approach where necessary. Although Article 32 only specifically mentioned preparatory works and circumstances of the conclusion of a treaty, the list is not exhaustive but rather to be taken as providing examples and therefore not forbidding any other supplementary sources.[20]

In the final step, the content of relevant Communications by the CRPD Committee will be examined. This continuous to represent an analysis outside of the strict method of VCLT Article 31 but stays within the broader scope of supplementary materials provided for under Article 32[21]. While there is nothing in neither the UNCRPD nor its additional protocol providing for legally binding power for these Communications, they represent both an important illustration of the views of the treaty body on the topics which they concern and guidance on expected practice, which may itself be the first step in establishing new common practice and interpretation.

In summary, the method used in this thesis is guided by the provisions of the VCLT and represents a mixture between a more traditionally dogmatic and a teleological approach. It seeks to ascertain the content of the relevant provisions, by and large through traditional means, but seeks to do so in a broader interpretive context, examining the framework as a whole and keeping in mind its purpose and application.

[19] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 32
[20] Dörr, O. & Schmalenbach, K. "Article 32. Supplementary means of interpretation" in Dörr, O. & Schmalenbach, K. eds. (2012) Vienna Convention on the Law of Treaties A Commentary. Berlin, Heidelberg: Springer Berlin Heidelberg pp. 580-581
[21] Ibid. p. 581

1.5 Theoretical perspective

This thesis will tackle the question discussed above from a human rights perspective, and, more specifically, from a disability rights/disability studies perspective. However, there is no one single such perspective, and a brief discussion of prominent disability studies perspectives is therefore necessary to provide clarity and highlight the one specifically chosen here. The dominant views on disability have shifted over time, and therefore three main models of disability will be highlighted: the medical model with its connection to a charity approach, the social model, and the human rights model.

The medical model of disability long represented the historically most common view on disability and persons with disabilities, viewing disability as a decease to be cured rather than as an inherent characteristic of the individual deserving of respect and accommodation. In other words, viewing disability as a problem, issue, or even sickness centred around the individual and outside the realm of what society need account for.[22] With this view, disability also becomes the responsibility of the individual, and it is for her to seek to be cured of it, whether actually possible or not, if she wants to be included. Unsurprisingly, this view has helped breed stigmatization and isolation, and can be seen as responsible for phenomena from segregated housing and work, or denial of employment altogether, to systems of institutionalization, including forced such.[23] At best, this model opens up for an approach to and view of persons with disabilities as charity cases, unable to lead fulfilling independent lives and sustain themselves but constantly reliant on others and therefore with diminished participation and associated rights in society. At worst, it can be linked to the mistreatment and abuse of persons with disabilities in various historical systems of forced institutionalization in the name of attempting to cure the often incurable. For the purposes of this study this model can be discounted entirely for two reasons. First, it is not considered particularly relevant today by the broader disability rights community, including both professionals and, at large, the global disabled community[24], and is not reflective of the modern development in international disability rights and law[25]. Second, it would

[22] Kanter, A. S. (2015) The Development of Disability Rights Under International Law: From Charity to Human Rights. New York: Routledge pp. 7-8
[23] Ibid. p. 46
[24] I have myself recently worked with international development cooperation between the Swedish National Organization of the Visually Impaired (SRF) and the African Union of the Blind (AFUB/UAFA) and neither organization, nor the World Blind Union (WBU), nor any other major organization of persons with disabilities, considers it positive or particularly relevant today.
[25] *See for example* UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 6 (2018) on equality and non-discrimination,* 26 April 2018, CRPD/C/GC/6. 8-11 *and* UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 8 (2022) on the right of persons with disabilities to work and employment*, 9 September 2022, CRPD/C/GC/8. 7-8

not be helpful in relating to questions of human rights and societal inclusion of persons with disabilities within a larger international human rights landscape as it discounts persons with disabilities both as rights and duty bearers.

Instead, disability studies, the global disability rights movement, and international disability law have broadly embraced the social model of disability.[26] Nowhere is this as evident as in the UNCRPD itself which can be understood to make reference to this model in its preamble "Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others"[27], which also succinctly summarizes the main points of the social model. In short, it emphasises a distinction between disability and impairment. Impairment being the condition of the person, e.g., reduced eyesight or mobility, and disability being the result of both physical environments and societal attitudes hindering the full and equal functioning and participation of the person with the impairment in any given context.[28] By adopting this view, the focus is moved from finding faults or limitations to be cured or fixed in the individual to focusing on the interplay with society and surroundings and the disabling impact of inaccessible design or of ignorant or discriminatory attitudes. This embraces "disability as part of the diversity of the human experience", emphasising the equality and shared fundamental value and dignity of all people rather than othering persons with disabilities by focusing on the trait that separates the group from the norm while still recognizing hindering structures and roles and effects in creating disability. Moving away from the focus on cures in the medical model to the responsibility of society to dismantle barriers and facilitate inclusion through accommodation, it emphasizes persons with disabilities as full and equal right and duty bearers with the same right as any other members of society to contribute and choose their own lives without disability being seen as intrinsically or inherently disqualifying.[29] In addition to representing the dominant perspective in modern disability studies, it is also a significantly more suitable model for this thesis concerned with disability labour rights, and particularly this right to inclusion in society and the workforce and reasonable accommodation.

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[26] Lawson, A. & Priestley, M. "The Social Model of Disability. Questions for law and legal scholarship?" in Blanck, P. & Flynn, E. eds. (2016) Routledge Handbook of Disability Law and Human Rights. London: Routledge p. 3

[27] 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. Preamble (5)

[28] Lawson, A. & Priestley, M. "The Social Model of Disability. Questions for law and legal scholarship?" in Blanck, P. & Flynn, E. eds. (2016) Routledge Handbook of Disability Law and Human Rights. London: Routledge pp. 4-6

[29] Kanter, A. S. (2015) The Development of Disability Rights Under International Law: From Charity to Human Rights. New York: Routledge pp. 46-47

However, the social model is not the be all end all which it may at first seem. Particularly after the entry into force of the UNCRPD, a human rights model of disability has been articulated and argued for. Views differ on whether it truly represents a development of views and understanding, as a new model altogether, or whether the human rights model should rather be seen as complementing and acting in tandem with the social model,[30] but whichever view is adopted it is evident that it has already permeated the practice and reporting of the CRPD Committee[31]. The two models also bear many similarities, although an articulated human rights model takes them further. While a pure social model approach can for instance be used to explain why persons with disabilities are affected by poverty at a higher rate than their peers without disabilities, the human rights model takes a social justice approach to the issue, aiming not only to explain, but also to remedy, it takes a further step in explicitly demanding the inclusion of persons with disabilities in the international development and cooperation agenda[32]. Thereby further reenforcing the role of persons with disabilities not as objects of charity but as equal stakeholders in the planning, distribution, and assessment of measures and resources.[33] Similarly, a human rights model arguably better mirrors the actual contents of the UNCRPD as a holistic view and human rights approach recognizes the full human rights landscape including both first generation (civil and political) and second generation (economic and social) rights.[34] As exemplified by both of these points, a human rights model better alleviates and emphasizes persons with disabilities as full and equal rights and duty bearers, in their respective societies and globally, regardless of their impairments. An approach also clearly found in the purpose of the UNCRPD to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms"[35].[36] Bearing this in mind, while still recognizing the value of the social model as well as the lack of consensus about the exact contents and limitations of either model, the complimentary thesis, viewing the social and human rights models as coexisting and complementing each other, rather

[30] *see for instance* Lawson, A. & Beckett, A. E. (2021) The social and human rights models of disability: towards a complementary thesis. The International Journal of Human Rights, 25:2 pp. 348-379
[31] Ibid. pp. 357-359
[32] *see for example* 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. Article 32
[33] Degener, T. "A human rights model of disability" in Blanck, P. & Flynn, E. eds. (2016) Routledge Handbook of Disability Law and Human Rights. London: Routledge pp. 47-48
[34] Ibid. pp. 35-38
[35] 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. Article 1
[36] Degener, T. "A human rights model of disability" in Blanck, P. & Flynn, E. eds. (2016) Routledge Handbook of Disability Law and Human Rights. London: Routledge pp. 34-35

than as incompatible or at odds, articulated by Lawson and Beckett[37], will guide the perspective of this thesis.

Concretely, to the extent that a separation is even necessary other than for semantic purposes, the social model can be seen to be held as representing the core original ideals, and the human rights model as representing the political and legal understanding and execution. Therefore, while the two are often inseparably intertwined, as this thesis aims to examine concrete questions of human rights law, rather than theorize disability in a social science sense, it will be guided by a human rights model which should be understood to also include, and to an extent develop on, the core ideas of the social model.

[37] Lawson, A. & Beckett, A. E. (2021) The social and human rights models of disability: towards a complementary thesis. The International Journal of Human Rights, 25:2 pp. 369-370

2 Contextual background

2.1 Labour rights as human rights

It has been a well-established and long-lasting view of some, that labour law and human rights law exist in parallel and make up two separate, rarely overlapping fields. Proponents of this view would argue that while human rights law concerns itself with rights founded in an idea of inherent natural rights, labour law is fundamentally more related to contract law with labour rights rooted in contractual relationships rather than inherent natural rights shared by all. However, this represents a reductionist view of the reality of labour rights today and the history of labour law.[38]

Founded in 1919 under the Treaty of Versailles, the International Labour Organization is not only one of the oldest surviving institutions of public international law, but also arguably one of the oldest human rights bodies – even if it may not always have styled itself as such historically. Still, the human rights dimension is noticeable from the outset as well as in the core conventions and more recent initiatives.[39] Already the declaration of Philadelphia[40], arguably marking the birth of the modern ILO and presently included as an annex to the ILO Constitution, contains multiple phrasings that can be considered part of the language of human rights. The Declaration emphasised the importance of "freedom of expression and association"[41] four full years before the United Nations Universal Declaration of Human Rights[42], and was similarly early in making references to the rights of "all human beings, irrespective of race, creed or sex"[43] and of its principles as "fully applicable to all people everywhere"[44]. This has continued with other ILO Conventions containing earlier expressions of a right or the rights of a group than found in later UN Conventions. For instance, the Minimum Age Convention[45] prohibiting child labour predates the prohibition of the same in the United Nations Convention on the Rights of the Child[46], and the

[38] Bellace, J. R. & ter Haar, B. "Perspectives on labour and human rights" in Bellace, J. R. & ter Haar, B. eds. (2019) Research Handbook on Labour, Business and Human Rights Law. Cheltenham: Edward Elgar Publishing Limited pp. 2-3

[39] *See* Swepston, L. "How the ILO embraced human rights" in Bellace, J. R. & ter Haar, B. eds. (2019) Research Handbook on Labour, Business and Human Rights Law. Cheltenham: Edward Elgar Publishing Limited pp. 295-313

[40] International Labour Organization, *Declaration of Philadelphia*, 10 May 1944

[41] Ibid. I b)

[42] United Nations General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III). Articles 19 & 20

[43] International Labour Organization, *Declaration of Philadelphia*, 10 May 1944. II a)

[44] Ibid. V

[45] International Labour Organization, *Minimum Age Convention, C138*, 26 June 1973, C138

[46] United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

Equal Renumeration[47] and Discrimination (Employment and Occupation)[48] Conventions predate the Convention on the Elimination of All Forms of Discrimination against Women[49] and International Convention on the Elimination of All Forms of Racial Discrimination[50]. This illustrates how even when the ILO has not considered itself a human rights organization, and labour rights have been considered distinct from human rights, developments in international labour law and -rights have predated and thus in a manner paved the way for developments in the field of international human rights law. Thus, even if the two were to be considered separate, they were not on parallel tracks, but labour rights paved the way for additional human rights.

Of course, labour rights also appear in a number of human rights instruments, both global and regional. Globally, the right to work is guaranteed for everyone in Article 23 of the UDHR[51] and in Article 6 of the International Covenant on Economic, Social and Cultural Rights[52]. Regionally, it is found in the African Charter on Human and Peoples' Rights[53] and ASEAN Human Rights Declaration[54] but is neither explicitly mentioned in the European Convention on Human Rights[55] nor the American Convention on Human Rights[56]. Still, the acceptance of the right to work not only in specialised conventions such as those of the LO, but also in major international instruments signals its position as a core human right, and its inclusion in both the UDHR and ICESCR guarantees its universal and global applicability even where national or regional systems may not use the exact term.

[47] International Labour Organization, *Equal Remuneration Convention*, 29 June 1951, C100
[48] International Labour Organization, *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111
[49] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13
[50] United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195
[51] United Nations General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III). Article 23
[52] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Article 6 Section 1
[53] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Article 15
[54] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012. Article 27 (1)
[55] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[56] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

2.2 Disability rights as human rights

For a long time, disability rights were not much considered as a specific area in the field of human rights law. Even though there should be no doubt that persons with disabilities are implicitly included in references to all people or persons in other instruments, the prevalence of the medical model discussed above meant that where persons with disabilities were considered specifically it was as a group of persons in need of additional special protections rather than as inherent rights and duty bearers. An example of this in treaty law can be found in the 1975 Declaration on the Rights of Disabled Persons[57]. While the Declaration was surely well intended, its main focus was on protecting rather than enabling. Something which can be seen for instance in the statement that persons with disabilities have a right to "enjoy a decent life, as normal and full as possible"[58], the inclusion of a right to "medical, psychological and functional treatment"[59], and a specific right to "be protected against all exploitation"[60], connecting it clearly to an idea of disability as something to be treated or cured, and persons with disabilities to be cared for rather than included and accommodated.

Yet even this older instrument contains some of what has come to characterise the modern social and human rights model approaches. The early inclusion of a right to "measures designed to enable them to become as self-reliant as possible"[61] may be seen as a precursor to the more extensive right to reasonable accommodations found in the United Nations Convention on the Rights of Persons with Disabilities. While the wording is weaker, "as self-reliant as possible" as opposed to "on an equal basis with others"[62], it still began to formulate a right to equality and inclusion. Similarly, the Declaration on the Rights of Disabled Persons stated that organizations of persons with disabilities could be "usefully consulted"[63] even if it stopped short of mandating it.

Still, it is no surprise that the UNCRPD was considered such a breakthrough. In taking a more holistic approach guaranteeing all, and not just the many specifically enumerated, human rights equally for persons with disabilities as well as adopting the respect-protect-ensure framework it created an explicit responsibility for its state parties to not merely agree to recognition of rights but to also take active steps in protecting and facilitating the equal exercise and enjoyment of all human rights. Whether

[57] United Nations General Assembly, *Declaration on the Rights of Disabled Persons*, 9 December 1975, A/RES/3447 (XXX)
[58] Ibid. Article 4
[59] Ibid. Article 6
[60] Ibid. Article 10
[61] Ibid. Article 5
[62] 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. Article 2
[63] United Nations General Assembly, *Declaration on the Rights of Disabled Persons*, 9 December 1975, A/RES/3447 (XXX). Article 12

positive or negative, active or passive. As it is not sufficient under the UNCRPD to passively respect a right by not actively violating it, there also existing a duty to ensure and facilitate the enjoyment thereof, the right to reasonable accommodation becomes a cornerstone of the modern disability rights framework.

However, this development did not occur in a vacuum. Instead, the UNCRPD should be understood and recognized as a part of a greater shift in international human rights treaties. From the first generation of human rights treaties such as the UDHR and ICCPR offering protection from violations and guaranteeing political rights and freedoms, over the second generation of treaties such as the ICESCR broadening the scope to economic, social, and cultural rights, to a third generation specifically protecting the rights of minority groups. It is in this latest generation of human rights, together with for example the CRC and the United Nations Declaration on the Rights of Indigenous Peoples[64] that the UNCRPD should be understood to be situated. Considering the Convention within this framework offers greater understanding of its context, as well as an important reminder of its role in the progressive development of international human rights law and the interplay of human rights as resting on each other.

Finally, disability rights have also began to enter the regional human rights landscape through the adaptation by the African Union, and ongoing member state ratification process, of the African Disability Protocol[65]. While the AU is to date the only regional human rights body to have introduced a specific treaty on the rights of persons with disabilities into its system, and the ratification process is still ongoing, this marks another significant step of progress in the recognition of disability rights as human rights.

[64] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295

[65] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa,* 29 January 2018

2.3 The interplay

If labour rights and human rights have sometimes been considered as having a parallel and rarely overlapping existence, that is nothing in comparison to the relationship between labour rights and disability rights. While the ILO has more recently launched a multitude of projects and issued publications related to persons with disabilities and employment, it cannot be ignored that disability was notably left out of the exhaustive list of grounds of discrimination in the Discrimination Convention[66]. It may not be possible to point to the specific effects of this, but it can also not be denied that it had the effect of de facto keeping the door open for the discrimination of persons with disabilities in the labour market to be kept legal. By virtue of it not being included as one of the specifically prohibited grounds of discrimination states can be in compliance with ILO C111 without taking any measures against, or even formally outlawing, discrimination of persons with disabilities.

The near-universal ratification of the UNCRPD[67] changes this. With its requirement not only for state parties to respect, protect, and ensure equal enjoyment of all human rights for persons with disabilities, but specific inclusion of an Article on work and employment[68], the two areas of human rights law have been forever merged. While this presents specific challenges, such as the one at the centre of this thesis, the limits of reasonable accommodation in the workplace, it also presents opportunities in the long run. Work is an essential part of inclusion in society, and just as many rights rest upon each other, recognition as an equal, and equally valued, member of society is often tied to perceived contribution. Contribution which is most easily communicated through work. With this understanding, promoting the right to work for persons with disabilities becomes of particular importance as it can be seen as a step in creating acceptance, and guaranteeing fulfilment of rights, in other areas. Persons who are enabled to work and earn a living independently are not only often perceived differently, but also have greater resources at their disposal enabling them to better assert their rights in other areas, and economic self-sufficiency greatly aids in securing a full and independent life.

[66] International Labour Organization, *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111. Article 1 Section 1 a)
[67] United Nations Human Rights Treaty Bodies, UN Treaty Body Database, *Ratification Status for CRPD – Convention on the Rights of Persons with Disabilities*, [ONLINE: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD retrieved 01 January 2023]
[68] 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. Article 27

3 Article 27 of the United Nations Convention on the Rights of Persons with Disabilities

Using the Vienna Convention-based method outlined above, the analysis finds its starting point in an examination of the relevant sections of the Convention text and textual analysis as prescribed in Article 31 of the VCLT[69]. Starting from the specific, provisions on labour are found in Article 27 of the UNCRPD titled "Work and Employment" which reads in its entirety:

"1. States Parties recognize the right of persons with disabilities to work, an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

[69] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 31

f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

g) Employ persons with disabilities in the public sector;

h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour."[70]

From this Article, the following relevant specificities can be drawn;

1) State parties to the UNCRPD recognize the right to work as an independent right and its equal applicability for persons with disabilities,
2) This includes the right to freely choose and accept work and to a work environment that is "open, inclusive and accessible",
3) State parties accept a responsibility to promote and safeguard this right,
4) This responsibility extends beyond prohibiting discrimination into taking active measures to protect the rights of persons with disabilities in the labour market, including to equal opportunities, and
5) Such measures include ensuring that reasonable accommodation is provided.

Beyond simple recognition of the right to work for persons with disabilities equally to those without disabilities, Article 27 should be understood to follow the purpose of the Convention[71] in creating a three-part responsibility for states to promote, protect, and ensure this right. Arguably, this responsibility exists stronger in the public than the private sector as states are to "promote employment" in the private sector[72] while called on to

[70] 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. Article 27
[71] Ibid. Article 1
[72] Ibid. Article 27 Section 1 h)

"[e]mploy persons with disabilities in the public sector"[73]. This might appear imbalanced at first but is less so when seen through the promote-protect-ensure framework. As the employer in the public sector, states are especially positioned to fulfil all three aspects of this nexus and can therefore be called on to do so entirely whereas they can exercise less direct control over public sector employers, necessitating different kinds of measures.

While adaptation of national anti-discrimination legislation may serve to promote, and to an extent protect, the right to work, ensuring it requires additional active measures be taken on a more local level. This is where reasonable accommodation comes into play representing such an active measure to ensure the right, and the one central to this examination. However, as Article 27 does not contain any definition of reasonable accommodation or guidance on its meaning, it is necessary to look beyond it and to the Convention as a whole and the specific Article in its context.

Here, Article 2 of the Convention is the immediate logical first place to seek guidance. Providing the initial definitions for the specific technical terms used in the Convention it defines reasonable accommodation as:

> "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"[74]

Key in this definition is the specification of the envisioned accommodations as those "necessary and appropriate", and the aim being to ensure exercise or enjoyment of a freedom or tight "on an equal basis" with persons without disabilities. However, the definition also contains the caveat that reasonable accommodation must not impose a "disproportionate or undue burden". What exactly would be undue or disproportionate is however left open. This leaves some ambiguity, but considering the ordinary meaning of the terms, as prescribed by the VCLT[75], can shed some light.

Something is not disproportionate in a vacuum or usually on its own. Instead, the proportionality of something must be measured against something else. Only in such a comparison can something be proportionate or disproportionate. Importantly, what is to be proportionate here is also not the measure or measures themselves, but the burden they may impose. This implies that it is acceptable for the carrying out of reasonable accommodation measures to come at a certain cost, of effort, finances, or otherwise - an understanding which is further supported by the wording "undue burden" in the same definition. Therefore, this cost or associated expenditure can be assumed to be what has to be proportionate and not

[73] Ibid. Article 27 Section 1 g)
[74] Ibid. Article 2
[75] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 31 (1)

undue, and it can be concluded that the entity for whom it cannot be so is that which makes the accommodations. However, this still does not qualify when or at what point a created burden would be undue or disproportionate. Two possible points for comparison can be imagined. Either the measures taken to provide reasonable accommodation are to be measured against their achievement of their purpose, or against the situation of the entity undertaking them.

If the case is the former, the goal they should be measured against is "the enjoyment or exercise on an equal basis with others" of a human right or fundamental freedom. In such case, the likely metric of measure should be the success of the undertaken accommodation measures. Something which seems unlikely. In the latter case, however, the question is still left wide open regarding where the line is drawn.

Still, some small light on how reasonable accommodation measures are to be valued may be found by looking beyond the specific Articles and to the greater overarching goals of the Convention. Beginning in the Preambles, state parties reaffirm "[…] the need for persons with disabilities to be their full enjoyment without discrimination" of human rights and fundamental freedoms[76] and recognize "[…] that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person"[77]. This is in itself nothing spectacular as it fits squarely within state parties' responsibility to respect rights of persons with disabilities. After all, rights which are not recognized can hardly be respected. There is however one more important statement made in the Preambles. State parties recognize the "existing and potential contributions" of persons with disabilities to their communities and societies, and that "full participation" of persons with disabilities in society will lead to "significant advances in the human, social and economic development".[78] While this does not in itself say anything about exactly how participation should be valued, or therethrough about what would be an unreasonable or undue burden in achieving such participation, it does indicate that equal participation should be valued very highly. After all, state parties can be assumed to be willing to devote considerable resources to something which is expected to significantly advance human, social and economic development. Given this, so should they to measures to ensure it, including reasonable accommodation measures as a prime example of such.

Furthermore, "Non-discrimination", "Equality of opportunity", and "Accessibility" are identified as general principles of the UNCRPD[79], and "In order to promote equality and eliminate discrimination, States Parties

[76] 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. Preamble (3)
[77] Ibid. Preamble (8)
[78] Ibid. Preamble (13)
[79] Ibid. Article 3

shall take all appropriate steps to ensure that reasonable accommodation is provided"[80]. Thus, the Convention identifies the providing of reasonable accommodation as a key component in meeting its goals and fulfilling its general principles, more explicitly tying it to the ensure dimension of the promote-protect-ensure nexus, and further indicating the high value of and strong duty in providing reasonable accommodation. However, Article 5 still does not state anything explicit about its limitations, reasonableness, or what constitutes an undue burden. What it does do though is introduce an additional factor in that "all appropriate steps" are to be taken. This presents both an answer and a question. As an answer, it shows a far-reaching responsibility as all steps are to be taken, but as for the new question it qualifies these as "all appropriate". This phrasing indicates that there are imaginable steps which could be taken to ensure reasonable accommodation, but which would not be appropriate. This follows the spirit of the definition provided earlier in the Convention which qualified that reasonable accommodation should not impose an "unreasonable or undue burden"[81]. Measures which would do so can be assumed to not be appropriate, and therefore not meet the additional standard of Article 5.

Finally, in the specific context of work and employment, with the right to work falling under the umbrella of economic, social, and cultural rights, the broadened context of the UNCRPD implies that the measures, and expenditures, for reasonable accommodation can be particularly large. In fact, as reasonable accommodation is a means of fulfilling the duty to ensure the enjoyment of a right under the Convention, when that right is the right to work, a right within the sphere of economic, social, and cultural rights, Article 4 binds state parties "to take measures to the maximum of [their] available resources"[82]. While this should likely not be interpreted as to mean that states should devote all their available resources to reasonable accommodation measures, as that would quite clearly be unreasonable, it can be taken as a clear indication that the bar for what is to be considered undue or unreasonable in the context of the Convention is set very high.

From this greater contextualization it can thus be deduced that there are limits to reasonable accommodation, but the Convention text alone does not provide a specific answer to what those limits are. What can be concluded is that measures which for any reason cannot be deemed appropriate, are unreasonable, or present an undue burden fall outside the scope of reasonable accommodation. However, at the same time the greater context and aims of the Convention indicate that a wide variety of measures would fall within the limits, and given the very high value placed on participation and its potential benefits in the Preambles it should take a lot for measures to fall outside them, although it is still clear that they exist.

[80] Ibid. Article 5
[81] Ibid. Article 2
[82] Ibid. Article 4 Section 2

4 The Committee on the Rights of Persons with Disabilities' General Comments

As a reading and analysis of the text of the UNCRPD alone did not sufficiently answer the research questions the next step following the analysis outlined in the methods section above is to turn to supplementary sources. Foremost of these for aiding in understanding of the Convention are the General Comments of the United Nations Committee on the Rights of Persons with Disabilities.

The CRPD Committee recently adopted a General Comment specifically on Article 27 of the Convention on the Rights of Persons with Disabilities and the "right of persons with disabilities to work and employment"[83]. In this eighth General Comment the importance of the right to work for persons with disabilities is highlighted, both in its importance for international development and the necessity of its fulfilment for states to meet their commitments under the Sustainable Development Goals,[84] and in its position as a "fundamental right, essential for realizing other human rights"[85]. It is recognized as essential to multiple aspects of the well-being of individuals and their families,[86] and as strongly connected to other parts of the UNCRPD and fulfilment of other rights under the Convention[87]. Particularly the recognition of the right to work as "fundamental" to independent living and inclusion in one's community, also rights under the UNCRPD,[88] is notable. By pointing out this specific connection so explicitly the CRPD Committee very clearly moves beyond only talking about the right to work as a core ecosoc right and to explicitly stating how the fulfilment of other rights, and indeed to something as fundamental as recognition as equal members of society, rests upon the right to work being recognized and fulfilled. Although it is also reiterated that states are required to take steps "to the maximum of their available resources" to progressively guarantee their "full realization"[89] of all ecosoc rights, this highlighting of the connection between the right to work and fulfilment of

[83] UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 8 (2022) on the right of persons with disabilities to work and employment*, 9 September 2022, CRPD/C/GC/8
[84] Ibid. 1
[85] Ibid. 2
[86] Ibid. 2-3
[87] Ibid. 65-80
[88] Ibid. 73
[89] Ibid. 53

other basic rights can be taken to imply an even greater responsibility when it comes to its fulfilment. While an explicit hierarchy of rights is neither stated nor implied, identification of one as fundamental for others points toward a particularly high priority in the order of progressive realization and expected resource allocation.

In the specific context of reasonable accommodation in the workplace, GC 8 offers the description of "the provision of individual modifications, adjustments and supports to enable persons with disabilities to perform the inherent requirements of their work on an equal basis with others"[90]. This definition follows what is apparent from the Convention text, but the highlighting of reasonable accommodation as taking aim at performance of inherent requirements of a job is notable. In choosing this wording, the CRPD Committee makes clear that reasonable accommodation in the workplace is not merely intended as an auxiliary function or supplementary support in an otherwise functioning situation but should instead also take aim at the core or central issues, even where these relate to something that can be considered an inherent requirement. It is also pointed out that reasonable accommodation measures should be decided in cooperation between the employer and the employee, existing or potential, needing them and that as a rule the solution preferred by the persons needing the accommodations should be the one chosen. Where this cannot be done because it would impose an undue burden alternative solutions either still have to be implemented, or the preferred solution should be implemented as far as possible without imposing such an undue burden.[91] In other words, a preferred or suggested reasonable accommodation measure being deemed impossible to implement because of the burden it would impose does not free the employer of responsibility to implement other measures or an adjusted version of it. From this can be understood that the right to reasonable accommodation in the workplace is, in principle, unlimited and that situations were not envisioned where no measures at all would be implemented and persons with disabilities thereby practically shut out of a specific workplace or job. While the CRPD Committee is careful to include the caveat of reasonable accommodation not imposing a disproportionate or undue burden, this stricter interpretation of at least the idea behind the concept also finds support in the reminder that, under the UNCRPD, denial of reasonable accommodation is itself a form of discrimination[92]. Maintaining an inaccessible status quo by not taking accommodation measures constitutes discrimination as soon as such measures are requested or the need for them becomes clear, or the moment a person with a disability seeks to exercise a right or access a non-accessible situation.[93]

[90] Ibid. 44
[91] Ibid.
[92] Ibid. 16 *and* 19
[93] Ibid. 19

Finally, GC 8 supports the textual interpretation that the UNCRPD lays an even stronger duty on public sector employers to ensure the right to work is respected for persons with disabilities than on private sector ones. While the requirements of the UNCRPD applies equally to both, the CRPD Committee expresses that public sector employers "should take a more rigorous approach to inclusion".[94] Considering this statement, the previous assumption that the bar for what constitutes a disproportionate or undue burden is set considerably higher in the public sector can be considered supported.

Before issuing its General Comment specifically on the right to work, the CRPD Committee also published a GC on Article 5[95] offering further guidance on, among other areas, reasonable accommodation. Here, reasonable accommodation is described as consisting of two parts. A legal obligation to take necessary measures to ensure a person with a disability can exercise a specific right, and a form of protection for the party required to provide the accommodation measures, guaranteeing they do not include such measures as would impose a "disproportionate or undue burden" on them.[96] Starting from the legal obligation to provide, reasonable in reasonable accommodation does not imply a test of the measure itself from the perspective of the provider. Reasonableness is not a means of exclusion, on a basis of valuation, finances, or otherwise, here, but instead takes aim at the needs of the person receiving the accommodation. Hence, an accommodation is reasonable if it is relevant, appropriate, and effective in meeting the needs of its recipient, meaning accommodations that work for the target individual are reasonable and ones that do not are not.[97] The test for the providing party is instead found in the second step where measures creating a "disproportionate or undue burden" are excluded. Here, disproportionate and undue do not carry different meanings or present different components to a test but are to be understood as synonyms for the same idea referring to the same context. If a request for reasonable accommodation puts an "excessive or unjustifiable burden on the accommodating party" that accommodation measure is not guaranteed as reasonable accommodation and does not need to be met.[98] The CRPD Committee stops short of providing closer definitions or examples of what exactly would be disproportionate, undue, excessive, or unjustified, but having given the four terms as synonyms has offered some guidance. First, the intended scope of exceptions under this caveat can be understood to be narrow, particularly as the terms are identified as constituting synonyms in this context and do not present different options for exclusion. Second, this

[94] Ibid. 39
[95] UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 6 (2018) on equality and non-discrimination,* 26 April 2018, CRPD/C/GC/6
[96] Ibid. 25
[97] Ibid. 25 a)
[98] Ibid. 25 b)

burden is the one placed on the provider of the accommodation and should therefore be measured against their situation. This implies that a possible universal definition in the context of the UNCRPD might not exist but that a new assessment will be necessary in each situation, taking into account the specific circumstances of each accommodating party and potentially putting a heavier emphasis on financial and material considerations. A conclusion also supported by the CRPD Committee stating that any denial "must be based on objective criteria" and that the length of the relationship between the parties should be a factor of consideration.[99]

In the specific context of labour, aside from what has already been discussed above and more extensively in GC 8, GC 6 also emphasises that a part of reasonable accommodation and the elimination of labour discrimination is guaranteeing equal opportunities for career advancement and -opportunities.[100] This may appear as a given and of fairly minor note at first, but on closer consideration says something about the scope of reasonable accommodation measures. With the emphasis that recipients should also enjoy equal opportunities in their careers, reasonable accommodation measures must be shaped and implemented in such a way as to not only work in a specific position, thereby locking the recipient in and preventing advancement. Equally, it is not enough for measures to provide for the bare minimum of accommodation for their recipient to carry out a job, but they must also cover parts of the job that may only be relevant for promotion and career advancement.

[99] Ibid. 27
[100] Ibid. 67 g)

5 Scholarly comments

As the method chosen for this study goes beyond a strict VCLT analysis and into more teleological territory it is also appropriate to consult some additional supplementary materials beyond those permitted under the Vienna Convention in the form of scholarly doctrine. As the UNCRPD is still a young Convention, and scholarship on its more specific legal questions is still limited, the availability of such material is limited. However, some scholarly comments have been published from which some additional clarification can be drawn outside of what is established through other sources elsewhere in this thesis.

In their 2017 commentary to the UNCRPD, Della Fina et. al. underscore that while the full realization of the right to work as understood under Article 27 of the Convention, in an open, inclusive, and accessible labour market, is subject to progressive and gradual realization, the right to reasonable accommodation is not. As it forms part of the protection against discrimination it falls under the umbrella of civil and political rights and therefore has an immediate binding effect on State parties. Labour market discrimination, the failure to guarantee the right to work, including denial of reasonable accommodation, they also note, can be linked to discrimination in other parts of society.[101] Given this interconnectedness, the right to reasonable accommodation cannot be subject to gradual realization as it would then be interpreted much more narrowly in a society already characterised by a lack of inclusion of persons with disabilities, in the labour market and elsewhere.

With regards to the content of the right, it is "an obligation to make adjustments of the working conditions in order to ensure that an employee's disability does not place the employee at a disadvantage compared to others". However, as this obligation only exists where it does not create an undue burden, it does not extend to or include a responsibility to make adjustments where a person's disability prevents them from performing a core function of the job.[102] What constitutes a core function, however, is not clearly defined anywhere and can be expected to be a gradually narrowing exception as advances in, for instance, technology make making evermore effective accommodations possible.

With regards to the limits of reasonable accommodation, and particularly the concepts of reasonableness and undue burden, Bantekas et. al. add

[101] Della Fina, V., Cera, R. & Palmisao, G. (eds.) (2017) The United Nations Convention on the Rights of Persons with Disabilities: A Commentary. Cham: Springer International Publishing. pp. 502-503
[102] Ibid. pp. 503-504

further in their commentary that the reasonableness of a measure is to be determined through an "objective analysis of proportionality" in order to determine whether denying a measure would constitute prohibited discrimination or not. As states enjoy a certain margin of appreciation even regarding this right, objective criteria cannot be established by an international adjudicating body.[103] When assessing proportionality, employers can especially consider the financial dimensions of implementing a certain measure. In this, the entire economic picture, including cash-flow of the company or organization in its entirety, and the net-cost of the accommodation measure to the employer should be determinative. Hence, larger enterprises, organizations, and states, have a greater responsibility than their smaller counterparts, although pubic, as well as central corporate, resources should also be made available to alleviate some of the cost. Notably, they also stress that an accommodation does not have to take aim at a core function or task of a job to be covered by the right to reasonable accommodation, but instead all measures necessary to enable an employee with a disability to perform the job are covered.[104]

[103] Bantekas, I., Ashley Stein, M. & Anastasiou, D. (eds.) (2018) The UN Convention on the Rights of Persons with Disabilities, a commentary. Oxford: Oxford University Press. pp. 793-794

[104] Ibid. 795-796

6 The Committee on the Rights of Persons with Disabilities' Communications

The jurisprudence of the United Nations Committee on the Rights of Persons with Disabilities is still quite limited in its entirety, and the number of Communications which have resulted in the adaptation of views even smaller. Despite this, three Communications can be identified as particularly important in their contributions to the body of interpretive international jurisprudence on reasonable accommodation and the right to work for persons with disabilities under Article 27 of the United Nations Convention on the Rights of Persons with Disabilities. In chronological order these are *Jungelin v. Sweden*[105], *V.F.C. v. Spain*[106], and *Sahlin v. Sweden*[107].

Jungelin v. Sweden

Marie-Louise *Jungelin* is a Swedish national[108] born with a severe visual impairment leaving her eyesight limited to distinguishing between light, dark, and certain colours. However, she attended a regular school, got her law degree from Stockholm University, and worked for both public, Swedish police, and private, an insurance company, sector employers. In 2006 she applied for a permanent position with the Social Insurance Agency, another public sector employer, in which she would have to work in various computer systems as well as handle both digital and physical, some hand-written, documents. After first advancing in the recruitment process she was later informed that despite her qualifications being sufficient for the job she would not be considered for the position as the Social Insurance Agency had made the assessment that she would not be able to fully work in the Agency's computer systems, nor read and process the hand-written materials which would be part of the assessments she would have carried out. The Agency gave as their reason for this that its

[105] UN Committee on the Rights of Persons with Disabilities (CRPD), *Communication No. 5/2011, Views adopted by the Committee at its twelfth session (15 September-3 October 2014)*, 14 November 2014, CRPD/C/12/D/5/2011

[106] UN Committee on the Rights of Persons with Disabilities (CRPD), *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 35/2015*, 29 April 2019, CRPD/C/21/D/34/2015

[107] UN Committee on the Rights of Persons with Disabilities (CRPD), *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 45/2018*, 15 October 2020, CRPD/C/23/D/45/2018

[108] UN Committee on the Rights of Persons with Disabilities (CRPD), *Communication No. 5/2011, Views adopted by the Committee at its twelfth session (15 September-3 October 2014)*, 14 November 2014, CRPD/C/12/D/5/2011. 1.1

systems could not be made accessible with technical aids and lacked the ability to convert and present information in Braille.[109] Jungelin challenged this through the courts with the help of the Swedish disability ombudsman. During the process she held that she had the necessary qualifications for the job and that the Social Insurance Agency had discriminated against her by disqualifying her on the basis of her disability and its refusal to take adaptive and accommodating measures. Three suggestions for such measures were presented, to adapt the Agency's systems to be accessible for her using technical aids, at an estimated cost of 10-15 million sek or about 2% of its annual IT budget, to set up programs to convert scanned information into an accessible format, and to convert physical documents into an accessible format using a scanner. To carry out these measures the Agency would have had to hire a personal assistant to deal with the hand-written materials, something it had done in the past. Jungelin also suggested this person could also carry out additional tasks for the Agency.[110] The Social Insurance Agency for its part maintained that her application had been duly considered, but that after contacts with its IT department it had become evident that there was no available tool that could carry out these measures and that the whole system would need to be reconstructed. A measure it claimed would be unreasonable due to its time-consuming nature and associated extreme financial burden. It also claimed that due to the nature of the work a personal assistant would in reality end up doing up to 80% of it, meaning the Agency would be paying two persons to do the same job. All the required measures combined would therefore put an unreasonable burden on the Agency. This view was largely supported by the Labour Court which sided with the Social Insurance Agency, dismissing Jungelin's application.[111]

Following this she took her case to the CRPD Committee, claiming violations of Articles 5 and 27 of the UNCRPD claiming the Agency had failed to adequately assess the feasibility of adaptive measures. Had the Agency implemented the suggested adaptations, making its system accessible to those using screen reading software and Braille displays, not only would Jungelin have been able to carry out most of the work of the advertised post, but so could, moving forward, other persons requiring the same or similar adaptations. As the main public institution tasked with the implementation of policy on persons with disabilities, and as a public entity, the Agency should be expected to take and implement measures in accordance with the Convention. By denying her the necessary accommodative measures, first through the Agency and then in the labour court, she argued, the Swedish government had failed both in its legislative and administrative duties to fully recognize and guarantee the right to work

[109] Ibid. 2.1-2.4
[110] Ibid. 2.5-2.6
[111] Ibid. 2.7-2.8

of persons with disabilities on an equal basis with others as well as to provide reasonable accommodation.[112]

The Swedish government, for its part, argued mainly that it had acted correctly in accordance with Swedish law, and that domestic law, both at the time of Jungelin's initial lawsuit and at present, sufficiently fulfilled the requirements of the Convention.[113] Under the law in force at the relevant time, an employer could not treat an applicant or employee with a disability less favourably than one without, including in recruitment processes. To determine whether a person had been discriminated against, she was to be compared to another person, existing or hypothetical, in a comparable situation, and to ensure the comparability the employer was obligated to take reasonable accommodation and supporting measures. Hence, an employer was not allowed to consider a person's disability status if its effects could be voided or significantly reduced by accommodation measures but could do so if her disability affected her ability to perform the tasks of the job even with such measures in case – in which case the person was considered to lack "the objective capabilities for the job".[114] Employers were only obligated to implement such measures as could "be considered reasonable on a case by case basis", and in assessing reasonableness one factor to be considered was "the costs of the measures in relation to the employer's ability to pay for them".[115] As such, the Swedish law at the time complied with the requirements of the Convention in guaranteeing a right to reasonable accommodation, and the caveat on reasonableness was similarly consistent with it.[116] As regards the argument that the required accommodations would have also benefitted future applicants and employees, the Swedish government argued that as the relevant law protected individuals from discrimination, hypothetical future impacts on or benefits to a larger group were not a factor that should be considered as creating such general accessibility was not within the scope or purpose of the law.[117] Thus, the Labour Court had correctly applied the same reasonability test and balancing of interests as should be understood under the Convention, and correctly ruled that no discrimination had taken place.[118]

In its majority opinion, the CRPD Committee expressed that State parties to the Convention have a responsibility to prevent discrimination and uphold the right to work for persons with disabilities in accordance with Article 27, including by providing reasonable accommodation under and in accordance with Articles 2 and 5.[119] However, the Committee also noted that "State

[112] Ibid. 3.1-3.4
[113] Ibid. 8.2-8.3
[114] Ibid. 8.4
[115] Ibid. 8.5
[116] Ibid. 8.9
[117] Ibid. 8.15
[118] 8.17-8.18
[119] Ibid. 10.5

parties enjoy a certain margin of appreciation" in assessing reasonableness and proportionality of reasonable accommodation measures. Given this, the majority did not consider it to be for the Committee to make such an assessment but for the national courts, and it being the role of the Committee rather to assess whether the assessment had been correctly and justly carried out.[120] With this in mind, the Committee did not find that the Swedish Labour Court had faulted in that regard, but instead that, e contrario, the Labour Court's assessment had been based on objective and reasonable considerations at the time. Therefore, the Committee did not find that Jungelin had had her rights under Articles 5 or 27 violated.[121]

However, a total of six Committee members issued dissenting opinions. They expressed their disagreement with the majority's framing of the case as simply being about the specific adaptations examined by the Swedish Labour Court, stating that in their view alternative accommodations suggested by the disability ombudsman had not been sufficiently considered.[122] Although agreeing that it was not for the CRPD Committee to act as a third instance, in their view he Committee should still have reviewed the criteria used by the national court in assessing reasonableness.[123] A reasonability test should ensure that the reasonable accommodation measures "were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions corresponding to the position for which he or she applied" and that "the public or private company or entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures". There was never any doubt that Jungelin had the professional capacity or experience to perform the tasks of the job, and as the aim of accommodations is to enable a person to perform a task factual capacity without accommodations can not be grounds to deny a person employment.[124] The national court failed, in the eyes of the dissenting Committee members, to consider the full scope of support available to the Agency, particularly financially, as well as its role in promoting employment of persons with disabilities, and, perhaps most notably, the positive impact adaptive measures, while individual in this instance, could have had on the future employment of other persons with visual impairments with the Agency.[125] In failing to consider these factors, the Labour Court reached an interpretation of the content of an "undue burden" so wide that it "severely limited" the ability of persons with disabilities to be hired for positions requiring adaptations of the working environment. This wide interpretation resulted in de facto exclusion of Jungelin from the

[120] Ibid. 10.6
[121] Ibid. 10.6-11
[122] Ibid. Appendix 1
[123] Ibid. Appendix 2
[124] Ibid. Appendix 4
[125] Ibid. Appendix 5

position, and therefore the Committee should have found that Sweden had breached Articles 5 and 27 of the Convention.[126]

V.F.C. v. Spain

V.F.C. is a Spanish national who used to work as a police officer. However, after a traffic accident he was left with a permanent motor disability and was classified as having a "permanent disability for the performance of his occupation", forcing him to go into mandatory retirement being expelled from the local police force where he had previously worked.[127] He requested to instead be put on modified duty and assigned to a post that would be compatible with his new disability status[128], starting a lengthy process through the Spanish legal system, leading an inadmissibility decision from the European Court of Human Rights, and eventually taking his complaint to the CRPD Committee where he claimed violations of Article 27 alone and in conjunction with Articles 3, 4, 5, and 13 of the UNCRPD.[129]

According to his complaint, by classifying him as permanently and totally disabled for work the Spanish authorities had arbitrarily discriminated against him by denying him access to reasonable accommodation or modified employment as this classification was not based on an individual medical assessment but was an administrative classification. Persons within this classification were excluded from being evaluated for alternative tasks, unlike persons within other disability classifications. Thereby, he had not only been discriminated against n the basis of his disability status, but also in comparison with a person of equal circumstances, including possibly with the same or similar disability status but who had been differently administratively classified. In this, the State did not only fail to prevent discrimination and provide reasonable accommodation, but also to promote employment of persons with disabilities in the public sector as the classification given to him prevented him from continuing his public sector employment with adapted tasks and instead forced him into early retirement.[130]

The Spanish government for its part maintained that its domestic laws and regulations were not discriminatory, and neither were their application to V.F.C.'s case. The competent body to make decisions on disability status is the Social Security Institute, and depending on classification Spanish law allows for different legal consequences to arise from different status. As the relevant ordinance prescribed mandatory retirement for persons with

[126] Ibid. Appendix 6
[127] UN Committee on the Rights of Persons with Disabilities (CRPD), *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 35/2015*, 29 April 2019, CRPD/C/21/D/34/2015. 1-2.2
[128] Ibid. 2.3
[129] Ibid. 2.3-3.1
[130] Ibid. 3.1-3.3; 5.3

V.F.C.'s classified disability status, this made him ineligible to be assigned to modified duty or for other accommodations as persons who are no longer civil servants cannot be assigned to modified civil service duties. What was relevant here, according to the State, was not whether V.F.C. would have been able to perform modified duties, but whether the laws had been correctly applied, which the State maintained they had.[131] As the relevant laws had been applied to him the same as to any other person classified as having the same disability status he could not be considered to have been discriminated against,[132] as these would be the relevant people in the same situation to compare him to.

In considering the merits of the case, the CRPD Committee recalled that parties to the UNCRPD have a duty to adopt legislation to safeguard the rights guaranteed under the Convention, including the right to work and that that right includes the right of persons with disabilities to retain their employment. Thus, states must provide reasonable accommodations to persons who acquire a disability during their employment to ensure it can be continued. This also follows from ILO Conventions 111 and 159.[133] It also specifically expressed that denial of reasonable accommodation is itself a form of discrimination under the Convention, and that the duty to provide accommodations arises as soon as a person requiring them seeks access to a non-accessible space or situation.[134] But states are also required to take necessary preventive measures to ensure accessibility. In assessing the "relevance, sustainability and effectiveness of reasonable accommodation" measures, numerous factors including "financial costs, available resources, size of the accommodating party (in its entirety), the effect of the modification on the institution and the overall assets" must be considered. In making these considerations, and assessing reasonableness, not just local resources, and effects, but those of and on an institution in its entirety, are to be considered. By ruling out a dialogue on such measures, and not showing that they could not be applied within other parts of the police force, the Spanish government had already denied V.F.C. the right to reasonable accommodation.[135] Assignment to alternative duties should only be considered a reasonable accommodation measure of last resort, after all other measures have been deemed undue or otherwise unimplementable.[136] In falling to allow even for this, and instead forcing retirement without a medical evaluation aimed at finding other appropriate duties, the state definitively violated V.F.C's right to work under Article 27 of the Convention. Despite, or rather through, the design of its laws and ordinances.[137]

[131] Ibid. 4.4
[132] Ibid. 4.6
[133] Ibid. 8.4
[134] Ibid. 8.5
[135] Ibid. 8.6
[136] Ibid. 8.7
[137] Ibid. 8.8-8.12

Sahlin v. Sweden

Rchard Sahlin is a Swedish national who was born deaf.[138] After obtaining a doctorate in public law in 2004 he held multiple short-term contracts with different universities, at the time of the communication at Umeå university where he taught in Swedish Sign Language through an interpreter to spoken Swedish.[139] In 2015 he applied for an advertised position as a permanent lecturer at Södertörn university where he had previously been temporarily employed. Hence, the university was aware of his need for interpretation. Despite assessing him to be the most qualified candidate for the advertised position, the university chose to end the recruitment process in 2016, claiming the cost of providing accommodations, a little over half a million sek, would be too high despite its annual staff budget of over half a billion sek and without considering other forms of adapted tasks that would come with lower associated costs.[140] Sahlin filed a complaint with the discrimination ombudsman who brought a civil suit against the university on his behalf.[141] However, the court found that the university had not discriminated against him as it found that it would not have been reasonable to demand the university bear the cost of sign language interpretation and had therefore cancelled the recruitment process altogether.[142] After this, Sahlin filed a complaint with the Committee, stating that the state had failed to respect and guarantee his right to work and reasonable accommodation, arguing that the duty to provide reasonable accommodation could not be placed solely on an employer but should be supported by the state,[143] and that the Swedish government had exceeded its margin of appreciation in its interpretation of the Convention's reasonability requirement, particularly considering the university's sizeable budget surplus.[144] He further claimed that the state had failed in its responsibility to consider alternative, less costly, accommodation measures or the feasibility of providing him with alternative tasks to minimize cost, as well as to consider the greater awareness raising benefits of hiring a senior lecturer with a disability.[145] The state, according to Sahlin, in its assessment and later through the court ruling failed to follow the general principles set forth in the Convention.[146]

The Swedish government, in tis response before the Committee, mainly focused its argument on the correctness of its reasonability assessment, and

[138] UN Committee on the Rights of Persons with Disabilities (CRPD), *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 45/2018*, 15 October 2020, CRPD/C/23/D/45/2018. 1
[139] Ibid. 2.1
[140] Ibid. 2.2
[141] Ibid. 2.3
[142] Ibid. 2.4
[143] Ibid. 3.1
[144] Ibid. 3.2-3.3
[145] Ibid. 3.4-3.5
[146] Ibid. 3.6

where the line should be drawn for an undue burden. According to its argument, an accommodation measure is only reasonable if the entity expected to provide the accommodation can bear the cost of it within its ordinary public or private activities.[147] Measures do not have to be taken if they present an undue burden on the party carrying them out, in this case the employer, and in assessing their financial and other costs, the scale and financial resources of the party expected to undertake them, and the possibility of obtaining public or other additional funding, should be specifically considered.[148] The Swedish government, on both a national and local level, had made considerable financial resources available to support such measures.[149] With regards to Sahlin's claim that alternative work tasks to those he would face challenges performing had not been duly and sufficiently considered, it noted that the announced position of lecturer required, by its definition and format, a high degree of in-person classroom lecturing, and that changing this would both require substantial changes to the public law programme and to the advertised position, making it inconsistent with the university's recruitment needs.[150] Regarding the claim of a surplus, the State argued that this surplus, while existing, was not freely available to be allocated, but that funds held by the university had to be used for the purposes which they had originally been granted for, and that Sweden's national budget surplus was an effect and part of national fiscal policy and should be considered both in that context and in relation to the national debt.[151] Specifically in relation to the reasonability of providing the necessary interpretation services for Sahlin to carry out the role of lecturer, it noted that the cost of interpretation would be almost equal to the pre-tax salary of the position, that it would be a recurring rather than a one-time cost, and that it would only benefit Sahlin himself and not other persons with disabilities or persons with disabilities in general.[152] This conclusion had been reached through the same proportionality test which should be understood to exist under and be prescribed by the Convention[153], and states enjoy a wide margin of appreciation in making this assessment.

In its assessment of the merits of the complaint, the Committee noted that State parties to the Convention have a responsibility, in accordance with Article 27 of the Convention, to "prohibit discrimination on the basis of disability with regards to all matters concerning all forms of employment, including conditions of recruitment, […] to employ persons with disabilities in the public sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace." It also cited its own jurisprudence from *Jungelin*, recalling that "" reasonable accommodation"

[147] Ibid. 4.4
[148] Ibid. 4.7; 4.19
[149] Ibid. 4.8-4.9
[150] Ibid. 4.12; 4.27
[151] Ibid 4.14
[152] Ibid. 4.21
[153] Ibid. 4.22

means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden".[154] It further stressed that, under Article 5 of the Convention, the denial of reasonable accommodation constitutes discrimination in itself, and, as the responsibility to provide reasonable accommodation arises as soon as a person requires it, duty bearers must enter into a dialogue with persons requiring it to find the best possible solutions for the individual's needs.[155] Finally, it agreed that states enjoy a certain margin of appreciation in assessing reasonableness and proportionality, and that it is generally for national courts to make this assessment.[156] Without going into the performed proportionality test itself, the Committee noted that by failing to inform Sahlin that the reason for cancelling the recruitment was the high cost of and insufficient funding to finance the necessary reasonable accommodation measure, sign language interpretation, the State had already failed in its responsibility to provide a consultative process.[157] In failing to balance the needs and interests of the employer and the employee through such a process, the State not only failed in this duty but also demonstrated a failure to consider alternative forms of accommodation.[158] This regardless of whether the proportionality test performed by the court with regards to the specific measure of sign language interpretation had been correctly performed and whether it had led to the correct conclusion or not. Additionally, the Committee found that in concluding that sign language interpretation would only benefit Sahlin individually, and not the greater collective of persons with disabilities in Sweden, the State had failed to consider the contrary negative impact of its decision. That is, by merely focusing on, and concluding that, the potential positive effect would only benefit one person, it had failed to consider that the negative effect of not providing interpretation might affect a greater collective, discouraging employers from considering persons with hearing impairments for similar positions. [159] In light of this, the Committee found that, again without going into the questions of reasonableness, proportionality or undue burden themselves, Sahlin's rights under Articles 5 and 27 of the Convention had been violated.[160]

[154] Ibid. 8.4
[155] Ibid. 8.5
[156] Ibid. 8.6
[157] Ibid. 8.7
[158] Ibid. 8.9
[159] Ibid. 8.10
[160] Ibid. 8.11

7 Discussion and analysis

The international human rights landscape is wide and far reaching, encompassing a number of different areas, including both labour and disability rights. In the area of disability rights, its arguably most important and central instrument today is the United Nations Convention on the Rights of Persons with Disabilities. The Convention covers and reaffirms rights in several different areas, including labour rights, guaranteeing the right to work for persons with disabilities in Article 27, and as such acts as a bridge between international labour and -disability law.

Through its design and purpose, the UNCRPD sets a three-pronged framework for State party responsibility, with duties to respect, protect, and ensure rights. The right to work under Article 27 is ensured through its connection to the right to reasonable accommodation, defined in Article 2. The general importance and central role of reasonable accommodation in the Convention is also underscored through the specifying of denial of reasonable accommodation as a form of discrimination itself in Article 5. In the respect-protect-ensure framework, the right to work is guaranteed through reasonable accommodation, with the realization of most aspects of the right depending on it, thereby making reasonable accommodation central to it. While this central positioning of reasonable accommodation indicates large and far-reaching responsibility, it is not unlimited. Reasonable accommodation is defined in the Convention as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden”, meaning it does indeed have limits in two directions. First, accommodations have to be necessary and appropriate, and second, should not impose a disproportionate or undue burden. In examining the limits of the right to reasonable accommodation, particularly the latter is of importance. The Convention text itself does not provide any closer or more precise definitions, but from lager context two things can be deduced. First, the state, or public employers, likely has a larger responsibility than private enterprise as it is specifically called to employ persons with disabilities itself while merely promoting their employment in the private sector. Second, states with greater resources likely have a greater distance to go before an accommodation is considered disproportionate or as creating an undue burden than those with less resources as under Article 4 of the Convention states are to take measures to the maximum of their available resources to guarantee economic, social, and cultural rights, of which the right to work is one.

Thus, as the text of the UNCRPD itself does not provide a clear answer to where the line is to be drawn, supplementary sources have to be consulted. The CRPD Committee has issued two relevant General Comments, one on labour, GC 8, and one on equality and non-discrimination, GC6, which also

covers some elements of reasonable accommodation. In GC 8, the right to work is stressed as a fundamental right, and its realization as central to the realization of other rights. Thereby, while neither creating nor implying a hierarchy of rights, the right to reasonable accommodation, as central to the ensuring of the right to work, is also elevated, and the notion that considerable resources have to be allocated to its realization is further supported. It is also pointed out that the aim is to enable a person with a disability to perform the inherent requirements of a job, and that appropriate accommodations have to be found through a consultative process between the (prospective) employer and employee. Hence, there is no limit as to what functions can be supported through reasonable accommodation, and neither is it enough for an employer to alone decide that a measure is not possible for them to implement. Furthermore, one measure not being possible to implement does not rid an employer of responsibility to undertake other accommodation measures which would be possible. Thus, the right to reasonable accommodation is in essence unlimited in that there will almost always be some kind of accommodation measure which can be implemented, and in the cases where such a measure exists an employer has a responsibility to provide it.

GC 6 explains reasonable accommodation as a two-faceted right. First, it creates a legal obligation to provide necessary accommodations for a person with a disability to enjoy a right, but in its second step it also provides a protection for the party responsible for providing the accommodation by excluding measures that are disproportionate or unreasonable. From this can be understood that as the first step is providing a protection for the person needing the accommodation, an accommodation cannot be unreasonable through its nature. If the person requesting a measure needs it, it is necessary and reasonable. Instead, it is through the second step that an accommodation can be disqualified, through its cost to or burden on the party responsible for providing it. Here, the terms excessive, disproportionate, undue, and unjustified may all be used, but are to be understood as synonyms to each other rather than as different categories for disqualification, thereby further narrowing what may be denied without engaging in prohibited discrimination. Importantly, the burden of proof is also placed on the would-be providing party to show that a measure would fall under this exception. While the CRPD Committee does not, in its General Comments, elaborate on what might fall into this category, it is made clear that it has to be shown through an objective assessment, creating an expectation that some form of reasonability test be performed, and emphasis is placed on financial and material conditions.

In scholarly doctrine, the position of the realization of the right to work as one on which a multitude of other rights rests is further emphasized. Through its connection to the right to be free from discrimination, through the right to reasonable accommodation, it is not purely an ecosoc right, as

the right to work normally is, but also a civil and political right. Therefore, while the extent of reasonable accommodation and its implementation are subject to gradual realization and states are afforded a margin of appreciation in carrying it out, there is no gradual realization or such margin allowing for it not to be implemented at all. Instead, all states have to provide reasonable accommodation to the best of their capacity from day one of being bound by the Convention. With this, the objectivity of the reasonability test becomes particularly important as it is a matter left to the states rather than any international adjudicating body.

In this assessment, as already noted above, the main factors which may be considered are economical. However, even when doing so, an employer's entire organizational cash-flow should be taken into account, as well as additionally any possibility to access additional outside funding, and what should be determinative is not the actual cost of the measure itself but the net-cost of the accommodation measure. Hence, if greater funding is available, or the employee can be expected to bring in greater revenue, accommodation measures may be more expensive. Equally, larger organizations or enterprises can be expected to bear larger cots, which also aligns with the idea of there being a certain margin of appreciation. Outside of these financial limitations, there is only really one other identified ground for denial. Reasonable accommodation measures should enable an employee to perform a task on an equal basis with others, but do not have to be implemented to enable performance of a core function of a job. However, just as the other grounds for denial have not been clearly defined anywhere, neither has what constitutes a core function. What has been noted, though, is that with technological advancements this should be an ever-shrinking criteria.

The final piece of interpretive guidance is that which can be found in the existing international jurisprudence, as expressed through the CRPD Committee's Communications in *Jungelin v. Sweden*, *V.F.C. v. Spain*, and *Sahlin v. Sweden*.

While the Committee did not get to making any authoritative statements on the contents or limits of reasonable accommodation in *V.F.C.* the case still provides a relevant piece of the puzzle. Although nothing was said about the exclusion criteria of undue or unreasonable, the communication did cement the importance of the reasonability test itself as well as the fact that there are no circumstances under which reasonable accommodation may be ruled out entirely. A state may not, as the Spanish state had, classify entire groups as having disabilities to such an extent that their only option is permanent retirement from the labour force without any individual assessment. Instead, individual assessments have to be made and different forms of accommodation considered, so as to find what works best for any particular individual in any given context. National laws to another effect are

incompatible with the Convention, even if the state would argue that they are in fact to the benefit of the individual through provisions of benefits, and in and of themselves, together with their application even if done formally correctly, violations of the rights to reasonable accommodation and work. Considering this, it is not sufficient for an assessment to have been carried out procedurally correctly in the national system and in accordance with domestic law for the requirement of procedural correctness, through an appropriate reasonability test, to be fulfilled. The national framework itself can be procedurally lacking or incompatible with the CRPD, making any test carried out, and of course particularly the ruling out of the need for a test, procedurally insufficient, and thus resulting in a violation of the Convention.

Similarly, in *Jungelin* the majority of the Committee also declined to assess or comment as to the content of the right to reasonable accommodation. Instead, in its opinion it focused on the reasonability test which had been performed by the Swedish Labour Court, finding that it had been sufficiently carried out and that it was therefore not for the Committee to re-examine given the doctrine of margin of appreciation. For disability rights advocates, this short conclusion can seem quite disappointing as the Committee's endorsement of the process in the Labour Court may also be taken by some as an endorsement of its conclusions. If it were to be understood as such, the Committee endorsed a view that reasonable accommodation could indeed be too expensive, no matter its effects on one individual or potential effects on a larger collective. In the case of Jungelin, a one-time cost of 2% of an institution annual IT-budget had been deemed an unreasonable burden on that institution, even though it would have enabled her and potential other visually impaired employees after her to work there and perform tasks on an equal basis with other employees of similar qualifications. However, the Committee was highly divided issuing the communication, and a sizeable minority issued its own opinion. While the minority agreed that the Committee should not act as a third instance, it did not share the view that the proportionality assessment had been correctly carried out. Not only had the Swedish court, in its opinion, failed to consider alternative accommodations, but it had also failed to consider the full scope of support and funding available to the would-be employer, as well as the benefit an adjustment of its systems would have to other persons with disabilities seeking employment there in the future.

The Committee continued its approach of not making comments on the performed proportionality tests in *Sahlin*. However, in its ruling in this communication it reversed its previous majority opinion, taking the stance expressed by the minority in *Jungelin* that the impact of an accommodation measure should not only be assessed against the positive effect for the individual directly concerned, but for a larger collective. In this case, that positive effect was not even limited to others being able to use an adaptation, but instead the state should have considered the more abstract positive effects for the community of persons with disabilities of hiring a

full-time lecturer who was himself part of that community. In this it not only reversed, but also expanded, its previous view, expanding the scope of positive effects to be considered in the proportionality assessment. Additionally, it also found that the Swedish state had failed to engage in the necessary consultative process of examining alternative accommodation measures, and that while cancelling a recruitment was not disadvantaging Sahlin in favour of someone else it still represented a failure to engage in said process.

Together the Committee communications help paint a clearer picture of what is required when assessing the proportionality of a reasonable accommodation measure, but, unfortunately, just like the other sources consulted, they do not say anything clear about the limits. As the Committee can be observed, through the pattern in its communications, to have taken the view that it is not its place to reperform a proportionality test or to critique the weighing of different factors, the exact limits remain unclear. Instead, what can be deduced is that a high importance is placed on process and on the correct and satisfactory performance of all required aspects of the assessment. This, together with the repeat stressing of the same, can be taken as a strong signal that the margin of appreciation afforded to states under the Convention is important, and perhaps even wider than many commentators have assessed it to be.

It is furthermore notable that the respondent state in both *Jungelin* and *Sahlin* is Sweden, a relatively more affluent state, and that a margin of appreciation, and its limits, still appears as the determining factor. Although there was no argument made that the Swedish state was unable to provide the requested accommodations in either case, its capacity was never tested nor discussed. While this means that no firm conclusions can be dawn about the extent of the permissible margin of appreciation, a comparison of the situations in the two Communications might still shed some light as the situations are comparable in that the employer in both cases was ultimately the state through a government agency, the Social Insurance Agency, and a public university respectively. First, it can be concluded that a one-time cost does not appear to have a stronger protection than an indefinitely recurring one. Second, while nothing can easily be concluded about the size of a cost relative to total available resources, as government agencies the employers ultimately had access to the same total amount of funds, if by the entirety of available resources to an entity one understands all resources available everywhere, in the case of a government agency then to the state as a whole, some guidance can be found in the idea of net-cost. The measure requested by Jungelin would have cost many times that of her annual salary while that of Sahlin would have ended up equal to his net salary and lower than his salary cost including employment fees. Thus, it would appear the relation between the salary of the employee requesting the accommodation and its cost is a particularly relevant factors, at least in the case of employers who are not expected to make a profit, as government agencies are not. Third, viewed the cases together, it cannot be deduced that cost over time is a

consideration. Instead, it appears cost at a given immediate moment is determinative. Building on this, theoretical future offsets by accommodating more employees at no additional, or only a small additional, financial cost do not appear to be a factor. This is also in line with the emphasis on reasonable accommodation as an individual measure. Instead, following the conclusions in *Sahlin*, collective impact is only relevant in the awareness-raising portion of the obligations under the UNCRPD. However, it is both in its positive and potential negative effect, meaning a potential negative impact should also be taken into consideration. It bears repeating, though, that while these conclusions are based on comparable cases, the CPRD Committee's focus on procedural correctness and refusal to probe or comment on the material aspects of the reasonability test means that they can merely be taken as indications and should not be considered jurisprudential. Particularly as the extent of the permissible margin of appreciation is still unclear, other than in the fact that it applies to the extent and cost, financial and material, of a reasonable accommodation measure, but not to whether any are considered at all.

8 Concluding remarks

The right to reasonable accommodation, although theoretically very broad, is not unlimited. Instead, each measure must be examined individually to determine whether it meets the standard of not presenting an unreasonable or undue burden. This has to be done through an objective assessment, or reasonability test, taking certain factors into consideration. First and foremost, of these are the financial and material implications, which prompted the initial line of questioning summarized in the title of this thesis as reasonable accommodation, at what cost?

As the examination of different sources in this thesis has shown, its limits have not been clearly defined. Both the text of the Convention itself and the General Comments issued by the CRPD Committee have avoided going into specificities regarding where the lines should be drawn regarding reasonableness. Instead, the GCs, as well as the studied scholarly comments, merely state that the main determinant should be financial, and that bigger enterprises, and wealthier states, have to be prepared to bear higher costs than smaller, or less wealthy ones. In other words, and as also clearly stated, a margin of appreciation exists. However, this margin of appreciation limits itself to the how of reasonable accommodation, which can be classified as the economic, social, and cultural rights part, and does not extend to the if, which as a part of freedom from discrimination constitutes a civil and political right. This duality of the nature of the right to reasonable accommodation, particularly within the right to work, itself an ecosoc right, might also explain why it has proven so difficult to draw firm lines, with there both existing and not existing a margin of appreciation. In its jurisprudence creating capacity, through its communications, the CRPD Committee has taken a rather clear view that a margin of appreciation exists and has so far denied further specifying where its limits are. Instead, the focus has been on process and on correct criteria.

To some, this might appear cowardly, as if the entire international framework tasked with safeguarding and interpreting the UNCRPD purposefully avoids this central question, but perhaps it is rather a sign of an international body protective of the newest international human rights instrument? By not drawing any red lines or attempting to establish binding economic or material standards, and instead emphasizing the need for procedural correctness, the CRPD Committee maintains the Convention as an instrument that can be abided by and gradually realized by all states, regardless of their economic capacity. In the long run, this could prove to strengthen, rather than, as one might first fear, weaken, the power of the right to reasonable accommodation as an initially vague, and possibly wide, potential margin of appreciation means that states cannot argue a lack of capacity as a reason or excuse as to why they would not provide or sufficiently protect it. As a margin of appreciation is not absolute, but decided individually, both in relation to cases and parties, it can be

determined so as to hold all State parties to act to their capacity – as also expressed in the Convention. With this, it can also be expected that as state capacity grows, so does the extent of their obligations with regards to reasonable accommodation. This would mean that with a rising level of material development and financial wealth globally the protections of the Convention will also follow through a decreased margin of appreciation and heightened expectation of, and protection for, reasonable accommodations. Much in the same way as envisioned by Della Fina et. al. with regards to which jobs are excluded from accommodation by virtue of their core function being incompatible with a certain disability or impairment. Taking this more positive outlook, the UNCRPD can be understood, and expected, to be self-strengthening over time.

However, regardless of which view one takes on this, and what level of optimism one prefers to view the current state of affairs with, it is clear that the limits of reasonable accommodation still remain to be clearly defined. Most likely, one will have to watch for the CRPD Committee to become bolder, as it appears at least somewhat to have in its partial reversal of *Jungelin* in *Sahlin*, or at the very least to make more comments on where to draw the line for State Parties' margin of appreciation, which should happen naturally as the body of Communications grows. But as a very living and evolving instrument there is also room for activists and academics to leave their mark still, not in the least by supporting individuals seeking to bring their cases in front of the CRPD Committee.

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