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LUND UNIVERSITY

Karolina Markusson

The Right to Accessibility

A comparison of the accessibility regulations in the CRPD and
ECtHR case law on accessibility under the right to private life

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Supervisor: Petra Gyöngyi

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Summary

Accessibility to buildings and facilities for persons with disabilities is closely connected with several other human rights, such as the right to political participation and the right to participation in cultural life. Accessibility may even be a precondition for the fulfilment of those rights. On that note, suggestions of changes to existing Swedish building regulations have been criticised for possibly reducing accessibility for persons with disabilities. Although Sweden has ratified the CRPD, the legal implementation of the Convention into Swedish legislation is still inadequate. Thus, it is timely to investigate other ways of enforcing the CRPD. This thesis aims to do just that, by comparing the CRPD regulations with the ECHR and its case law.

This thesis has found that there is a lack of overlap between the CRPD and the case law and provisions of the ECHR, and that the CRPD goes further in providing rights for persons with disabilities. Additionally, even when the ECtHR does use the CRPD as a source of interpretation it does so inaccurately, confusing CRPD concepts. Consequently, this results in a lack of predictability in cases concerning persons with disabilities.

The lack of overlap between the CRPD and the ECtHR case law can to some extent be explained by the different backgrounds, aims and scopes of the two instruments. The ECHR is a general rights document, which aims to guarantee minimum rights standards. Meanwhile, the CRPD is a specific disability rights instrument which aims to ensure the full participation in society for persons with disabilities by imposing widespread obligations on states. Given the differences between these two instruments, the lack of overlap between them is understandable, but still allows for critique.

This thesis argues that the lack of overlap between the two instruments constitutes a problem since the ECtHR's inability to accurately use the CRPD provisions as a means of interpretation might lead to limited enforcement of the rights of persons with disabilities. As the ECtHR has a stronger judicial authority than the complaints mechanism of the CRPD, it is more likely that States will follow the rulings of the former, rather than the latter. For persons with disabilities residing in a state like Sweden, which has not implemented the CRPD provisions into its legislation, other judicial authorities will then be important in order to ensure their rights. If the ECtHR would increase its use of the CRPD as a source of interpretation it could play an important role in increasing the impact of the CRPD in its Member States. In the end, this could improve the possibilities for persons with disabilities to have their rights ensured.

Sammanfattning

Tillgänglighet till byggnader och anläggningar för personer med funktionsnedsättning är tätt sammanbundet med flera andra rättigheter, så som rätten till politiskt deltagande och rätten till deltagande i det kulturella livet. Tillgänglighet kan till och med vara en förutsättning för att dessa rättigheter ska uppfyllas. Med detta i åtanke har förslag till ändringar i svenska byggregler fått motta kritik om att ändringarna riskerar att minska tillgängligheten för personer med funktionsnedsättning. Sverige har ratificerat CRPD, men konventionen har inte implementerats i svensk lag. Därför är det relevant att undersöka andra möjligheter att genomdriva CRPD i praktiken. Syftet med denna uppsats är att undersöka precis detta genom att jämföra bestämmelserna i CRPD med EKMR och dess praxis.

Denna studie har dragit slutsatsen att det finns diskrepanser mellan CRPD och praxis från Europadomstolen, och att CRPD innehåller ett starkare skydd för rättigheter för personer med funktionsnedsättning. Europadomstolen har gradvis börjat använda sig av CRPD som källa i sina tolkningar, men det finns exempel på att domstolen tolkar CRPDs begrepp felaktigt. För fall som rör personer med funktionsnedsättning resulterar detta i brist på förutsägbarhet.

CRPD och EKMR har olika bakgrund, syfte och omfattning, vilket till viss del kan förklara diskrepansen dem emellan. EKMR är en allmän rättighetsstadga vars syfte är att skydda rättigheter på en miniminivå. CRPD, å andra sidan, är en rättighetskonvention specifikt inriktad på personer med funktionsnedsättnings rättigheter och som går längre än EKMR i vilka rättigheter den skyddar, och vilka skyldigheter den ålägger staten. Givet olikheterna mellan dessa två rättighetsinstrument är diskrepansen dem emellan förståelig, men kan likväl kritiseras.

Det är problematiskt att det finns diskrepanser mellan CRPD och Europadomstolens praxis eftersom detta kan leda till begränsad effekt av CRPDs bestämmelser för personer med funktionsnedsättning i praktiken. Eftersom Europadomstolens auktoritet är större än CRPD kommitténs är det mer sannolikt att stater följer Europadomstolens snarare än CRPD kommitténs prövningar. För personer med funktionsnedsättning som lever i Sverige, där CRPD inte har blivit implementerat i nationell lagstiftning, kan andra juridiska auktoriteter bli viktiga för att genomföra konventionen i praktiken. Genom att öka sin användning av CRPD som tolkningsinstrument skulle Europadomstolen kunna öka CRPDs inflytande i medlemsstaterna i fall som rör rättigheter för personer med funktionsnedsättning. Detta skulle kunna hjälpa personer med funktionsnedsättning att få igenom sina rättigheter i praktiken.

Preface

I would like to express my gratitude to my supervisor Petra Gyöngyi for her support and invaluable input in this thesis. I would also like to thank Anna Bruce for allowing me to try my legal skills in practice and providing me with so many engaging opportunities.

Abbreviations

CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant for Civil and Political Rights
ICESC	International Covenant for Economic, Social and Cultural Rights
NGO	Non-governmental organisation
UN	United Nations

1 Introduction

1.1 Background

The Swedish National Board of Housing, Building and Planning has proposed changes to the current building requirements regarding accessibility, making building standards more general by removing many specific standards on measurements. It leaves the responsibility to the developer to ensure accessibility in buildings.¹ The proposed changes have been criticised by multiple parties including the non-profit organisation Svensk Tillgänglighet that works for increased accessibility for persons with disabilities. They have expressed concern that the new proposal leaves too much room for interpretation for the developers, which may complicate the fulfilment of accessibility standards.² The Swedish Disability Rights Federation is concerned that the proposal will lead to reduced accessibility to buildings for persons with disabilities.³ The Swedish Equality Ombudsman notes that the National Board of Housing, Building and Planning has not properly investigated if the proposal might lead to reduced accessibility for persons with disabilities, and emphasises the importance of analysing the consequences of the proposal for persons with disabilities to ensure that they are not discriminated against.⁴ Considering these proposed changes, it is interesting to note that the Committee on the Rights of Persons with Disabilities (CRPD Committee) has held that it is more cost effective to take accessibility into account from the outset when constructing a new building, compared to making accessibility adjustments to an already existing building.⁵

The proposal has raised questions about the implications for persons with disabilities in terms of accessibility to buildings. Apart from national anti-discrimination legislation, Sweden also has international legal obligations as both the European Convention on Human Rights (ECHR) and the Convention on the Rights of Persons with Disabilities (CRPD) have been ratified by Sweden.⁶ However, these instruments are distinct from one another and might not

¹ Boverket (The Swedish National Board of Housing, Building and Planning), ‘Översyn av reglerna om tillgänglighet’; Boverket (The Swedish National Board of Housing, Building and Planning), ‘Remiss - Boverkets förslag till föreskrifter om tillgänglighet och användbarhet för personer med nedsatt rörelse- eller orienteringsförmåga i byggnader’.

² Branschorganisationen Svensk Tillgänglighet, ‘Remiss Om ”Boverkets Förslag till Föreskrifter Om Tillgänglighet Och Användbarhet För Personer Med Nedsatt Rörelse- Eller Orienteringsförmåga i Byggnader”’.

³ Funktionsrätt Sverige, ‘Remissvar: Boverkets Förslag till Föreskrifter Om Tillgänglighet Och Användbarhet För Personer Med Nedsatt Rörelse- Eller Orienteringsförmåga i Byggnader’.

⁴ Diskrimineringsombudsmannen (The Equality Ombudsman), ‘Yttrande Över Boverkets Förslag till Föreskrifter Om Tillgänglighet Och Användbarhet För Personer Med Nedsatt Rörelse- Eller Orienteringsförmåga i Byggnader’.

⁵ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’, para. 15.

⁶ United Nations, ‘UN Treaty Body Database: View the Ratification Status by Country or by Treaty’; Council of Europe Office in Georgia, ‘Maps & Members’.

provide the same rights in terms of accessibility for persons with disabilities. This lack of overlap is problematic because it might hinder the enforcement of the right to access, where individuals will be the ones suffering the consequences. If there is a lack of overlap, individuals will be negatively impacted if accessibility regulations are not making its way into the actual enforcement mechanisms, such as the European Court of Human Rights (ECtHR or the Court). Both instruments are relevant in determining the legal obligations for Sweden in terms of disability rights. In the ECHR the relevant rights can be found in the right to private life in Article 8 and in the prohibition of discrimination in Article 14. Respectively, in the CRPD the relevant rights can be found in Article 5 on equality and non-discrimination, Article 9 on accessibility, Article 19 on independent living and inclusion in the community, Article 29 on participation in political life, and finally, in Article 30 on participation in cultural life. The high number of relevant CRPD Articles can be explained by the fact that accessibility is closely interconnected with, and often a precondition for, the enjoyment of other rights.⁷

Even though these two legal instruments to some extent overlap in which rights they provide, the enforcement of them is very different from one another, and so are their status in the Swedish legal system. First, the ECHR has a special stance in the Swedish legal hierarchy. It is incorporated into Swedish law, and the Swedish constitution holds that no laws or regulations violating Sweden's undertaking due to the ECHR may be enacted.⁸ This was incorporated into the constitution to mark the importance of the ECHR and means that domestic courts can disregard national laws and regulations which violate the ECHR.⁹ Second, Sweden is party to the CRPD, but its stance in the Swedish legal system is very different to the ECHR. When Sweden ratified the CRPD no real changes were made to the current legislation to accommodate for the newly adopted Convention.¹⁰ Already in 2014, the CRPD Committee criticised Sweden for not having integrated the Convention into Swedish law. The Committee added that consequently, the Convention cannot be used as guidelines in national courts. It then urged the Swedish State Party to incorporate the Convention into Swedish legislation in order to make it applicable as a national law.¹¹

⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility, para. 36.

⁸ Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (The Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms) § 1; Regeringsformen (1974:152) (Instrument of Government) Chapter 2, § 19.

⁹ Jermsten, 'Karnov Lagkommentar till Regeringsformen 2 Kap. 9 § (Commentary on the Instrument of Government Chapter 2 § 19)'.

¹⁰ Socialdepartementet, *FN:s konvention om rättigheter för personer med funktionsättning*, pp. 11-12.

¹¹ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Sweden', paras. 7-8.

Not much has happened 10 years later. In its Concluding Observations on Sweden delivered in March 2024, the CRPD Committee again expressed concern that the Convention had not been implemented into Swedish law and could therefore not be used as a legal basis for claims in judicial and administrative procedures. Additionally, it criticised the lack of a systematic overview of already existing laws and regulations' conformity with the Convention and was concerned that judiciary and administrative bodies did not interpret domestic laws in light of the Convention.¹² To summarise, despite the criticism ten years ago, the Swedish state has still not taken any action to ensure the compliance of domestic legislation with the Convention.

The difference in legal authority between the ECHR and the CRPD (at least in Sweden) is thereby clear. Depending on which legal instrument an individual uses for their rights, the consequences might differ. The example of Sweden thereby illustrates that although relevant rights to ensure accessibility for persons with disabilities are formally guaranteed, the implementation in practice remains a challenge.

Additionally, all the States Parties to ECHR are also parties to the CRPD, including Sweden. Hence, it is relevant to investigate to what extent the ECHR and the CRPD overlap, in order to see what consequences a possible lack of overlap could bring for the individual using the conventions to ensure their right. The aim of this thesis is to investigate precisely that. There is limited previous research on this, and therefore this thesis will hopefully shed some new light on this issue.

1.1.1 An Overview of the ECHR

The ECHR is a document for protection of fundamental rights which was adopted in 1950 and has since then had a great impact on the protection of human rights in Europe.¹³ One of the key aspects to the influence of the ECHR is its enforceability in the European Court of Human Rights. The Court was established in 1959 with the purpose to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”.¹⁴ All matters concerning the interpretation and application of the Convention fall within the jurisdiction of the Court.¹⁵ The Court receives around 50 000 applications each year, which indicates the faith people

¹² Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on the Combined Second and Third Periodic Reports of Sweden’, paras. 7-8.

¹³ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Türkiye, Ukraine and the United Kingdom are parties to the ECHR; Council of Europe Office in Georgia, ‘Maps & Members’.

¹⁴ ECHR Article 19.

¹⁵ ECHR Article 32 (1).

have in the Court's ability to provide redress if the Convention and its rights have been violated. Many of the Court's judgements are complied with, even though it sometimes takes a long time for this to happen.¹⁶ These judgements also seem to have a large impact on national law.¹⁷ Previous research has shown that every state that is party to the Convention has at some point made fundamental, structural or systematic changes to their national laws after a judgement from the Court.¹⁸ For example, the Nordic countries have changed their previous system of compelling workers to be part of a labour union, after the Court found this to violate the freedom of association in e.g. *Sørensen and Rasmussen v. Denmark*.¹⁹

Despite this, the Court faces many problems. One is the high number of applications received each year. Another is the fact that every State Party to the convention has their own legal system with its own principles and laws that the Court has to take into account. Yet another is the challenge of navigating the different values that exist in all States in order to find a European consensus on controversial topics.²⁰ Sweden is party to the ECHR and has also incorporated the ECHR to have a special stance in the Swedish legal system, which was mentioned earlier. This special relationship to the ECHR shows its importance in the Swedish legal system.

1.1.2 An Overview of the CRPD

The CRPD is a human rights treaty that was adopted by the United Nations (UN) General Assembly in 2006. Its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.²¹ The CRPD covers a broad range of rights: from civil and political rights to economic social and cultural rights.²² As of May 18th, 2024, there are 164 signatories to the CRPD. Also the European Union (EU) is party to the Convention.²³

The CRPD was quickly negotiated, in only four years, which is unprecedented for a human rights treaty. However, the Convention only came to be

¹⁶ Gerards, *General Principles of the European Convention on Human Rights*, p. 1 ff..

¹⁷ See e.g. L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights regime', *European Journal of International Law*, 19 (2008), 125-129, as cited in Gerards, Janneke, *The Basics of the Convention System, General Principles of the European Convention on Human Rights*, p. 1-2.

¹⁸ See the report by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, *Impact of the European Convention on Human Rights in States Parties: Selected Examples* (Strasbourg, 8 January 2016) AS/Jur/Inf (2016) 04, as cited by Gerards in *General Principles of the European Convention on Human Rights*, p. 2.

¹⁹ *Sørensen and Rasmussen v. Denmark*.

²⁰ Gerards, *General Principles of the European Convention on Human Rights*, p. 2 ff.

²¹ Article 1 CRPD.

²² Broderick and Ferri, p. 60 ff.

²³ 'United Nations Treaty Collection, Status of Treaties, Chapter IV, 15. Convention on the Rights of Persons with Disabilities'.

after decades of work to change attitudes and approaches to persons with disabilities.²⁴ The CRPD made disability rights a human rights issue and sees disability as a social construct.²⁵ This will be further addressed as part of the human rights-based approach under section 1.3.4.

The monitoring mechanism of the CRPD is the Committee on the Rights of Persons with Disabilities (the CRPD Committee, or the Committee). The Committee consists of independent experts. Its purpose is to monitor the implementation of the CRPD in the States which have ratified the Convention.²⁶ The Committee is responsible for handling individual complaints under the Convention and conducting investigations on systematic breaches of it. It also provides general comments meant to guide the interpretation of the Convention.²⁷

1.2 Purpose and Research Question

The purpose of this thesis is to investigate the regulation of accessibility for persons with disabilities in Article 8 of the ECHR, with the specific delimitation to accessibility to buildings and facilities. Relevant case-law from the ECtHR will be highlighted and compared to the regulation of accessibility to buildings in the CRPD to investigate to what extent the provisions and case law of the ECHR reflect the regulations of the CRPD. This purpose will be achieved through the following research question:

To what extent does Article 8 of the ECHR and its case law regarding accessibility to buildings and facilities reflect the regulation of accessibility to buildings and facilities in the CRPD?

As will be further elaborated in the CRPD chapter of this thesis, the CRPD Committee distinguishes between accessibility and reasonable accommodation. By “accessibility to buildings and facilities” I refer to the possibility to physically be able to enter or use a building or facility. This may include situations concerning either accessibility or reasonable accommodation according to the definitions by the CRPD, which will follow under Chapter 3 about the CRPD.

1.3 Methodology and Material

1.3.1 Methodology

²⁴ United Nations, Department of Economic and Social Affairs, ‘Convention on the Rights of Persons with Disabilities (CRPD)’.

²⁵ Broderick and Ferri, *International and European Disability Law and Policy*, p. 59 ff.

²⁶ United Nations, Department of Economic and Social Affairs, ‘Committee on the Rights of Persons with Disabilities’.

²⁷ Broderick and Ferri, *International and European Disability Law and Policy*, p. 80 ff.

This is a legal scientific thesis written as the final task of the Swedish legal programme, which will give me a Master of Laws. The objective of this research is to investigate the regulation of accessibility for persons with disabilities in Article 8 of the ECHR, and in the CRPD. This will be done by comparing the regulations and case law from the ECtHR on accessibility to buildings and facilities to the corresponding regulations in the CRPD.

To achieve this purpose, the doctrinal method will be used, together with some comparative aspects. Van Hoecke criticises legal doctrine for, amongst other things, being too descriptive, lacking a clear methodology, and making the difference limited between publications of legal practitioners and legal scholars. However, he still believes it to be a discipline in its own right and defines it by its empirical aspects in combination with interpretation.²⁸ This thesis will use Van Hoecke's definition of methodology in legal doctrine, where the first step is to collect all relevant material. The second step is to form a hypothesis based on the collected material, which is then tested using classic canons of interpretation.²⁹ The material used in this thesis was in terms of normative sources the ECHR and the CRPD with relevant additional text for interpretation of the conventions, for example the General Comments to the CRPD. In terms of authoritative sources, case law from the ECtHR and scholarly legal texts have been used. This method was chosen as it suits the purpose of this thesis to use the combination of collection of data with testing the hypothesis using interpretation. As the purpose of the thesis is to investigate what similarities and differences there are in the regulations of the ECHR and the CRPD respectively, using the material previously mentioned is necessary.

This thesis further has elements of a comparative method, as it compares the provisions and case law of the ECHR, a regional convention, with the corresponding ones from the CRPD, a global UN convention. Usually, the comparative method encompasses the comparison of two or more distinct national legal systems.³⁰ However, in this thesis the comparison will not include any national legal system. Rather, the comparison will be between two conventions within international law: the European regional legal system based on the ECHR; and the international legal system based on the CRPD. The different contexts of the two conventions are important to keep in mind and may cause problems in making a well-balanced comparison between the two. Even so, there is a relevant overlap between them: all States Parties to the ECHR have also ratified the CRPD.³¹ Hence, the CRPD is relevant to all States Parties to the ECHR when it comes to disability rights. The CRPD is the main international Convention on the topic, and it is therefore relevant to bring it into consideration. Both conventions have an official version in the English

²⁸ Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?', p. 1-3.

²⁹ Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?', p. 11 ff.

³⁰ Farran, 'Comparative Approaches to Human Rights', p. 134 ff.

³¹ Council of Europe Office in Georgia, 'Maps & Members'.

language, which will make the comparison more precise as no translation is needed.

As the thesis aims to compare the ECtHR case law within the given topic to the CRPD, the case law is naturally an important part of the thesis. The case law was limited to the topic of disability rights, and more specifically to access to buildings and facilities. The selection of case law was further limited to cases about the right to private life derived from Article 8 ECHR. The search of cases was focused on cases concerning accessibility to buildings and facilities. *Lárusson v. Iceland* from 2022 is the most recent case from the ECtHR concerning accessibility under Article 8. *Lárusson v. Iceland* was a sort of stepping stone for the selection of cases. In *Lárusson v. Iceland*, the Court mentioned previous case law on the same topic. Some of these cases were then selected and used based on their relevance for the purpose of this thesis. Based on the fact that the Court itself has considered the mentioned cases to be key cases for accessibility under Article 8, they have been considered important in this thesis as well. Further, search words such as “article 8”, “accessibility”, and “disability” have been used separately and in combination with each other, and from the search results, the cases relevant to this thesis have been chosen. An extensive list of all cases from a certain period of time or from a certain search word will, however, not be accounted for. The case law is instead intended to exemplify and represent key cases on accessibility to buildings under Article 8.

1.3.2 Material

To achieve the purpose of this thesis, a variety of materials have been used. This includes the international and regional human rights instruments the CRPD and the ECHR, as well as some national Swedish legislation. For the interpretation of these legal instruments, commentary sources have played an important part in this thesis. The CRPD Committee’s General Comments have, for example, been crucial for the understanding of the CRPD provisions together with Della Fina’s *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*. Also, Gerard’s book *General Principles of the European Convention on Human Rights* has served as the foundation for the informative section in the ECHR chapter. Additionally, case law from the ECtHR has been used in comparison with the provisions of the CRPD. As the reasoning behind the selection of case law was addressed in the previous section, this will not be repeated here. Finally, doctrinal sources have been used to add a critical perspective on the subject. It is also noteworthy that certain sources, such as Henrard’s article, were written in 2017, before *Lárusson v. Iceland* was delivered.

Much of the critical perspective on *Lárusson v. Iceland* drew inspiration from Broderick’s blog post “Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings” published at the Strasbourg Observers website. Although, a blog post might not be the most desirable source,

its author increases the credibility. The blog post was written by Broderick, Professor at Maastricht University and Co-director of the Maastricht Centre for Human Rights, and whose research focus lies in human rights law, and disability equality law.³² Hence, the blog post will still be used as an important source for the case law analysis. The analysis of *Lárusson v. Iceland* would benefit from more perspectives, but unfortunately it has been difficult to find further sources discussing the case, or even accessibility to buildings under ECHR. The lack of sources indicates the importance of this thesis in bringing a perspective on this topic. Additionally, the comparison between the CRPD and the ECHR brings yet another angle which hopefully will contribute to already existing research on the CRPD.

1.3.3 Literature Review

The state of research regarding the ECHR is comprehensive. Seeing as the Convention was opened for signature already in 1950, the amount of research is understandable. For the information about the ECHR and its Court, general literature has been used. This included the book *General Principles of the European Convention on Human Rights* by Janneke Gerards, which for example discusses the Court's approach when handling cases and provides a foundation for understanding the Convention and its interpretation. General sources were also used in relation to the CRPD, primarily the book *The United Nations Convention on the Rights of Persons with Disabilities – A Commentary* edited by Valentina Della Fina, Rachele Cera and Giuseppe Palmisano. The commentary is one of the key sources analysing the CRPD article by article. The book was crucial for this thesis, and provided background information on specific CRPD articles, as well as addressed the understanding of disability from a human rights-based approach. The authors are all researchers with backgrounds in international law and specialised in social and disability rights.

Regarding the specific topic of this thesis, accessibility to buildings and facilities under the right to private life in ECHR Article 8, sources were limited. Although there are many sources on Article 8 and its case law, specific sources on accessibility for persons with disabilities to buildings were scarce. Some specialised sources were, however, possible to find and primarily by the same author. Andrea Broderick is specialised in disability rights law and her work has contributed greatly to this thesis. Broderick's and Delia Ferri's book *International and European Disability Law and Policy: Text, Cases and Materials* and the article *The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: a tale of two halves or a potentially unified vision of human rights?* have both been valuable sources for the comparison between the ECHR and the CRPD. They were, however, published before some cases from the Court were published, in particular *Lárusson v. Iceland* which came in 2022. For the analysis

³² Broderick, 'Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings'.

of that case in particular, Broderick's blogpost for the Strasbourg Observer has provided invaluable insights and reflections.

It is worth noting that there are examples of ECtHR cases concerning access to buildings and facilities, but which have been considered to fall under other articles than Article 8 of the ECHR where the Court has found that the lack of accessibility has constituted a breach of Convention provisions. Hence, there are other cases concerning accessibility, but they are not related to Article 8 and the right to private life.

As previously mentioned, sources on accessibility to buildings under Article 8 of the ECHR are few. This thesis might therefore contribute to the state of research by providing a detailed analysis of ECtHR case law, including the most recent developments. Furthermore, the comparison of the ECtHR case law with the CRPD provides an additional perspective to the analysis.

1.3.4 The Human Rights-based Approach to Disability Rights

This thesis is written in the light of a human rights model of disability. The CRPD Committee defines the model in the following way: "the human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. [...] It also recognizes that human rights are interdependent, interrelated and indivisible."³³

Historically, there has been a shift from a medical to a social model or approach to disability. The medical model considers disability as an impairment that needs treatment and rehabilitation, and as diverging from a normal health status. When persons with disabilities are excluded from society, the medical model considers this an individual problem, caused by the impairment. The medical model therefore legitimises the segregation of persons with disabilities to, for example, different facilities and schools. It also legitimises the removal of legal capacity from persons with disabilities. During the negotiations leading up to the CRPD, many agreed on the importance of using another model than the medical one as the basis of the Convention. The social model, on the other hand, considers disability to be a social construct, and just one of many different ways a person can be. If the medical model considers disability an individual problem, the social model considers it a societal one. When persons with disabilities are excluded from society, the social model considers this a result of barriers and discrimination. The social model was developed as a critique of the medical model but has itself been criticised.³⁴

³³ Committee on the Rights of Persons with Disabilities, 'General Comment No. 6 (2018) on Equality and Non-Discrimination', para. 9.

³⁴ Degener, 'A New Human Rights Model of Disability' p. 41 ff.

Degener argues that the CRPD goes beyond the social model of disability, and instead introduces a human rights-based model.³⁵ This can be seen in the purpose of the CRPD which is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”³⁶ This is different from the social model of disability which does not use principles or values as a foundation for the rights of persons with disabilities. The human rights model is special as human rights are unconditional and universal and cannot be neither given nor taken away. This means that human rights are not dependent on whether or not a person has an impairment. The preamble of the CRPD reaffirms this view by recognising the universality of all human rights for persons with disabilities.³⁷

1.4 Delimitations

This thesis investigates rights for persons with disabilities and is limited to addressing accessibility to buildings. This delimitation is relevant as the lack of accessibility to buildings is a common problem for many persons with disabilities, which for example has been highlighted by the Swedish Equality Ombudsman.³⁸ There has been several cases in the ECtHR specifically addressing accessibility to buildings, which will be further addressed later in this thesis. The case of *Lárusson v. Iceland*, which came just in 2022, shows the actuality of the topic and how lack of accessibility to buildings poses a problem in the day-to-day lives of persons with disabilities. Article 9 of the CRPD is wholly dedicated to accessibility and covers accessibility to physical buildings, but also to information, communication technology, and emergency services, giving it a broad possibility of application. For the purpose of this thesis, however, only the aspects regarding accessibility to buildings will be addressed. The same goes for all articles, including Article 19 of the CRPD which regulates independent living and inclusion in the community. A big part of the Article focuses on deinstitutionalisation for persons with disabilities, a crucial part of independent living, but since this is not related to accessibility to buildings either, it will not be addressed.

Another important international legal framework to mention is that of the European Union (EU). The EU has ratified the CRPD, and in addition it also has its own charter for fundamental rights.³⁹ Hence, the EU membership entails obligations for the States. Furthermore, many of the states that have ratified the ECHR are also members of the EU, which means that the EU regulations

³⁵ Degener, p. 42 ff.

³⁶ CRPD Article 1.

³⁷ Degener, p. 43 ff.

³⁸ Diskrimineringsombudsmannen (The Equality Ombudsman), ‘Yttrande Över Boverkets Förslag till Föreskrifter Om Tillgänglighet Och Användbarhet För Personer Med Nedsatt Rörelse- Eller Orienteringsförmåga i Byggnader’.

³⁹ United Nations, ‘UN Treaty Body Database: View the Ratification Status by Country or by Treaty’; Charter of Fundamental Rights of the European Union.

on accessibility are relevant. There also seems to be a lack of overlap between the case law of the Court of Justice of the European Union and the CRPD.⁴⁰ It would be interesting for future research to investigate accessibility in relation to the EU Charter, However, it falls outside the scope of this thesis, and will therefore not be addressed further here.

To limit this thesis to cover only accessibility to buildings allows for a more thorough research on the topic which hopefully will lead to more insight into something relevant to the daily lives of many. To narrow the scope further, only case law from ECHR Article 8 on the right to private life concerning accessibility will be thoroughly addressed in this thesis. As will become clear, accessibility to buildings and facilities is interconnected with many other rights, such as the right to education. Such cases will not be the primary focus of this thesis but may be mentioned in short to illustrate differences and similarities between cases concerning accessibility. The reason for this delimitation is to be able to dive deeper into the specifics of accessibility under Article 8 ECHR. The delimitation also serves a function of illustrating how cases concerning accessibility can be treated different depending on their potential overlap with other rights in the ECHR.

1.5 Definition

‘Persons with disabilities’ are defined in the CRPD as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁴¹ This definition will be the foundation for the understanding of the term disability in this thesis.

1.6 Outline

This thesis will first account for the two fundamental rights instruments, and later move on to an analysis of these in comparison. Chapter 2 will investigate the provisions from the CRPD related to accessibility. Other rights from the CRPD will also be mentioned if they are related to accessibility, or to the ECtHR case law accounted for later. Chapter 3 will account for provisions from the ECHR. Primarily Article 8 on the right to private life will be addressed, as that is the most relevant provision for the topic of this thesis. After that, case law about accessibility to buildings and facilities related to Article 8 will be accounted for. Chapter 4 will compare and analyse the CRPD provisions with the case law from the ECtHR. Lastly, Chapter 5 will provide the final conclusions on the findings of this thesis.

⁴⁰ Conte, *The UN Convention on the Rights of Persons with Disabilities and the European Union: The Impact on Law and Governance*.

⁴¹ CRPD Article 1.

2 Convention on the Rights of Persons with Disabilities

This chapter will account for the regulation of accessibility to buildings in the CRPD using doctrine to get a more thorough understanding of the meaning of the provisions. The chapter will start by a short overview of the immediate and progressive realisation of rights, followed by an account of the articles in the CRPD which are the most relevant in relation to accessibility to buildings, and the case law from the ECtHR mentioned in the previous chapter. It is important to keep in mind that the CRPD provisions are addressed in relation to the case law of the ECtHR, which will follow in Chapter 3. Therefore, only the parts of the CRPD articles which are relevant for the comparison with the case law will be addressed. Finally, accessibility is closely connected to other rights. For example, accessibility to a polling station can determine whether or not a person with a disability is able to cast their vote, thereby impacting their right to participation in political life from Article 29. Therefore, several rights indirectly connected to accessibility will be accounted for here.

2.1 The CRPD – A Far-reaching Disability Rights Instrument

The CRPD is an instrument specific for the rights of persons with disabilities. It covers both civil and political rights, as well as economic, social and cultural rights. The Convention further provides widespread positive obligations for States in order to ensure participation in society for persons with disabilities.⁴²

2.2 Immediate and Progressive Realisation of Rights

Rights can be divided into categories of immediate and progressive realisation respectively. Generally, a distinction can be made between the rights in the International Covenant Civil and Political Rights (ICCPR), which are immediate, and the rights in the International Covenant on Economic, Social and Cultural Rights (ICESC), which are progressive. The ICCPR holds that States Parties to the Covenant undertake to respect the rights of the Covenant and to ensure them to all persons within the States' territory and under its jurisdiction, providing an immediate realisation of rights.⁴³ The ICESC, on the other hand, holds that State Parties undertake to take steps to the maximum of its available resources and by all appropriate means, in particular through the adoption of legislation, in order to progressively realise the rights of the

⁴² Broderick, 'The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?', pp. 202-203.

⁴³ United Nations General Assembly, International Covenant on Civil and Political Rights, Article 2 (1).

Covenant.⁴⁴ A nearly identical provision on economic, social and cultural rights can also be found in Article 4 (2) of the CRPD, which means that the same provision about progressive realisation of rights is applicable also on the economic, social and cultural rights in the CRPD.

2.3 Preamble and General Principles

The preamble of the CRPD emphasises the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom justice and peace in the world, which is proclaimed in the UN Charter.⁴⁵ Additionally, it underlines the need for persons with disabilities to be guaranteed full enjoyment of human rights and fundamental freedoms without discrimination. Discrimination on the basis of disability is also considered a violation of the inherent dignity and worth of the human person.⁴⁶ The importance of accessibility for persons with disabilities to fully enjoy their human rights is also mentioned in the preamble.⁴⁷ The concept of disability is further held to be evolving and the result of the interaction between persons with impairments and socially constructed and environmental barriers, hindering their full and effective participation in society on an equal basis with others.⁴⁸

The preamble ties in closely with the purpose of the CRPD, which is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁴⁹ Besides providing the purpose of the Convention, Article 1 also defines persons with disabilities as including those with long-term impairments which may not enjoy full and effective participation in society on equal basis with others as a consequence of their impairment in interaction with different barriers.⁵⁰

Accessibility is specifically mentioned as one of the general principles which constitutes the foundation of the CRPD. The other principles of the Convention are respect for inherent dignity and independence of persons, non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity, equality of opportunity, equality between men and women, and, finally, respect for the evolving capacities of children with disabilities.⁵¹

⁴⁴ United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, Article 2 (1).

⁴⁵ CRPD Preamble para. (a).

⁴⁶ CRPD Preamble para. (c) and (h).

⁴⁷ CRPD Preamble para. (v).

⁴⁸ CRPD Preamble para. (e).

⁴⁹ CRPD Article 1.

⁵⁰ CRPD Article 1.

⁵¹ CRPD Article 3.

2.4 Equality and Non-discrimination (Article 5)

Article 5 of the CRPD regulates equality and non-discrimination. In summary the Article holds that States Parties recognise the equality of all persons before the law and that all persons are entitled to equal protection of the law without any discrimination. The Article further prohibits all discrimination on the basis of disability and States Parties are obliged to guarantee effective legal protection against discrimination on all grounds for persons with disabilities. However, measures that might constitute different treatment of persons shall not be considered discrimination if they are necessary to achieve actual equality of persons with disabilities. Finally, States Parties shall take all appropriate measures to ensure the provision of reasonable accommodation.⁵² The concept of reasonable accommodation will be further developed under section 2.5 on Accessibility.

Equality and non-discrimination are fundamental principles of international human rights law, established in for example the ICCPR and the ICESR.⁵³ Equality and non-discrimination also have an important position in the CRPD, as they are part of its general principles in Article 3. There it is held that States Parties undertake “to take all appropriate measures to eliminate discrimination on the basis of disability by any person organization or private enterprise”.⁵⁴ Further, States Parties ensure to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations and practices that constitute discrimination against persons with disabilities.⁵⁵ Discrimination on the basis of disability is defined in Article 2 as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

Importantly, the Convention also introduces the principle that denial of reasonable accommodation constitutes discrimination.⁵⁶ It is therefore relevant to also investigate the definition of that term. Reasonable accommodation is defined 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.”⁵⁷ Examples of denial of reasonable accommodation are to deny entry to an accompanying

⁵² CRPD Article 5.

⁵³ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on Equality and Non-Discrimination’, para. 4.

⁵⁴ CRPD Article 4 (1e).

⁵⁵ CRPD Article 4 (1b).

⁵⁶ Cera, ‘Article 5 [Equality and Non-Discrimination]’, p. 158 ff.

⁵⁷ CRPD Article 2.

person or refusing to in other ways accommodate a person with a disability.⁵⁸ The concept of denial of reasonable accommodation will be further elaborated under the heading “Article 9 Accessibility”, where it will be compared to the obligation of accessibility.

The CRPD underlines the notion that persons with disabilities are just as entitled to protection against discrimination as any other person, by affirming that discrimination on the basis of disability violates the inherent dignity and worth of the person subjected to it. This formulation “discrimination on the basis of disability”, rather than “discrimination against a person with a disability”, protects also persons that do not have disabilities themselves, but who have been discriminated against because they have been assumed to have a disability, or because of their association with a person with a disability. Notably, the prohibition of discrimination in the CRPD neither requires intent nor is limited to a specific group. Therefore, the prohibition of discrimination applies not only to State Parties and their agencies, but also to private persons and organisations.⁵⁹ In its general comment to Article 5, the CRPD Committee starts by emphasising its concern that States Parties still have a mostly medical approach to disability in their laws and policies, which is not in line with the Convention’s human rights-based model. The medical approach is as mentioned earlier problematic as it does not acknowledge persons with disabilities as rights holders.⁶⁰

In comparison to the non-discrimination provision in the ECHR, Article 5 of the CRPD also includes provisions on equality. These provisions recognise that all persons are equal before the law. The fourth paragraph also adds that measures necessary to achieve equality for persons with disabilities shall not be considered discrimination. This reflects the idea of substantive equality, which means that to achieve equality for a disadvantaged group, different treatment of that group might be needed. This different treatment should, as mentioned before, not be considered discrimination. Substantive equality differs from formal equality, which tries to achieve equality by using same treatment for different groups. Formal equality can thereby tackle some forms of discrimination but does not take into account the disadvantaged position of certain groups. For those groups it is not enough to receive the same treatment as other groups, as this does not have an equal result. Substantive equality, on the other hand, takes these power imbalances into account, and considers different treatment of disadvantaged groups to be a tool to achieve equality.⁶¹

⁵⁸ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on Equality and Non-Discrimination’, para. 18 c.

⁵⁹ Cera, ‘Article 5 [Equality and Non-Discrimination]’, p. 158 ff.

⁶⁰ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on Equality and Non-Discrimination’, para. 2.

⁶¹ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on Equality and Non-Discrimination’, para. 10-11.

2.5 Accessibility (Article 9)

Article 9 of the CRPD regulates accessibility. In summary it holds that in order to ensure independent living and full participation of persons with disabilities, States Parties shall take measures to ensure that persons with disabilities get access to the physical environment and to other facilities and services open or provided to the public, both in urban and rural areas. Measures include the identification and elimination of obstacles to accessibility and applies for example to buildings and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces. States Parties shall also take appropriate measures to adopt and monitor minimum standards to ensure the accessibility to facilities and services open or provided to the public. They shall also ensure that private entities providing services to the public take into account all aspects of accessibility for persons with disabilities.⁶²

Accessibility is a prerequisite for persons with disabilities to participate fully in society on equal terms with others and to enjoy their civil, political, economic, social and cultural rights.⁶³ Therefore, accessibility is one of the fundamental principles on which the Convention is based.⁶⁴ Because accessibility is a prerequisite for persons with disabilities to live independently and participate fully in society, denial of access should be viewed as discriminatory.⁶⁵

The General Comment states two situations which provide a minimum standard for when lack of accessibility to a service or facility open to the public should constitute discrimination. (1) The service or facility was established after the relevant accessibility standards were put in place. (2) The service or facility could have been made accessible through reasonable accommodation.⁶⁶ Article 9 is thereby closely connected to Article 5 on equality and non-discrimination. Accessibility is interconnected with other fundamental rights, such as freedom of movement, in that accessibility to public transport is needed for freedom of movement to be achieved for persons with disabilities.⁶⁷ The right to accessibility can also be found in other international human rights instruments such as the ICCPR Article 25 (c), which states the right of every citizen to have access to public services in their home country.⁶⁸ The CPRD Committee holds that many of the barriers hindering persons with

⁶² CRPD Article 9.

⁶³ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 4.

⁶⁴ CRPD Article 3 (f).

⁶⁵ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 23.

⁶⁶ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 31.

⁶⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 1.

⁶⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 2.

disabilities from participating in society are man-made, such as steps in entrances to buildings or lack of elevators in buildings with stairs. Such barriers are often the result of a lack of knowledge of how to make buildings and facilities accessible, rather than a conscious decision to exclude persons with disabilities. Awareness-raising is therefore crucial for increased accessibility.⁶⁹

It is the responsibility of the State Party to ensure that buildings and facilities open or provided to the public are accessible. The determining factor is whether the building or facility is open or provided to the public, and not whether it is public or privately owned. This means that the State Party is responsible for the accessibility, not only for its own buildings and facilities, but for all those buildings and facilities open or provided to the public.⁷⁰ This can for example be ensured through legislation and guidelines provided to private actors. Furthermore, denial of access to a building or facility open or provided to the public should be considered to constitute discrimination, regardless of if it happens in a public or private building or facility. Additionally, persons with disabilities should be able to access physical environments both in urban and rural areas.⁷¹

States Parties have the duty to identify and eliminate barriers to accessibility to, inter alia, buildings and other indoor and outdoor facilities. The CRPD Committee holds in its General Comment to Article 9 that “other indoor and outdoor facilities” should include law enforcement agencies and areas for social interaction, cultural and political activities, to name a few.⁷²

One of the general obligations from Article 4 regards the promotion of universally designed goods and facilities. Universal design refers to the design of products and environments with the intention of them to be usable by all people without the need for adaptation.⁷³ States Parties are obliged to promote or execute research and development of such products and facilities, and to promote the implementation of universal design in standards and guidelines.⁷⁴ Universal design is related to accessibility in the sense that universal design prevents the need for adaptations when persons with disabilities want to use a certain product or facility. This is due to the fact that universally designed objects are meant to work regardless of who will use them. The universal design-obligation is to be implemented gradually by the States Parties, to

⁶⁹ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’, para. 3.

⁷⁰ CRPD Article 9 para. 2 (b); Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’, para. 13.

⁷¹ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’, para. 13, 16.

⁷² Committee on the Rights of Persons with Disabilities, ‘General Comment No. 2 (2014) Article 9: Accessibility’, para. 17.

⁷³ CRPD Article 2.

⁷⁴ CRPD Article 4 (1f).

finally reach the target of all new objects, infrastructure, facilities and services being designed so that all persons can use them.⁷⁵

In the General Comment to Article 9, the CRPD Committee clarifies the distinction between accessibility and reasonable accommodation. Reasonable accommodation means the necessary and appropriate alterations and adjustments made in situations when it is needed to ensure persons with disabilities' enjoyment of human rights on an equal basis with others. The alterations and adjustments made should not impose a disproportionate or undue burden.⁷⁶ The obligation to provide reasonable accommodation is an *ex nunc* duty, which means that it comes into effect when a person with a disability in a certain situation require accommodation in order to enjoy their rights on equal terms with others.⁷⁷ With this in mind, the Committee holds that reasonable accommodation is related to individuals, while accessibility is related to groups. Therefore, States Parties have a duty to provide accessibility *ex ante*, that is before an individual wishes to access a certain facility or service. This entails a responsibility to set accessibility standards, after consultation with organisations for persons with disabilities, for relevant stakeholders such as builders. The obligation to provide accessibility is unconditional. Consequently, failure to provide accessibility cannot be excused by referring to providing accessibility being a burden. On the other hand, reasonable accommodation must only be provided if it would not impose an undue burden on the party.⁷⁸ For persons who have been denied access due to their impairment, effective legal remedies should be available, and it is the responsibility of the State Party to ensure this.⁷⁹

2.6 Living Independently and Being Included in the Community (Article 19)

To live independently and be included in the community is regulated in Article 19. In summary, the Article provides that States Parties shall take effective and appropriate measures to facilitate the full enjoyment by persons with disabilities of the right to on equal terms with others live in the community. The full inclusion and participation by persons with disabilities in the community should be ensured by providing access to community services and facilities open to the general population.⁸⁰

⁷⁵ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 24.

⁷⁶ CRPD Article 2.

⁷⁷ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 26.

⁷⁸ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 25.

⁷⁹ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2 (2014) Article 9: Accessibility', para. 29.

⁸⁰ CRPD Article 19.

From the perspective of the analysis in this thesis, this section will focus accessibility as a precondition to live independently and be included in the community, meaning that 19c will be the most relevant. In the context of this Article, independent living means that persons with disabilities are given the means to have control over and make decisions about their lives. Personal autonomy and self-determination are both crucial in order to live independently. Being included in the community means to live a full social life and to have equal access to all services and facilities open to the public. It also includes the right to have access to all political and cultural events to which the person with a disability wishes to participate.⁸¹ Services and facilities include, but are not limited to, housing, hospitals, schools, transportation, and museums. Accessibility to such services and facilities are crucial for persons with disabilities to live independently and be included in the community.⁸² Thereby, the interconnection between Articles 19 and 9 on accessibility is clear.

The accessibility to housing covered by Article 19 is important to ensure the possibility of living in the community on an equal basis with others. It is not enough to offer accessible housing only in specific areas, where persons with disabilities must live together in the same building or area, but accessible buildings must exist in different part of cities and be sufficient in numbers to allow persons with disabilities to choose where they want to live. To achieve this, new barrier-free housing must be built, and old housing must be renovated to be barrier-free.⁸³ The Committee has identified several core elements which serve to ensure the realisation of Article 19. One of these are to ensure non-discrimination in accessible housing, and to adopt mandatory building regulations in order to build accessible housing. Another one is to develop, implement and monitor non-compliance with accessibility legislation and standards for basic services. Yet another one is to ensure that there is no retrogression in achieving the content of Article 19, unless it is justified and done in accordance with international law.⁸⁴

Article 19 entails an obligation for the States Parties to take measures to ensure that the provisions of the Article are not violated by neither the State nor private entities. Furthermore, the right to have access to community services and facilities in Article 19 (c) is a progressive right, as it is part of the economic, social and cultural rights. Progressive realisation does, however, still entail an immediate obligation for the States Parties to develop strategies for the implementation of the right to access to community services and

⁸¹ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 16.

⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 32.

⁸³ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 34.

⁸⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 38 (b), (d) and (f).

facilities.⁸⁵ The fact that a right requires progressive realisation rather than immediate, does not allow States Parties to ignore it, but steps need to be taken in order to fulfil that right.

Additionally States Parties have an immediate obligation to eliminate discrimination against persons with disabilities. In the context of Article 19, this means an obligation to remove for example legislation that prevents persons with disabilities from being able to get accessible housing or accessing mainstream facilities or services. Another immediate obligation which is applicable in this context is the duty to provide reasonable accommodation from Article 5 (3) of the Convention.⁸⁶

2.7 Participation in Political and Public Life (Article 29)

Participation in political and public life is regulated in Article 29. In summary, it holds that States Parties have an obligation to guarantee political rights for persons with disabilities, which includes the opportunity to enjoy these rights on an equal basis with others. States Parties have an obligation to ensure that persons with disabilities are able to fully participate in political and public life by ensuring the accessibility of voting procedures, facilities and materials. Persons with disabilities shall have the right to express their political opinion and if they so wish, they shall have a right to vote through the assistance of another person of their choice. They shall also have the right to vote by secret ballot in elections.⁸⁷

Being able to participate in the political life of the society in a fundamental part of an active citizenship which persons with disabilities for long have been deprived of, partly due to inaccessibility of voting procedures and venues. As the Convention was negotiated, there was a general consensus to the importance of this provision, as it ensures the equal participation of persons with disabilities in important decision-making. This ensures that persons with disabilities themselves are able to make decisions that will affect them.⁸⁸

Article 29 is connected to the accessibility regulation in Article 9, as accessibility is one of the preconditions for persons with disabilities to enjoy full participation in political and public life.⁸⁹

States have an obligation to ensure for persons with disabilities the equal opportunity for political participation on an equal basis with others. To fulfil this

⁸⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 39-40.

⁸⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on living independently and being included in the community, para. 46.

⁸⁷ CRPD Article 29.

⁸⁸ Cera, 'Article 29 [Participation in Political and Public Life]', p. 526-527.

⁸⁹ Cera, 'Article 29 [Participation in Political and Public Life]', p. 534.

obligation, the States have a margin of appreciation to choose the measures that should be adopted. The concept of margin of appreciation will be further addressed under Chapter 3. However, States cannot simply conform to passivity, as that would constitute a violation of the right under Article 29.⁹⁰ The obligation includes to ensure accessible elections through removing environmental barriers that may hinder persons with disabilities from voting. Such barriers can for example consist of stairs as the only option to access the polling station, doorways too narrow to fit wheelchairs, or small voting booths.⁹¹

2.8 Participation in Cultural Life, Recreation, Leisure and Sport (Article 30)

Article 30 regulates the right to participation in cultural life, recreation, leisure and sport. In summary, the Article provides the recognition of the right of persons with disabilities to take part in cultural life on an equal basis with others. States Parties have an obligation to ensure that persons with disabilities have access to places for cultural events, such as theatres and museums. Additionally, States Parties shall take measures to ensure that persons with disabilities have the opportunity to develop their creative potential. In order to enable persons with disabilities to participate on an equal basis with others in recreational and sporting activities, States Parties undertake to ensure that persons with disabilities have access to sporting and recreational venues, and to encourage participation of persons with disabilities in such activities.⁹²

2.9 Summary

This chapter has provided that the CRPD is a specific disability rights convention, providing far-reaching rights. It further imposes positive obligations on States. The Convention distinguishes between the concepts of accessibility and reasonable accommodation, and also holds that denial of reasonable accommodation constitutes discrimination. Furthermore, the CRPD articles related to accessibility have been accounted for. Many of the rights provided by the Convention are interconnected. Therefore, accessibility is not only relevant in relation to Article 9, but also through other rights as accessibility can be a precondition for other rights to be achieved. This shows the importance of ensuring accessibility for persons with disabilities.

This chapter has attempted to provide a foundation for the future analysis and comparison of the CRPD with the ECtHR case law on accessibility to buildings and facilities. In the following chapter, the ECHR and its case law will be accounted for.

⁹⁰ Cera, 'Article 29 [Participation in Political and Public Life]', p. 529.

⁹¹ Cera, 'Article 29 [Participation in Political and Public Life]', p. 533.

⁹² CRPD Article 30.

3 European Convention on Human Rights

This section of the thesis addresses the understanding of accessibility in relation to the right to private life established in Article 8 of the ECHR. The chapter will begin by accounting for some general information about the ECHR. Then a short introduction of how the Court interprets the Convention will follow. Articles 8 and 14 of the Convention will be addressed, and finally three key cases concerning accessibility to buildings and facilities under Article 8 will be accounted for.

3.1 The ECHR and Disability

The Convention is a general instrument, providing a minimum standard of rights protection. The purpose of the Convention and its Court is to uphold these minimum standards in relation to its Member States.⁹³ The ECHR was adopted already in 1950, as previously mentioned. During that time, the approach to disability was mainly medical, which was addressed in the introductory chapter. Therefore, disability is not explicitly mentioned in the Convention, and rights for persons with disabilities are not specifically addressed. However, the Court has through its case law interpreted several Convention provisions to now include rights for persons with disabilities, based on the idea that the Convention is a living instrument which should reflect evolving consensus in society.⁹⁴ The Court has held that consensus from international legal instruments and from the practice of States Parties “may constitute a relevant consideration for the Court” in its interpretation.⁹⁵ The CRPD may, due to its many contracting Parties, reflect such a global consensus, and the instrument has been cited by the Court multiple times.⁹⁶

ECHR mainly protects civil and political rights (an exception is the protection of the right to property and education in the First Protocol of the Convention). In comparison, the CRPD which protects civil and political rights, as well as economic, social and cultural rights.⁹⁷

3.2 The Approach of the ECtHR when Reviewing Convention Rights

The approach of the ECtHR when reviewing accessibility claims follows the general steps of Article 8 where it is possible to see a general pattern of the Court’s approach in dealing with possible infringements of Convention rights. First, the Court determines the applicability of the Convention article

⁹³ Gerards, *General Principles of the European Convention on Human Rights*, p. 10.

⁹⁴ Broderick and Ferri, *International and European Disability Law and Policy*, pp. 425-426.

⁹⁵ Demir and Baykara v. Turkey, para. 85.

⁹⁶ Broderick and Ferri, *International and European Disability Law and Policy*, pp. 426-427.

⁹⁷ Broderick and Ferri, p. 427.

in question. Second, the Court determines if the right in question has been interfered with. And third, if the Court found an interference in the second step, it investigates whether the interference can be justified, and if so, whether such a justification exists in the case at hand.⁹⁸ Simplified, the model can look like this:

1. Is the relevant article applicable?
2. Has there been an interference with the article?
3. If there has been an interference, can the interference be justified?
If so, is there such an acceptable justification in the case at hand?

The question of applicability includes to define the wording of the provisions in the Convention. When determining the applicability in regards to Article 8, for example, the Court has to define ‘private life’ and what can fall within its ambit.⁹⁹ In the case law on accessibility to buildings and facilities in relation to the right to private life under Article 8, applicability is the step where the Court spends the most time, as will be apparent further on.

Regarding the second step, interference, Gerards uses cases from the Court to illustrate that it sometimes does not do a thorough investigation on whether the measures complained of constitutes an interference of the article in question. Instead, it may simply assume that there is an interference if the issue has been determined to fall within the scope of the relevant article. Further, the Court might not investigate further if the applicant and the State both have acknowledged an interference. Other times, the reasoning of the Court is not clearly divided into the steps above, and the Court instead investigates applicability and interference at the same time. The Court might also spend little time on the question of interference if they have found that the interference in any case would not constitute a violation of the article in question, Gerard writes.¹⁰⁰

The third step on justification means that even if an interference of a Convention right has been established, this interference might under certain circumstances be permissible. It can depend on the right itself, whether a justification can make an interference of the right permissible. As an example, the prohibition on torture in Article 3 is absolute, and no interference of Article 3 can be justified.¹⁰¹ Articles 8 and 14 are not absolute, and therefore justifications to interferences of the rights provided in them can be made. Article 8, for

⁹⁸ Gerards, *General Principles of the European Convention on Human Rights*, p. 12.

⁹⁹ Gerards, *General Principles of the European Convention on Human Rights*, pp. 12-13.

¹⁰⁰ Gerards, *General Principles of the European Convention on Human Rights*, pp. 14-15.

¹⁰¹ Gerards, *General Principles of the European Convention on Human Rights*, pp. 18-19.

example, contains general limitation clauses.¹⁰² There are general principles to the Convention that provide guidance on the justifiability of interferences.

In conclusion, the model provides a general idea of how the Court approaches each case, but for each article in the Convention there are more specific relevant rules.

3.3 The Margin of Appreciation Doctrine

To balance the interests of States Parties with the interests of the individual, the Court awards the States a certain margin of appreciation. This means that the Court has found certain infringements of rights defensible as the State has been awarded a large margin of appreciation in that case.¹⁰³

In cases regarding positive obligations for States, where the applicant has requested certain measures to be taken, the Court will generally award the State a wide margin of appreciation if the requested measures require the use of limited State resources. The Court considers the State itself to be in a better position to judge how to best spend its limited resources. If the Court awards the State a wide margin of appreciation it will only examine the situation in the case superficially, and only situations that are clearly unreasonable or disproportionate are considered to fall outside the margin of appreciation of the State. Another result of the State being awarded a wide margin of appreciation is that the burden of proof then usually is placed on the applicant. Finally, in cases with a wide margin of appreciation, the Court may set the bar quite high for when it finds a violation, only in situations where the State has assessed the case in an arbitrary or manifestly unreasonable way.¹⁰⁴

In many cases concerning accessibility under Article 8, the measures sought by the applicants require limited State resources. Therefore, the Court generally awards the States a wide margin of appreciation in such cases, as the cases later in this chapter will illustrate.

3.4 Right to Respect for Private Life (Article 8)

As explained in the introduction the ECHR does not contain specific provisions addressing disability rights. Instead, questions pertaining to rights of persons with disabilities are addressed under several articles, Article 8 being one of them.

Article 8 of the Convention holds that:

¹⁰² Gerards, *General Principles of the European Convention on Human Rights*, p. 25.

¹⁰³ Gerards, *General Principles of the European Convention on Human Rights*, pp. 160-197.

¹⁰⁴ Gerards, *General Principles of the European Convention on Human Rights*, pp. 160-197.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Article covers four different rights: the right to private life, family life, home and correspondence. It covers a variety of aspects, such as abortion, custody of children, rights of sexual minorities, and the legality of measures taken by the police.¹⁰⁵ This thesis will focus on the rights of persons with disabilities, which has been interpreted by the Court to fall under the right to private life.

In the second paragraph, the limitations to the right is stated. This means that it is permissible to interfere with the right in the situations stated, for example in the interests of the economic well-being of the country. These interferences must, however, be necessary in a democratic society and made in accordance with the law.

3.4.1 Negative and Positive Obligations

Article 8 provides both negative and positive obligations for the States Parties to the Convention. Negative obligations are obligations for the State to not interfere with individuals' rights and freedoms. Positive obligations, on the other hand, are the State's obligation to take action to ensure the individual's rights and freedoms. Despite this distinction, the negative and positive obligations often overlap, and it is ultimately up to the Court to interpret the facts of the case to determine which obligation is at hand in the case.¹⁰⁶ Through its case law, the ECtHR seem to have included positive measures in Article 8 for especially vulnerable individuals. In relation to positive measures, the Court has used the two following concepts: direct link, and the fair balance test. Direct link refers to the establishment of a direct and immediate link between the measures requested by the applicant, and the applicant's private life. The fair balance test considers that a fair balance should be struck between the interests of the individual and the general interests of the society.¹⁰⁷

Henrard writes about positive state obligations in the context of religion, but to some extent it is also relevant for the purpose of this thesis. Several cases under ECHR Article 8 concerning persons with disabilities show how positive

¹⁰⁵ Hirvelä and Heikkilä, *Right to Respect for Private and Family Life, Home and Correspondence*, pp. 1-2.

¹⁰⁶ Hirvelä and Heikkilä, pp. 2-3.

¹⁰⁷ Broderick and Ferri, *International and European Disability Law and Policy*, p. 435.

obligations can be considered “duties of reasonable accommodation”.¹⁰⁸ Henrard mentions *Zehnalová and Zehnal v. the Czech Republic*,¹⁰⁹ which will be addressed in more detail further down, as well as *Botta v. Italy*,¹¹⁰ *Marzari v. Italy*,¹¹¹ and *Sentges v. Netherlands*¹¹² as examples of cases that were all considered inadmissible either because Article 8 was not applicable, or because the complaints were manifestly ill-founded. Henrard concludes: “These cases confirm the Court’s careful approach to demands for far-reaching positive state obligations, especially in the sphere of socio-economic rights.”¹¹³

When analysing cases requiring positive measures under Article 8, the Court uses two tests. First, the applicant needs to show a direct link between the measures requested and their private life. If no direct link is established, Article 8 is considered inapplicable. Second, the State must strike a fair balance between the rights of the individual and the society. This meant in *Sentges v. the Netherlands* that the cost of a robotic arm for the applicant who had a disability was considered to be too high by the State, as the applicant already had access to a broad range of health care rights and had received a special wheelchair.¹¹⁴ The Court meant that not providing the applicant with a robotic arm was justifiable under the fair balance-test as the financial cost for the society would have been high.¹¹⁵

3.5 Prohibition of Discrimination (Article 14)

Article 14 of the Convention holds that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This Article prohibits discrimination and must be combined with one of the other articles of the Convention to be applied before the Court. Disability is not mentioned specifically as one of the grounds set forth in the Article but the Court has through its case law included discrimination based on disability

¹⁰⁸ Henrard, ‘Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities’, p. 968.

¹⁰⁹ *Zehnalová and Zehnal v. the Czech Republic*.

¹¹⁰ *Botta v. Italy*.

¹¹¹ *Marzari v. Italy*.

¹¹² *Sentges v. the Netherlands*.

¹¹³ Kristin Henrard, “Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forward and missed opportunities”, p. 968.

¹¹⁴ *Sentges v. the Netherlands*.

¹¹⁵ *Sentges v. the Netherlands*; Kristin Henrard, “Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forward and missed opportunities”, p. 968.

under “other status”.¹¹⁶ In this thesis, the prohibition of discrimination will be addressed in relation to the right to private life in Article 8.

3.6 Right to Free Elections (Protocol no. 1 to the ECHR, Article 3)

Article 3 of the Protocol no. 1 to the ECHR states the right to free elections. The States Parties undertake to hold free elections where it is possible to vote by secret ballot, in a way which ensures the free expression of opinion of the people in the choice of legislature.¹¹⁷ Although the right to free elections might seem to be not directly related to accessibility, it can be. Accessibility can be a precondition for persons with disabilities to be able to enjoy their right to free elections, as the case *Mólka v. Poland* will show. This Article is therefore mentioned to provide some background for the case *Mólka v. Poland*, which will be addressed under section 3.7.2.

3.7 Case Law on Accessibility to Buildings and Facilities

The following case law has been selected based on the purpose of this thesis, that is to investigate to what extent the case law from Article 8 of the ECHR regarding accessibility to buildings and facilities reflect the regulation of accessibility to buildings and facilities in the CRPD. The cases selected are key cases on the topic of accessibility to buildings and facilities under Article 8. Only the legal questions in the case regarding accessibility to buildings will be addressed. Other legal questions, such as procedural ones, might be important for the case, but will not be addressed as they are not relevant for the purpose of this thesis.

3.7.1 *Zehnalová and Zehnal v. Czech Republic* – Lack of Accessibility to a Large Number of Buildings

In 2002 the Court delivered its decision in *Zehnalová and Zehnal v. Czech Republic*. In summary, the case concerned lack of access for persons with disabilities to several buildings open to the public in the applicants’ hometown. One of the applicants had a disability which meant that she used a wheelchair for mobility. The applicants complained that they had suffered discrimination of their rights due to lack of accessibility to many buildings in their hometown, and the failure of the national authorities to improve the situation. Amongst the buildings where they lacked accessibility, they mentioned in particular the post office, the police stations, the customs office, the District Office, the district social-security office, cinemas, the District Court, various lawyers’ offices, most specialist doctors’ surgeries and the town

¹¹⁶ Broderick and Ferri, *International and European Disability Law and Policy*, p. 440 ff.

¹¹⁷ Although the provision is not related to accessibility directly, it has been incorporated to provide context for the case of *Mólka v. Poland*, which will be addressed further down.

swimming pool.¹¹⁸ The first applicant held that “she was unable to enjoy a normal social life allowing her to deal with her everyday problems in a dignified manner and to practise her profession, not because of any interference by the State but on account of its failure to discharge its positive obligations to adopt measures and to monitor compliance with domestic legislation on public buildings.”¹¹⁹

The Court started by investigating if the case at hand fell within the ambit of private life under Article 8 of the ECHR. The applicants argued that their case was different from that of *Botta v. Italy*¹²⁰ in that their lack of access concerned buildings and facilities necessary for their needs in their hometown. The Court mentioned that Article 8 provides positive obligations for the State to respect private and family life. It also mentioned that there must be a fair balance between the individual interests and the interest of the community as a whole, and that the State has a certain margin of appreciation, which in this case is wide, since the concept of “respect” is not clearly defined. The Court had previously held that there must be a direct and immediate link between the measures the applicant seeks, and the applicant’s private life.

In *Botta v. Italy* the judgement held that when a situation concerns interpersonal relations of such a broad and indeterminate scope that no direct link between the measures sought by the applicant and their private life can be made, Article 8 is not applicable.¹²¹ In *Pretty v. the United Kingdom* the Court held that Article 8 is only applicable in exceptional cases where the lack of access to buildings open to the public affects the applicant’s life in such a way as to interfere with their right to personal development and the right to establish and develop relationships with other persons and the outside world.¹²² Only then do the State have a positive obligation under Article 8 to ensure accessibility to the buildings in question. In this case, however, the Court held that the rights were too broad and indeterminate as the applicants had not provided evidence of interference with their private life by showing a direct link between lack of access to the buildings in question and the needs of her private life. Since the many buildings were complained of, the Court questioned the applicants’ need to use them on a daily basis and therefore saw no direct and immediate link between the situation complained of and the applicant’s private life. The Court therefore concluded that Article 8 was not applicable on this case and that there consequently have been no violation of Article 8, nor Article 14 in conjunction with Article 8. The case was declared

¹¹⁸ *Zehnalová and Zehnal v. The Czech Republic*, p. 1 ff.

¹¹⁹ *Zehnalová and Zehnal v. The Czech Republic*, p. 7.

¹²⁰ *Botta v. Italy*. The complaint concerned the applicant’s inability to access the beach in a town that was not his hometown. The Court held that Article 8 was inadmissible since there was no direct link between the measures sought by the applicant (to make the beach accessible to him) and his private life.

¹²¹ *Botta v. Italy*.

¹²² *Pretty v. the United Kingdom*.

inadmissible.¹²³ The CRPD is not mentioned in the case as it was only adopted four years after the case was finalised.

3.7.2 *Mólka v. Poland* – Accessibility and the Right to Vote

In 2006 the Court delivered its decision in *Mólka v. Poland*, which concerned an applicant who could not cast his vote in the local elections due to the polling station being inaccessible to him as a wheelchair user. As the applicant arrived at the polling station in order to cast his vote, he asked how to enter the polling station, or to be brought a ballot paper in order to be able to cast his vote. However, the chairman of the Local Electoral Commission held that the applicant could not cast his vote as it was not permitted to take ballot papers outside the polling station, and the chairman “was not going to carry the applicant inside the station”.¹²⁴ The applicant then left without casting his vote. He later called the Municipal Electoral Commission and protested the refusal to let him vote, and additionally asked for assistance in order to cast his vote. The Commission, however, told him to arrange himself for assistance to enter the polling station. The applicant submitted a complaint to the regional court, complaining of being unlawfully deprived of his right to vote. The regional court dismissed his complaint based on the fact that the applicant did not himself take initiative to engage third persons to carry him into the polling station on a stretcher, adding that the public authorities were not in a position to eliminate difficulties faced by persons with disabilities in enjoying their rights.¹²⁵

In front of the ECtHR the applicant complained under Article 3 of Protocol No.1 and Article 14 of the ECHR of a breach of his right to vote because of his disability. The Court on its own accord added a complaint under Article 8, about the right to private life.¹²⁶

The right to vote is not considered absolute under the ECHR. Instead, states have a wide margin of appreciation in regard to limitations to this right. The ECtHR has in previous case law established in general terms that limitations to rights cannot be arbitrary or disproportionate, and further cannot limit individuals’ right to freedom of expression. Such limitations also cannot violate the prohibition on discrimination in Article 14. Other limitations to the right to vote are assessed on a case-by-case basis.¹²⁷

In *Caamafío Valle v. Spain*, the Court pointed out that even though the ECHR is an international instrument that shall be interpreted in accordance with relevant standards in international law, the Court is not bound by interpretations

¹²³ *Zehnalová and Zehnal v. The Czech Republic*, p. 10 ff.

¹²⁴ *Mólka v. Poland*, p. 2.

¹²⁵ *Mólka v. Poland*, pp. 2-4.

¹²⁶ *Mólka v. Poland*, p. 10.

¹²⁷ Seatzu and Vargiu, ‘The Right to Vote of Persons With Disabilities and the Difficult Relationship Between the CRPD and the European Court of Human Rights’, pp. 266-268.

made by other bodies to comparable international instruments.¹²⁸ On the other hand, in *Toplak and Mrak v. Slovenia*, which also concerned the right to vote for persons with disabilities, the Court specifically noted that the CRPD should be taken into consideration in the case, as an international instrument.¹²⁹ Seatzu and Vargiu argue that this difference can be attributed to whether the applicant had an intellectual or physical disability, in the sense that in the case concerning applicants with physical disabilities, the Court held that the CRPD as an international instrument should be considered. The opposite was true for the case concerning an applicant with an intellectual disability.¹³⁰ Their conclusion is, however, mainly based on these two cases, and whether such conclusions can be drawn from such limited examples is not clear.

Regardless, even though the CRPD was considered in *Toplak and Mrak v. Slovenia*, it didn't necessarily make a difference for the outcome as the Court allowed the State a wide margin of appreciation and held that since the ECHR member states have a very different view of how voting rights should be fulfilled, Slovenia could not be considered to have breached the applicants' right to vote. Both these cases were issued with only a few months in-between them. It is therefore not clear whether the provisions of the ECHR and its additional protocols on the right to vote must be interpreted in light of the relevant provisions in the CRPD. The authors argue that one indication that the ECHR should in fact interpret cases in light of the CRPD is that the CRPD as a globally adopted UN Convention reflects a new consensus in the field of disability rights.¹³¹ This is because the Court must regard changing views in its Member States.¹³²

Returning to *Mólka v. Poland*, the Court held regarding Article 3 of Protocol No. 1 that the Article was not applicable to regional elections to assemblies that do not have any inherent primary rulemaking powers. As this applied to the election where the applicant did not get to cast his vote, this part of the application was declared inadmissible.¹³³

Additionally, in regard to the alleged violation of the right to private life in Article 8 of the ECHR, the Court started by determining whether the lack of access for the applicant to a polling station in local elections fell within the ambit of "private life". Hence, the problem concerned a positive obligation for the state to take action in order to respect the applicant's right to private life, which is embedded in Article 8. The Court held that it is unclear how far-

¹²⁸ *Caamaño Valle v. Spain*, paras. 52-54.

¹²⁹ *Toplak and Mrak v. Slovenia*, para. 112.

¹³⁰ Seatzu and Vargiu, 'The Right to Vote of Persons With Disabilities and the Difficult Relationship Between the CRPD and the European Court of Human Rights', pp. 269, 280-281.

¹³¹ Seatzu and Vargiu, 'The Right to Vote of Persons With Disabilities and the Difficult Relationship Between the CRPD and the European Court of Human Rights', pp. 280-282.

¹³² *Toplak and Mrak v. Slovenia*, para. 113.

¹³³ *Mólka v. Poland*, pp. 11-15.

stretched the positive obligations are for the states, but two relevant principles were the fair balance-test, where a fair balance has to be struck between the competing interests of the individual and the society as a whole, and the margin of appreciation awarded to the states. In general, “private life” is a broad term without exhaustive definition, but in previous cases the Court defined the term as covering the physical and psychological integrity of a person.¹³⁴ It covers the right to personal development and to establish and develop relationships with other persons and the outside world.¹³⁵ Personal autonomy is further important for the interpretation of the right to private life.¹³⁶ In several previous cases, the Court has determined that Article 8 is relevant to complaints about public funding in order to improve mobility and quality of life for persons with disabilities.¹³⁷ In order for persons with disabilities to enjoy their rights from the Convention, States may have to take positive measures.¹³⁸

As Mólka’s case related to his involvement in the local community and the exercise of his civic duties, the Court held that it can be argued that this situation relates to the applicant’s ability to form relationships with people from his community, and thereby his personal development. The Court further acknowledged that the authorities’ inability to ensure the applicant’s right to vote might have made the applicant feel humiliation and distress, which in turn might negatively affect his sense of personal autonomy and therefore the quality of his private life.¹³⁹

To fall within the ambit of private life in Article 8, a direct and immediate link between the applicant and their private life must be established.¹⁴⁰ The Court held that it is not impossible that such a link would exist in the present case, but refrained from investigating this as the Court found the application inadmissible on other grounds.¹⁴¹

The Court held that in situations like Mólka’s, the margin of appreciation for States is wide, because the issue concerns accessibility to polling stations which require the use of the State’s limited resources. The Court considered the State itself to be in a better position than the Court to judge how they distribute their limited resources, and therefore the Court did not evaluate this further. The Court also noted that the applicant did not show that he could not have been assisted by other persons in entering the polling station to cast his vote. Finally, the situation at hand was limited to one incident in isolation, rather than “a series of obstacles, architectural or otherwise, preventing

¹³⁴ *X and Y v. the Netherlands*, para. 22.

¹³⁵ See, inter alia, *Peck v. the United Kingdom*.

¹³⁶ *Pretty v. the United Kingdom*.

¹³⁷ *Marzari v. Italy*.

¹³⁸ *Mólka v. Poland*, pp. 15-16.

¹³⁹ *Mólka v. Poland*, p. 17.

¹⁴⁰ *Botta v. Italy*, para. 34.

¹⁴¹ *Mólka v. Poland*, p. 17.

physically disabled applicants from developing their relationships with other people and the outside world”, as the Court held.¹⁴² The Court also noted that since the incident relevant to the case took place, a domestic law had been put in place which obligated authorities to provide access to polling stations for persons with disabilities. Considering all these aspects of this case, the Court held that the State cannot be said to have failed to ensure respect for the applicant’s private life and rejected the claim under Article 8. As none of the other Articles were considered by the Court to be applicable on the case, the application was declared inadmissible.¹⁴³

3.7.3 *Lárusson v. Iceland* – The First Case to Fall Within the Ambit of Private Life

In 2022 the first case from the ECtHR came where lack of accessibility to buildings for a person in a wheelchair fell within the ambit of private life.¹⁴⁴ The applicant, Lárusson, was permanently paralysed from the chest down and consequently used a wheelchair for mobility. The case concerned the lack of accessibility to two buildings made for cultural events in the applicant’s home municipality, which he claimed hindered his participation in cultural events, and hindered him from attending birthday parties and other social events with his children, thereby severely hindering his participation in society, personal development, and right to establish and develop relationships with his community.¹⁴⁵ The question for the Court was whether the lack of accessibility to these buildings constituted a violation of his right under Article 14 in conjunction with Article 8 of the ECHR.

In the case, the Court holds that the concept of “private life” from Article 8 has no exhaustive definition and should be interpreted broadly. It covers a person’s physical and psychological integrity and, to some extent, the right to develop relationships with others and the right to personal development.¹⁴⁶ In cases previously mentioned cases *Botta v. Italy* and *Zehnalová and Zehnal v. the Czech Republic*, as well as *Glaisen v. Switzerland* the Court found that the situations did not fall within the ambit of private life, and therefore found the cases inadmissible.¹⁴⁷ In this case, however, the Court did find that the situation fell within the ambit of private life, as it differed from the other cases in significant aspects. Unlike in *Botta v. Italy*, Lárusson’s situation concerned his home municipality. Unlike in *Zehnalová and Zehnal v. the Czech Republic*, Lárusson identified a small, clearly defined number of buildings with lacking accessibility and how not getting access to them affected his personal life. Unlike in *Glaisen v. Switzerland*, this case did not concern lack of access to just one of many similar private owned cultural venues, where the applicant

¹⁴² *Mótko v. Poland*, p. 18.

¹⁴³ *Mótko v. Poland*, pp. 17-20.

¹⁴⁴ *Lárusson v. Iceland*, para. 43.

¹⁴⁵ *Lárusson v. Iceland*, para. 48.

¹⁴⁶ *Lárusson v. Iceland*, para. 41.

¹⁴⁷ *Glaisen v. Switzerland*.

could get similar cultural experiences at another comparable venue. For Lárusson, one of the buildings that lacked accessibility was the main cultural centre of the municipality. It was not shown that Lárusson could gain access to other similar cultural and social events in his municipality. Information from the Government provided that there were no other buildings in the municipality that had the same purpose as the non-accessible buildings in question. The other building that was complained about was primarily aimed at children and teenagers but could also be rented out for events where parents could attend. Unlike in the previously mentioned cases, the applicant had successfully identified two public buildings which were important for the cultural and social life in his municipality, and to which he did not have access.¹⁴⁸ The Court acknowledged that accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society, as held by the CRPD Committee, and that the lack of accessibility to the particular buildings in this case “was liable to affect the applicant’s right to personal development and right to establish and develop relationships with other human beings and the outside world.”¹⁴⁹ Therefore, the Court held that the situation fell within the ambit of private life under Article 8, and consequently Article 14 in conjunction with Article 8 was applicable.¹⁵⁰

Further, the Court’s assessment went over the rules on discrimination, noting that it also constitutes discrimination if the State, without an objective justification for it, treats people the same, although their situations are significantly different.¹⁵¹ For the Court to find that the difference in circumstances is significant, a certain threshold must be reached. The threshold must also be reached when the applicant is complaining of discrimination due to the State not fulfilling its positive obligations.¹⁵² The threshold is reached when a measure produces a particularly prejudicial impact on certain people as result of protected ground.¹⁵³ This includes for example disability. The Court further held that interpretation of the ECHR shall be in harmony with relevant international law, which in this case is the CRPD as it is a case about disability rights.¹⁵⁴

The Court then discussed the margin of appreciation afforded to States in “assessing whether and to what extent differences in otherwise similar situations justify different treatment”.¹⁵⁵ Generally, States are awarded a wide margin of appreciation in relation to economic or social measures.¹⁵⁶ The Court held

¹⁴⁸ *Lárusson v. Iceland*, para. 43-46.

¹⁴⁹ *Lárusson v. Iceland*, para. 46.

¹⁵⁰ *Lárusson v. Iceland*, para. 46.

¹⁵¹ *J.D. and A. v. the United Kingdom* para. 84, as cited in *Lárusson v. Iceland* para. 56.

¹⁵² *Toplak and Mrak* para. 111, as cited in *Lárusson v. Iceland*, para. 56.

¹⁵³ *Ádám and Others v. Romania* para. 87 and *Napotnik v. Romania* para. 73, as cited in *Lárusson v. Iceland*, para. 56.

¹⁵⁴ *Lárusson v. Iceland*, para. 57.

¹⁵⁵ *Vallianatos and Others v. Greece* para. 76, as cited in *Lárusson v. Iceland* para. 58.

¹⁵⁶ *Biao v. Denmark* para. 93, as cited in *Lárusson v. Iceland* para. 58.

that in claims regarding lack of access to public buildings in the context of right to respect for private and family life, which is the case of *Lárusson*, the margin of appreciation for States should be wide.¹⁵⁷

The Court concluded that the lack of access to the buildings in question did not amount to discrimination by the State, and hence Article 14 in conjunction with Article 8 had not been violated. As previously mentioned, the State has a wide margin of appreciation in situations like this one, and with that in mind, the Court argued that the municipality had taken considerable efforts to improve accessibility to public buildings since 2011, choosing to prioritise buildings connected to education and sports. This prioritisation within their budget was, according to the Court, reasonable, and to hold that the municipality should have to make further improvements to accessibility as part of its positive obligations would impose a disproportionate or undue burden on it.¹⁵⁸

In conclusion, the Court held that the situation fell within the ambit of private life, meaning that Article 14 in conjunction with Article 8 was applicable. However, they did not find that there had been a violation of these provisions, as the municipality had made efforts to improve accessibility to public buildings, and the State has a wide margin of appreciation in situations like this one.

3.7.3.1 *Mentions of CRPD in the Case*

The judgement refers to parts of the CRPD, which Iceland has ratified, as part of the relevant legal framework. Articles 2 on definitions, 9 on accessibility, and 30 on participation in cultural life, recreation, leisure and sport are considered relevant, as well as parts of the General Comment from the CRPD Committee on accessibility.¹⁵⁹ The Court further holds that the ECHR should as far as possible be interpreted in line with other relevant rules of international law, and consequently the rules about rights for persons with disabilities from the CRPD should be considered in this case. The Court then proceeds to note that the General Comment No. 2 of the CRPD holds that “the denial of access of persons with disabilities to, *inter alia*, facilities and services open to the public should be viewed withing the context of discrimination”.¹⁶⁰ The Court has in earlier case law about disability rights found that ECHR Article 14 needs to be read in light of the CRPD. There the Court understood the CRPD phrase “reasonable accommodation” to mean “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case”.¹⁶¹ The Court further held that reasonable accommodation is a tool for breaching unjustified

¹⁵⁷ *Lárusson v. Iceland* para. 58.

¹⁵⁸ *Lárusson v. Iceland* paras. 63-65.

¹⁵⁹ *Lárusson v. Iceland*, paras. 25-26.

¹⁶⁰ *Lárusson v. Iceland*, para. 57.

¹⁶¹ *Çam*, para. 65, and *Toplak and Mrak*, para. 114, as cited in *Lárusson v. Iceland* para. 59.

inequalities that constitute discrimination, and that Article 30 of the CRPD explicitly provides that States shall guarantee persons with disabilities participation in cultural life on an equal basis with others.¹⁶² The Court finally mentioned the previously established European and worldwide consensus on the need to protect persons with disabilities from discriminatory treatment.¹⁶³

3.7.3.2 *Dissenting Opinion*

Judge Zünd in his dissenting opinion disagreed with the majority and instead held that there had in fact been a violation of Article 14 in conjunction with Article 8. He held that the Government should have planned the necessary accessibility adaptations and estimated the related costs, as well as provided the Court with a time frame as to when the adaptations could be achieved. He held that without such information, the Court could not make an informed judgement on whether the margin of appreciation had been overstepped. He further found a violation of Article 14 in conjunction with Article 8 on procedural grounds, as the domestic courts had not assessed thoroughly enough why an improvement of the accessibility situation had not yet taken place, or when it was planned to happen, nor accounted for costs related to accessibility alterations or the financial situation of the municipality.¹⁶⁴ Finally, he argued that there were “good reasons to assume that the respondent State did not take sufficient measures to remedy the tangible structural causes of inequality, in order to enable the applicant to exercise his right to private life on an equal basis with others”, as one of the buildings in question had recently undergone renovation without improving accessibility for persons with disabilities, and as no improvements to the buildings had happened since the start of the domestic proceedings in 2015.¹⁶⁵

3.7.3.3 *Lárusson v. Iceland - A Missed Opportunity by the ECtHR?*

Broderick comments on *Lárusson v. Iceland* in Strasbourg Observers, calling the judgement “yet another missed opportunity to etch out lines of convergence between the interpretation of the ECHR and the CRPD”.¹⁶⁶ The article highlights the importance of the case in that it ruled that lack of wheelchair access could fall within the ambit of private life in Article 8 ECHR, in contrast to earlier case law. Despite this, Broderick emphasises the very narrow scope under which the ECtHR is willing to consider accessibility issues to fall under the ambit of private life. There must be a complete inaccessibility of (primarily private) buildings, which are specifically identified, and providing important services to the people living in its proximity. She compares the narrow

¹⁶² *Lárusson v. Iceland* para. 59.

¹⁶³ *Glor v. Switzerland*, para. 53, as cited in *Lárusson v. Iceland*, para. 57.

¹⁶⁴ *Lárusson v. Iceland*, Dissenting Opinion of Judge Zünd para. 1 ff.

¹⁶⁵ *Lárusson v. Iceland*, Dissenting Opinion of Judge Zünd para. 8.

¹⁶⁶ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

scope established by the ECtHR to the CRPD where it is stated that accessibility to all buildings should be progressively realised.

Further, the article points out the divergence between the views of the ECtHR and the CRPD Committee. In its judgement, the ECtHR points out parts of the CRPD that are particularly relevant to the case, notably the CRPD Committee's General Comment No. 2 on Accessibility which holds that "as long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise."¹⁶⁷ This clearly provides that the State is responsible for the accessibility of goods, products and services if they are open to the public, even if they are privately owned. The ECtHR supposedly relies on the CRPD, but its case law holds that only reduced accessibility to public buildings can fall within the ambit of private life. This shows a divergence between the two.¹⁶⁸

The article claims that the Court missed an opportunity to distinguish between the CRPD's reasonable accommodation (CRPD Article 5) and accessibility obligations (CRPD Article 9). Broderick holds that reasonable accommodation is "an individualised, reactive and immediate obligation that arises upon a specific request from an individual with a disability. A failure to provide a reasonable accommodation automatically violates the principle of non-discrimination, unless it imposes a disproportionate or undue burden on the duty bearer."¹⁶⁹ The accessibility obligation under Article 9 on the other hand, is group-based, forward-looking and gradually realisable. According to the CRPD Committee it cannot be limited by a clause of "disproportionate or undue burden". *Lárusson v. Iceland* concerned a more general lack of accessibility, which is connected to Article 9, as the measures which the municipality was to take were connected to making the buildings generally accessible. The Court acknowledged that the accessibility to the buildings was insufficient for the applicant, and other persons with disabilities, and purported to apply an individualised test of reasonable accommodation to check whether the State had made adjustments to accommodate the applicant individually. However, the Court never completed this reasonable accommodation's test, but instead assessed the general situation of inaccessibility for persons with disabilities, and then applied the disproportionate burden limitation,

¹⁶⁷ *Lárusson v. Iceland* para. 26, citing CRPD General Comment no. 2 para. 13, as cited in as cited in Broderick, 'Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings'.

¹⁶⁸ Broderick, 'Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings'.

¹⁶⁹ Broderick, 'Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings'.

concluding that saying that the State should have made the buildings accessible would put a disproportionate and undue burden on it.¹⁷⁰

Broderick further points out that the Court used the term “reasonable accommodation” from the CRPD without actually mentioning the provision which provides the duty to ensure reasonable accommodation in order to not discriminate in Article 5 (3) CRPD. She holds that the Court, both in this and previous cases, has failed to untangle the relevant CRPD obligations, which has led to a “surface-level assessment of the measures adopted by the State”.¹⁷¹ She offers the following considerations of what the Court’s assessment got wrong. First, the Court’s assessment of what efforts the State had made to increase accessibility was lacking, as it was not clear on what grounds they considered that the State had taken “considerable efforts” to improve accessibility to public buildings. Second, as pointed out by the dissenting opinion, there were “good reasons” to assume that the State had actually not taken enough steps to improve accessibility, based on the fact that one of the buildings had been extensively renovated shortly before the domestic proceedings began without an explanation as to why accessibility to persons with disabilities was not improved during the renovations.¹⁷² After the renovations, accessibility was still not in accordance with the standard building regulations. According to the CRPD’s General Comment No. 2, if a building open to the public was established after building regulations were put in place, the forward-looking accessibility duty applies, meaning that the situation at hand should be considered prohibited disability-based discrimination.¹⁷³ Third, the Court’s assessment of the municipality’s prioritisation of increasing accessibility to educational and sports facilities as neither being arbitrary nor unreasonable is criticised by Broderick as seemingly arbitrary based on the fact that the CRPD does not make a distinction between different types of buildings.¹⁷⁴

3.8 Summary

The ECHR is a general rights document containing many different rights provisions, where one is the right to private and family life in Article 8. There are no rights explicitly connected to persons with disabilities in the Convention. However, the Court has through interpretation in its case law held that rights for persons with disabilities can fall within the ambit of private life in Article 8. Because the provision is general, it is necessary to use case law to

¹⁷⁰ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

¹⁷¹ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

¹⁷² *Lárusson v. Iceland*, Dissenting Opinion of Judge Zünd para. 8, as cited in Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

¹⁷³ CRPD General Comment No. 2 para. 31, as cited in Broderick, “*Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings*”.

¹⁷⁴ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

determine under which circumstances there has been an infringement of the right to private life in relation to disability rights. In relation to accessibility to buildings, a violation of Article 8 can primarily consist of States' failure to fulfil their positive obligations. A possible breach of Article 8 then consists of an omission, instead of an active action by the State.¹⁷⁵

Based on the case law that has been addressed in this chapter, the Court considers there to have been an infringement of the right to private life in respect to accessibility to buildings for persons with disabilities under the following circumstances. Applicants must show a direct and immediate link between the measures requested by the applicant and the applicant's private life.¹⁷⁶ Further, there must be a fair balance between the competing interests of the individual and the community as a whole. Moreover, States have a certain margin of appreciation.

The three key cases on accessibility to buildings *Zehnalova and Zehnal v. the Czech Republic*, *Mólka v. Poland* and *Lárusson v. Iceland* have all been addressed in detail. The final case has further been analysed using Broderick's opinions. These cases are meant to provide a baseline for the analysis which will follow in the next chapter.

¹⁷⁵ *Mólka v. Poland*, pp. 15-16.

¹⁷⁶ *Botta v. Italy*.

4 Analysis

The purpose of this section of the thesis is to analyse the information brought up in the two previous chapters and investigate to what extent Article 8 of the ECHR and its key cases regarding accessibility to buildings and facilities reflect the regulation of accessibility to buildings and facilities in the CRPD. I will argue that the CRPD goes further than the ECHR and its case law in granting rights for persons with disabilities. Consequently, there is a lack of overlap between the two conventions. Additionally, I will argue that the lack of overlap between the ECtHR case law and the CRPD is a problem because of the stronger position of the ECtHR as a legal authority in comparison to the CRPD Committee. Consequently, if the ECtHR does not use the CRPD as a source of interpretation, the rights of persons with disabilities might suffer.

The cases which have been brought up in this thesis are all about accessibility to buildings and facilities, and the applicants have all claimed that they have been discriminated against due to lack of accessibility. This suggests that States have failed to fulfil their positive obligation under Article 8. The Article, as previously mentioned, includes not only the obligation to refrain from actions violating the right to private life, but also the positive obligation to ensure individuals' right to private life. For the right to private life in Article 8 to be applicable, the ECtHR has clarified in its case law that the applicant needs to establish a direct and immediate link between the situation complained of and the applicant's private life.

4.1 The ECtHR's Inability to Distinguish Between Denial of Reasonable Accommodation and Accessibility

This thesis will argue that there is a lack of overlap between the accessibility regulations in the CRPD and the ECtHR case law, and that the CRPD goes further in providing rights for persons with disabilities. This argument is based on the following examples.

First, one difference between the two instruments is that denial of reasonable accommodation constitutes discrimination in the CRPD but is not explicitly mentioned as a ground for discrimination in the ECHR. Hence, failure to provide necessary adjustments for a person with a disability that does not impose a disproportionate or undue burden and to ensure that person's enjoyment of their human rights constitutes discrimination under the CRPD, but not under the ECHR.¹⁷⁷ Consequently, persons with disabilities will not be able to argue under the ECHR that they have been discriminated against if they are denied

¹⁷⁷ CRPD Article 2; Cera, 'Article 5 [Equality and Non-Discrimination]', p. 158 ff.

reasonable accommodation, which may prevent them from being able to fully enjoy their fundamental rights on an equal basis with others.

Second, the ECtHR has failed to distinguish between reasonable accommodation and accessibility in its case law, for example in *Lárusson v. Iceland*. This was described by Broderick as “yet another missed opportunity”.¹⁷⁸ To shortly repeat what has been held earlier, the CRPD Committee describes reasonable accommodation as the necessary and appropriate modifications made when it is needed for a person with a disability to enjoy their rights on an equal basis with others. Modifications should be made if they do not impose a disproportionate or undue burden. Reasonable accommodation comes into effect when a person with a disability in a certain situation requires accommodation in order to enjoy their rights on equal terms with others. Reasonable accommodation is relevant in relation to individuals, whereas accessibility is relevant to groups. The accessibility obligation is anticipatory, unconditional and shall be gradually implemented. This includes to provide building standards which will ensure accessibility, and to make plans for how to increase accessibility in already existing buildings. Inaction to provide accessibility because it is a burden is not a valid justification for inaction in the eyes of the CRPD.¹⁷⁹

In *Lárusson v. Iceland* the Court instead mixed up the two concepts and did not use the distinction provided by the CRPD Committee.¹⁸⁰ Broderick holds that the case concerned a general lack of accessibility for the applicant and other persons with disabilities to the building in question. The measures requested by the applicant concerned were general ways of increasing accessibility, in line with existing building regulations.¹⁸¹ This, she argues, meant that the case concerned accessibility, and not reasonable accommodation. The latter would instead have been the case if the applicant had been denied access to the building, or had asked for personalised accommodation.¹⁸² Based on the distinction made by the CRPD Committee, the duty to provide accessibility is not limited by if the measures requested impose a “disproportionate or undue burden”. That limitation only applies to the duty of reasonable accommodation. The Court, however, used the conditions dedicated to the duty of reasonable accommodation to determine whether the Icelandic authorities complied with their positive obligation to take measures to ensure the applicant was able to exercise his right to private life on an equal basis with

¹⁷⁸ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

¹⁷⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility, paras. 25-26.

¹⁸⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility, paras. 25-26.

¹⁸¹ *Lárusson v. Iceland*, paras. 6-10.

¹⁸² Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

others.¹⁸³ The Court itself put it this way: “the Court will therefore proceed to assess whether the respondent State has fulfilled its duty to accommodate the applicant [...]”¹⁸⁴

Using this logic, the Court then found that since the Icelandic authorities had taken measures to increase accessibility in general it would impose a disproportionate or undue burden on the authorities to take further measures “to reasonable accommodate the applicant”.¹⁸⁵ According to Broderick, the Court should instead have treated the situation as a question of accessibility, in which the limitations related to reasonable accommodation would not be relevant. Nonetheless, even if the Court was right in considering the situation to fall under the duty of reasonable accommodation rather than accessibility it still failed to correctly apply the guidelines on the concept provided by the CRPD Committee, and which in fact were quoted in the judgement.¹⁸⁶ As previously mentioned, reasonable accommodation is an immediate duty which applies to individuals, where adjustments for the individual should be made unless they impose a disproportionate or undue burden. The Court held that the authorities had taken considerable measures to increase accessibility in the municipality in general, then applied the reasonable accommodation-limitation by concluding that it would impose a disproportionate or undue burden on the authorities to take further measures.¹⁸⁷ Hence, the Court did not actually consider the reasonable accommodation-duty in relation to Lárusson as an individual.¹⁸⁸ One could of course argue that the Court could have reached the same conclusion if considering the duty through an individual approach. The Court could have argued that making the necessary adjustments to enable Lárusson to access the building in question, and thereby providing him with reasonable accommodation, would still have imposed a disproportionate and undue burden on the municipality. This argument is especially relevant since States as a rule are awarded a wide margin of appreciation regarding measures that require the State’s limited resources. Regardless, the Court failed to make the distinction between accessibility and reasonable accommodation, and seemingly applied a mix of both rules simultaneously.

In conclusion, the Court uses the language and provisions of the CRPD without fully committing to the CRPD Committee’s interpretation of these provisions. This harms the predictability of issues concerning accessibility under

¹⁸³ *Lárusson v. Iceland*, para. 60.

¹⁸⁴ *Lárusson v. Iceland*, para. 61.

¹⁸⁵ *Lárusson v. Iceland*, para. 63.

¹⁸⁶ See *Lárusson v. Iceland* para. 27 which references the CRPD General Comment No. 6 (2018) on equality and non-discrimination, paras. 40-42.

¹⁸⁷ *Lárusson v. Iceland*, para. 63.

¹⁸⁸ Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

Article 8, as one cannot expect the Court to apply the CRPD provisions in the way the CRPD Committee intended them to be applied.

4.2 Limited State Resources – A Valid Reason Not to Fulfil Accessibility Obligations?

Third, another difference between the case law of the ECtHR and the CRPD is that the ECtHR gives States a large margin of appreciation in how to spend their limited resources. This is mentioned in for example *Mólka v. Poland* and *Zehnalová and Zehnal v. the Czech Republic*.¹⁸⁹ The idea is that the States themselves are in a better position to judge how to wisely spend their resources than the Court, which has little insight into national financial situations.¹⁹⁰ The CRPD, on the other hand, holds that States cannot excuse the omission to provide accessibility “by referring to the burden of providing access for persons with disabilities”.¹⁹¹ This difference between the two instruments is crucial as lack of resources is a common justification for lack of action by States. Broderick holds that “in many respects, it is difficult to marry the ECtHR’s concept of the ‘margin of appreciation’ with the CRPD, and, in particular, the wide-ranging positive obligations imposed on States Parties to the CRPD (with their ensuing socio-economic implications).”¹⁹²

4.3 Difficulty to Fall Within the Ambit of Private Life

Fourth, *Zehnalová and Zehnal v. the Czech Republic* furthermore illustrates how difficult it is for situations complained of to fall within the ambit of private life. The applicants in the case complained of a large number of inaccessible buildings in their hometown, but the Court still did not consider the situation to fall within the ambit of private life.¹⁹³ Another example is *Botta v. Italy* where the Court held that there was no direct link between the situation complained of and the applicant’s private life, and declared Article 8 inapplicable.¹⁹⁴ It therefore seems like the first step of the Court’s approach to cases, determination of the applicability, poses a challenge for the applicants in cases concerning positive obligations relating to accessibility under Article 8. However, in *Lárusson v. Iceland* the Court did in fact find the situation to fall within the ambit of private life.¹⁹⁵ This might at least serve as an indication

¹⁸⁹ *Mólka v. Poland*, pp. 16-18; *Zehnalová and Zehnal v. the Czech Republic*, p. 11 ff.

¹⁹⁰ Gerards, *General Principles of the European Convention on Human Rights*, pp. 160-197.

¹⁹¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility, para. 25.

¹⁹² Broderick, ‘The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?’, p. 205.

¹⁹³ *Zehnalová and Zehnal v. the Czech Republic*, p. 6 ff.

¹⁹⁴ *Botta v. Italy*.

¹⁹⁵ *Lárusson v. Iceland*, paras. 44-46; Broderick, ‘Arnar Helgi Lárusson v. Iceland: Muddying the Waters on Inaccessibility of Public Buildings’.

that the Court is moving closer to the more generous view on which situations can fall within the ambit of private life, making Article 8 applicable.

4.4 Accessibility and the Right to Vote

Fifth, divergence between the CRPD and the ECtHR case law is visible also in terms of the right to vote. In order to enjoy the right to vote, persons with disabilities need to be able to access voting stations. This was not the case in *Mólka v. Poland*, where the voting station was not accessible to the applicant, and he could consequently not cast his vote. The Court held that the right to vote provided by Protocol No. 1 to the ECHR was not applicable on regional elections, and hence not in this case.¹⁹⁶ In comparison, the CRPD provision on participation in political and public life has no limitation as to which elections it is applicable on. On the contrary, it ensures that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others” for example by ensuring that voting facilities are accessible.¹⁹⁷ The right to vote is crucial for the participation in political life, and a way of ensuring that persons with disabilities are able to participate in decisions concerning them.¹⁹⁸ Also regional elections have an impact on individuals, and are important for persons with disabilities to express their opinion and participate in the political life. The decision in *Mólka v. Poland*, and the provisions behind that decision, does not give much weight to the importance of the right for persons with disabilities to express their political opinion and participate in public life. In this regard, it is possible to see a discrepancy between *Mólka v. Poland* and the CRPD, where the right to vote provided for in the CRPD encompasses more than the right to vote in the ECHR.

4.5 Accessibility as a Precondition for Participation in Cultural Life

Sixth, Accessibility is one important component in ensuring the possibility for persons with disabilities to participate in cultural life.¹⁹⁹ If you cannot physically access cultural venues, you can also not take part and enjoy the cultural events organised there. *Lárusson v. Iceland* concerned Lárusson’s lack of access to the local cultural centre, which meant that he could not take part on an equal basis with others in the cultural life of his municipality.²⁰⁰ As mentioned earlier, States Parties to the CRPD have the duty to identify and eliminate barriers to accessibility to, inter alia, buildings and other indoor and outdoor facilities.²⁰¹ The CRPD Committee holds that this includes for

¹⁹⁶ *Mólka v. Poland*, pp. 11-15.

¹⁹⁷ CRPD Article 29.

¹⁹⁸ Cera, ‘Article 29 [Participation in Political and Public Life]’, p. 526 ff.

¹⁹⁹ Leahy and Ferri, ‘Barriers to Cultural Participation by People with Disabilities in Europe: A Study across 28 Countries’.

²⁰⁰ *Lárusson v. Iceland*.

²⁰¹ CRPD Article 9.

example areas for cultural activities.²⁰² This likely includes such cultural establishments which were at the centre of *Lárusson v. Iceland*, indicating that there might be a lack of overlap between the CRPD and *Lárusson v. Iceland*, as the Court found no violation of Article 8 in the case.

4.6 The ECHR and the CRPD – General Minimum Rights Standards Meet Specific Disability Rights Standards

I have compared case law from the ECtHR to the CRPD and found that there are differences between the two. But can these differences stem from more fundamental differences between these instruments? As the previous chapters have held, these instruments are quite different in what rights they cover. The CRPD is a human rights convention specifically focused on the rights of persons with disabilities. This allows it to be more specific and far-reaching in the rights it contains, when compared to the more general ECHR.²⁰³ For example, the CRPD specifically prohibits discrimination on the basis of disability.²⁰⁴ This differs from the prohibition of discrimination in Article 14 of the ECHR where disability is not explicitly mentioned as one of the grounds for discrimination. However, even though disability is not explicitly mentioned in the ECHR, it has been included as a ground for discrimination by the ECtHR through its interpretation of “other” grounds.²⁰⁵

Additionally, the CRPD was adopted only in 2006, compared to the ECHR which was adopted in 1950. As time has passed, the human rights’ concept has developed. The ECtHR has stated that the CRPD seem to reflect a European and global consensus on the right for persons with disabilities to be protected from discrimination and has through interpretation extended several provisions of the ECHR to include rights for persons with disabilities. The CRPD has also been cited by the ECtHR several times.²⁰⁶

The conventions are furthermore different in their aims and scope. The ECHR mainly protects civil and political rights.²⁰⁷ However, in *Airey v. Ireland* the Court clarified that while the Convention mainly protects civil and political rights, many of them might have implications that are in the social and economic sphere.²⁰⁸ In light of this, the Court opened up to the possibility of its

²⁰² Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility.

²⁰³ Broderick and Ferri, pp. 425-427.

²⁰⁴ CRPD Article 5.

²⁰⁵ European Union Agency for Fundamental Rights, European Court of Human Rights, and Council of Europe (Strasbourg), *Handbook on European Non-Discrimination Law*, p. 186.

²⁰⁶ Broderick and Ferri, pp. 425-427.

²⁰⁷ However, an exception is the protection of the right to property and education in the First Protocol of the ECHR. Broderick and Ferri, *International and European Disability Law and Policy*, p. 427.

²⁰⁸ *Airey v. Ireland*.

own interpretation of the Convention rights to stretch to the field of social and economic rights. In contrast, the CRPD protects civil and political rights, as well as economic, social and cultural rights.²⁰⁹ Additionally, the ECHR mainly contains negative obligations for States, whereas the CRPD contains widespread positive obligations.²¹⁰ However, the ECtHR has gradually extended its interpretation to include certain positive obligations, for example in the right to education²¹¹ and in terms of interpersonal relations.²¹² But for the ECHR these extensions of which rights it encompasses have been gradual and are still restrictive, whereas the CRPD from the start has covered a wider span or rights with the economic, social and cultural rights.

The ECHR is a general rights document, which provides a sort of minimum standard for fundamental rights protection. The purpose of the ECHR and the Court is to set minimum guarantees in terms of fundamental rights.²¹³ The CRPD, on the other hand, provides positive rights, which implies quite far-reaching obligations for States and positive actions.²¹⁴ Hence, these two human rights instruments have vastly different aims and purposes. It is therefore probably not realistic to expect there to be a full overlap between the two. Broderick and Ferri hold that “without doubt, the Court cannot incorporate all of the progressive CRPD obligations into its jurisprudence. It is constrained, inter alia, by the nature and scope of the ECHR itself. Notwithstanding this, it is arguable that the Strasbourg Court should draw on the spirit and tenor of the substantive provisions of the CRPD when interpreting ECHR rights for persons with disabilities [...]”²¹⁵

While remembering the different aims of the two rights instruments, it can still be valid to criticise the lack of overlap. Despite the ECHR only providing a minimum standard for the protection of fundamental rights, I would argue that the current minimum standard provided by the ECHR and its case law is not good enough in terms of the protection of the right to accessibility to buildings and facilities for persons with disabilities. The minimum standard should instead take more inspiration from the CRPD.

4.7 Is the Lack of Overlap Between the ECtHR’s Case Law and the CRPD a Problem?

²⁰⁹ Broderick and Ferri, p. 427.

²¹⁰ Broderick, ‘The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?’

²¹¹ Case ‘*Relating to Certain Aspects of the Laws on the Use of the Languages in Education in Belgium*’ v Belgium.

²¹² *X and Y v. the Netherlands*, as cited in Stoyanova, *Positive Obligations under the European Convention on Human Rights*, pp. 10-11.

²¹³ Gerards, *General Principles of the European Convention on Human Rights*, p. 10.

²¹⁴ Broderick and Ferri, *International and European Disability Law and Policy*, pp. 60-62.

²¹⁵ Broderick and Ferri, p. 429.

I have argued that the CRPD goes further than the ECtHR in its case law, and that consequently there is a lack of overlap between the two, and that this might be explained by the different aims and scopes of the two instruments. But is this lack of overlap a problem? I will argue that the lack of overlap between the ECtHR case law and the CRPD complicates the effective implementation of relevant CRPD rights. The fact that all States Parties to the ECHR are also parties to the CRPD makes this overlap relevant.

The ECHR has a separate Court with rich case law which enforces the ECHR. Although its legitimacy is sometimes questioned among certain states, the Court still has a generally high level of legitimacy which can be seen in its good execution record.²¹⁶ The CRPD, on the other hand, does not have a Court to enforce its Convention. Instead, individuals can submit complaints to the CRPD Committee which then makes decisions on the matter. A precondition for this to happen is that the State Party complained of has ratified the optional protocol recognising the Committee's authority to receive such complaints.²¹⁷ These decisions are, however, not enforceable by the Committee, and hence it is up to the States Parties to adhere to them. It is perhaps not surprising then that decisions by the CRPD Committee have less effect on the States than the ECtHR's judgements and decisions. In summary, the CRPD goes further in protecting the rights of persons with disabilities, but its enforcement system is relatively toothless. On the other hand, the ECHR (and its accompanying case law) is restrictive in the rights it provides for persons with disabilities, but its Court is respected, and its judgements and decisions enforced. In order to enforce rights for persons with disabilities it therefore makes a big difference if in the questions concerning disability rights, the ECtHR takes inspiration from the specific disability rights instrument CRPD as a sort of *lex specialis*. The Court has also done so in other cases, for example in cases concerning the right to education.²¹⁸ However, those cases concerned the right to education specifically, and thereby Article 2 of ECHR Protocol No. 1 was relevant, and not only the right to private life in Article 8. Therefore, it is important to mention that the aforementioned conclusions only are true for case law about accessibility to buildings and facilities under Article 8 of the ECtHR. There are examples of cases concerning access to buildings and facilities, but which have been considered to fall under other articles of the ECHR where the Court has found that the lack of accessibility has constituted a breach of Convention provisions.²¹⁹ Another conclusion to

²¹⁶ Glas, 'A Characterisation of the Convention System', pp. 48-52.

²¹⁷ CRPD Optional Protocol Article 1.

²¹⁸ See for example *G.L. v. Italy* and *Enver Şahin v. Turkey*.

²¹⁹ See, for example, *Enver Şahin v. Turkey* where the Court found there to be a violation of the prohibition on discrimination in ECHR Article 14 read in conjunction with the right to education in ECHR Protocol No. 1 Article 2. The applicant used a wheelchair after an accident which led him to be paralysed from the waist down. As the university building where his classes were held was not adapted to wheelchair users he could not access it. The Court held that the national authorities had not done enough to ensure that the applicant could exercise his right to education on an equal basis with the other students.

draw is thereby that if the situation complained of concerns lack of accessibility, but also another right provided in the Convention, the applicant may have better chances of success in the Court, in comparison to if the case “only” falls under the right to private life in Article 8.

4.8 Sweden as an Example

The reason why it is problematic that the ECtHR has a stronger position as a judicial authority than the CRPD Committee is because the lack of overlap between the two instruments then could potentially lead to less enforcement of the rights of persons with disabilities. To illustrate this, Sweden will be used as an example. It is up to each state to implement the conventions to which they are party into their national legislation. As mentioned in the background, when Sweden ratified the CRPD no real changes were made to the legislation, as it was considered to already be in line with the CRPD. If this really was the case has been questioned already a decade ago, as well as again this year by the CRPD Committee, which held that “the Convention has not been fully incorporated into domestic Swedish law and hence does not provide a basis for legal claims in administrative and judicial procedures”.²²⁰ Evidently, it seems like Sweden has problems with the implementation of the CRPD.

For persons with disabilities living in Sweden, it might therefore be important how other judicial authorities use the CRPD as a means of interpretation. As the CRPD has not been incorporated into Swedish law, it would probably make a larger difference for persons with disabilities in Sweden if the ECtHR used the CRPD provisions in its interpretation for cases concerning access to buildings and facilities, than if the CRPD Committee would be the only body using these provisions. This could lead to a bigger impact for persons with disabilities on their access to buildings and facilities. Since the CRPD already has been ratified by Sweden, the problem lies not in the formal existence of disability rights provisions, but how they can be enforced in practice. The ECtHR could play an important role in implementing the CRPD in its practice, which it has already started doing, and therefore increase the impact of the CRPD on its Member States, thus improving the possibilities for persons with disabilities to have their rights ensured.

While on the topic, I will now end with some final reflections on Sweden and its relationship to the CRPD. The introductory chapter of this thesis touched upon the suggested changes to Swedish building regulations, and the critique these changes have received. Keeping these suggested changes in mind, it is relevant to know that the Swedish State as party to the CRPD is obliged to develop and monitor the implementation of minimum standards and guidelines for accessibility. It is also the responsibility of the State to review

²²⁰ Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on the Combined Second and Third Periodic Reports of Sweden’, para. 7 (b).

already existing accessibility laws in order to ensure any legislative gaps and fill them. Accessibility standards and guidelines should further be developed in close cooperation with persons with disabilities and organisations that represent them.²²¹ As mentioned, the proposed changes have been criticised by, inter alia, organisations for persons with disabilities, which have expressed concern for the possibly negative implications of a change in building regulations on the accessibility for persons with disabilities. Considering the obligations of the Swedish State, provided for by the CRPD, it does seem like the suggested changes are a step in the wrong direction. Another way to go would be to consider the critique by the CRPD Committee and actually incorporate the provisions of the CRPD into Swedish legislation. If that happened, whether or not the ECtHR used the CRPD for interpretation in its judgements would hopefully not matter, as persons with disabilities in Sweden would be able to invoke the CRPD in the Swedish legal system without being dependent on ECtHR case law.

²²¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014) Article 9: Accessibility.

5 Conclusion

As has been brought forward many times already in this thesis, accessibility is closely intertwined with other rights. Independent living, participation in political and public life, and participation in cultural life are all examples of rights whose fulfilment can be dependent on accessibility. Hence, accessibility for persons with disabilities is crucial for the fulfilment of other rights and is also important in its own right to ensure independence and full participation for persons with disabilities in society on an equal basis with others. The importance of accessibility explains why this thesis has tried to investigate the approach to the topic by the ECtHR.

The purpose of this thesis has been to investigate to what extent Article 8 of the ECHR and its case law regarding accessibility to buildings and facilities reflect the regulation of accessibility to buildings and facilities in the CRPD. In conclusion, this thesis has shown that there is a lack of overlap between the CRPD and the ECHR with its accompanying case law. One example to support this claim was the Court's inability to distinguish between and adequately apply concepts provided by the CRPD, resulting in a confusing judgement. Another example is the different stances on the right to participation in political life, where *Mólka v. Poland* showed that the ECtHR did not consider the right to free elections to include regional elections. This again shows a lack of overlap in comparison to the CRPD, which does not make a distinction between regional and national elections, but instead underlines the importance of ensuring the participation for persons with disabilities in political life on an equal basis with others.

The lack of overlap can to some degree be explained by the different aims and backgrounds of the two instruments. In general, the ECHR is a broad rights instrument that provides a minimum standard for fundamental rights. In contrast, the CRPD is a much newer rights instrument which is specialised in the rights for persons with disabilities and aims to provide more than just a minimum standard of rights. Therefore, it is not surprising that the case law of the ECtHR does not fully reflect the CRPD in terms of accessibility to buildings and facilities. However, the large number of ratifications of the CRPD indicate a change in the global consensus in terms of rights for persons with disabilities. This is further supported by the fact that all states that have ratified the ECHR also have ratified the CRPD, indicating that the CRPD also reflects a regional consensus on disability rights. Hence, it is not unreasonable to expect that the ECtHR should move closer to the CRPD in its judgements.

This thesis has further argued that the lack of overlap is problematic since the ECtHR's inability to accurately use the CRPD provisions as a means of interpretation complicates the enforcement of the rights of persons with disabilities. This is because the ECtHR has a stronger judicial authority than the enforcement mechanism of the CRPD, the CRPD Committee. So in conclusion,

the CRPD goes further in protecting the rights of persons with disabilities, but its enforcement system is not the most effective. In comparison, the ECHR and its case law only provides minimum rights standards, but it has a respected Court which enforces the Convention. It therefore makes a big difference for the individual trying to get their rights protected if the ECtHR takes inspiration from the specific disability rights instrument the CRPD as a sort of *lex specialis*. That way, the CRPD provisions would get a stronger practical stance through the ECtHR, increasing the Convention's impact throughout Europe. In the end, this could improve the possibilities for persons with disabilities to have their rights ensured.

Another, and more straightforward, way to increase the impact of the CRPD for individuals is through national legislation. If, for example, Sweden would incorporate the CRPD into national legislation it would ensure the possibility to invoke the Convention in national courts without the dependency on European case law.

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