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The Unfolding of Equality in International Human Rights Conventions

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This chapter is based on the premise that international human rights law (IHRL) is both morally and legally obliged to endeavor practically as well as principally to not only apply to all humans, but to have the same *relevance* for all of us. The core foundation for this premise is the recognition in IHRL that all human beings are ends in ourselves, with the same inherent dignity and worth. A secondary foundation is a meta-application of the concept of equality in IHRL. Through the metamorphosis from formal to substantive equality, IHRL demands that states parties scrutinize apparently neutral frameworks, rules, principles and practices for disparate impact on the enjoyment of valuable life opportunities among their constituencies. Logic implies that IHRL internally must do the very same soul searching it demands from domestic frameworks for implementing IHRL. The consequences of this exercise in terms of expanded concepts and principles, shifted boundaries of state obligations as well as extended ambits of rights must then be brought to bear on the negotiations of diversity specific conventions.[1]

The twin 1966 UN Covenants, the International Covenant on Civil and Political Rights (ICCPR)[2] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[3], were created with narrow norms of both equality and humanity in mind. IHRL has been playing catch up ever since.[4] The 2006 Convention on the Rights of Persons with Disabilities (CRPD)[5] is the latest in a string of diversity specific conventions adopted under the auspices of the United Nations (UN); all developed to make human rights and equality a reality in the lives of members of disprivileged groups. The Preamble (k) of the CRPD candidly recognizes the failures of IHRL in relation to persons with disabilities:

> States Parties [are] [c]oncerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world[.]

In order to chart the trajectory of IHRL towards universal relevance, this chapter identifies and explores two formative interrelated developments. The main focus is on the role played by the concept of equality and non-discrimination; the go-to concept for diversity justice in IHRL.[6] An additional

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1 This chapter is part of a larger research project investigating the role and development of the concept of equality in the negotiation, interpretation and application of diversity specific human rights conventions.

2 International Covenant on Civil and Political Rights (ICCPR). Adopted 16 December 1966. Entered into force 23 March 1976. 1999 UNTS 171.

3 International Covenant on Economic, Social and Cultural Rights (ICESCR). Adopted 16 December 1966. Entered into force 3 January 1976. 993 UNTS 3.

4 For an illustration of this process in relation to disability, see Gerard Quinn and Theresia Degener with Anna Bruce and others, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations Press 2002).

5 Convention on the Rights of Persons with Disabilities (CRPD). Adopted 13 December 2006. Entered into force 3 May 2008. 2515 UNTS 3.

6 I approach the concept of equality and non-discrimination as one concept rather than two. The division of equality on the one side and non-discrimination on the other, as principles and rights, can of course be employed in order to make distinctions. No such practice is

focus is the role played by fault lines of state obligations, such as those between the public and private sphere, between activity and passivity and between immediate and progressive obligations. The unfolding of the legal concept of equality and non-discrimination and the continuous traversing of fault lines of state obligations in IHRL, propelled forward by the negotiations of diversity specific conventions in the UN at a regular interval, is examined as having paved the way for the CRPD.

To this end, the chapter is divided into two substantive parts. Part 1 charts the road leading up to the CRPD through the diversity specific conventions that came before it. The development of the concept of equality and non-discrimination is explored, with the ambition to see if it habitually alters when it is confronted in earnest with diversity and if these alterations travel from one convention to the next. Finally, the formative features of a concept of substantive equality emerging as the sum total of the diversity specific conventions preceding the CRPD is delineated.

Part 2 analyzes how the developments of the concept of equality and non-discrimination in IHRL traveled to the final text of CRPD as "[e]quality of opportunity"[7] and how this concept compares to that of substantive equality as it emerges from previous conventions. A central feature of substantive equality is that it operationalizes that second section of the formula for equality. Substantive equality does not content itself with consistency; that relevantly similar situations be treated similarly. Instead, it upgrades human diversity as a legitimate source for claims by requiring that relevantly different situations be treated differently, and in a way that is conducive to human rights. Part 2 concludes by tracking if and how this feature of the equality formula has made its mark on the CRPD in terms of upgrading human diversity as a legitimate source for claims. Before this, a brief excursion is made into the consequences of the life conditions of members of out-groups like persons with disabilities being included in IHRL only as *an afterthought*. Focus is put to how this position discourages the recognition of requirements and experiences that do not fit the norm, in other words diversity specific claims, even in negotiations of diversity specific conventions. By doing so, an ambition of this chapter is to upgrade human diversity as the proper center around which IHRL should orbit, at least until it can truthfully claim to have the same relevance for all.

1 The Relay Race from Formal to Substantive Equality Preceding the CRPD

Part 1 traces the development of the concept of equality and non-discrimination and related fault lines of state obligations in three diversity specific UN human rights conventions preceding the CRPD: the 1965 Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[8], the 1979 Convention on the

however formative to IHRL and a division would therefore be unhelpful as a presentation tool in this chapter.

7 CRPD Article 3 (e) General principles.

8 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Adopted 21 December 1965. Entered into force 4 January 1969. 660 UNTS 195.

Elimination of All Forms of Discrimination against Women (CEDAW)[9] and the 1989 Convention on the Rights of the Child (CRC)[10]. This Part shows how these conventions amount to a continuous expansion of IHRL, driven by a combination of the concentrated attention to diversity a negotiation process entails and IHRL's promise of universal relevance. It also illustrates how the development under each convention travels to the next convention, allowing the struggle for rights by members of each disprivileged group to start at the finishing line of the one before it. Finally, the sum of expansions through these diversity specific conventions is conceptualized as, and characterized through, the formative features of substantive equality.

1.1 Expansions of IHRL and Equality through ICERD, CEDAW and the CRC

Right from the outset, and at a regular pace, the generic twin international Covenants were supplemented by diversity specific conventions.[11] Since the 1960's the two Covenants have been complemented by conventions on justice for members of particular groups, including racial justice (ICERD), gender justice (CEDAW), justice for children (CRC) and justice for persons with disabilities (CRPD).

1.1.1 The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The first diversity specific convention developed under the auspices of the UN was ICERD. ICERD was negotiated during the same period as the ICCPR and the ICESCR and adopted in 1965, a year prior to the adoption of the Covenants. Both the two Covenants and ICERD contain equality and non-discrimination standards. The entitlements and obligations in the ICCPR and the ICESCR are however mainly framed as set standards (x has the right to y), supplemented with a general prohibition of non-discrimination. ICERD, and through it racial justice, is in contrast framed entirely through the concept of equality and non-discrimination (x has the right to y on an *equal* basis with z). ICERD lists rights only as a prelude to demanding that these be enjoyed "without distinction as to race" or without "racial discrimination".[12] The titles of the conventions themselves give away these different forms for protection: The Covenants speak of "rights" while ICERD speaks of "discrimination".

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9 Convention on the Elimination on All Forms of Discrimination against Women (CEDAW). Adopted 18 December 1979. Entered into force 3 September 1981. 1249 UNTS 13.

10 Convention on the Rights of the Child (CRC). Adopted 20 November 1989. Entered into force 2 September 1990. 1577 UNTS 3.

11 Frédéric Mégret refers to this process as the "pluralization of human rights", which he defines as "the phenomenon whereby human rights, as law and ideology, has increasingly recognized the needs of specific groups or categories within humanity as worthy of a specific human rights protection". Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30(3) HRQ 494, 495.

12 ICERD Article 5.

ICERD expands the concept of equality and non-discrimination in the two Covenants. A major development in ICERD is the recognition of "special measures" aimed at "securing adequate advancement of certain racial or ethnic groups or individuals".[13] Through this, ICERD explicitly states the mandate to temporarily treat members of disprivileged racial groups better than others, in order to remedy the effects of systemic inequalities socially created in the past. The two Covenants, in comparison, contain no provisions on special measures. The tool of special measures in ICERD is explicitly temporary. Once the active, systemic and collective favouring inherent in special measures has undone the effects of previous equally active, systemic and collective disfavouring, any differential treatment ceases to be lawful.[14]

The monitoring committees overseeing the implementation of diversity specific instruments are usually the bodies to take formative interpretative leaps, as part of their efforts to make human rights reach the actual grievances of their constituencies. A central example of this is when the Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) in 1993 explicitly stated that the reference in Article 1 (1) ICERD to that discrimination can be established through its "purpose or effect" means that apparently neutral situations, rules or practices can be discriminatory if they have "an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin".[15] This recognises that a society organised amidst a reigning logic of racial inequality will continue to have patterns privileging the situations and lifestyles of the racially privileged, to the continued detriment of those who have been, and still are, racially disprivileged.

In addition to these expansions of the concept of equality and non-discrimination itself, ICERD expanded a number of fault lines of state obligations external, but intimately connected to, the protection against inequality and non-discrimination. One such major expansion in ICERD was the explicit creation of state obligations to take pro-action to combat the mechanisms and prejudice *behind* violations connected to racial disprivilege and not just its manifestations.[16] Nothing to this effect was included in the ICCPR or the ICESCR. Another fault line of state obligation shifted by ICERD was the attribution of immediate effects to violations of economic, social and cultural rights, when these violations amount to racial discrimination. This shift materialised through ICERD, as opposed to the ICESCR, not qualifying economic, social and cultural rights as subject only to progressive implementation.[17] A much-related fault line expressly traversed by ICERD was the traditional take on civil and political rights as giving rise only to negative obligations, or at least only to regulatory measures. As opposed to the ICCPR,

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13 ICERD Article 1 (4). See also Article 2 (2).

14 Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, para. 27.

15 Committee on the Elimination of Racial Discrimination General Recommendation No. 14 on article 1, paragraph 1, of the Convention, 1993, para. 2.

16 ICERD Article 7.

17 ICESCR Article 2 (1).

ICERD left no doubt that racial discrimination affecting civil and political rights gives rise to obligations of active measures.[18]

Finally, a related fault line shifted by ICERD is the explicit duty of states to curb violations between private actors and not just between the state and private actors, as given by ICERD Article 2 (1) (d).[19] Again, nothing to this effect was included in the ICCPR or the ICESCR.

1.1.2 The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW was adopted in 1979, fourteen years after ICERD. CEDAW expands on the concepts of equality and non-discrimination in the two Covenants as well as on that in ICERD. In contrast to ICERD, CEDAW requires appropriate responses tailored to those situations where some women have experiences that biologically differ from those of men: pregnancy, childbirth and maternity. CEDAW Article 12 states that "*notwithstanding* the [right to] access to health care services […] on a basis of equality of men and women [,] States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".[20] Notably, this demand is presented not as a requirement of the right to equality and non-discrimination, but as an *exception to this right*, albeit a mandated one.[21]

Much as the CERD Committee, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) uses its mandate to explicitly expand the reach of the concept of equality and non-discrimination. The CEDAW Committee extended the ambit of CEDAW to gender-based violence, although violence is nowhere mentioned in CEDAW. The CEDAW Committee used the concept of discrimination to do this, stating that "[t]he definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."[22]

1.1.3 The 1989 Convention on the Rights of the Child (CRC)

The CRC was adopted in 1989, ten years after CEDAW. The CRC does not use the concept of equality and non-discrimination to frame the injustices facing

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18 ICERD Article 2 (Chapeau).

19 "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization[.]".

20 Emphasis added.

21 Emphasis added. This exception is generally expressed in CEDAW Article 4 (2): "Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.".

22 Committee on the Elimination of Discrimination against Women General Recommendation No. 19: Violence against women, 1992, para. 6.

children. Unlike ICERD and CEDAW, the demands made in the CRC in the name of its constituency are not framed as a prohibition of members of the group being unduly disadvantaged compared to others (x has the right to y on an *equal* basis with z). Instead, CRC takes the form of set rights (x has the right to y) and spells out in detail what is due children in the name of justice, without reference to what is due or granted 'others', in this case adults. In contrast to the absolute majority of the rights in the ICCPR and the ICESCR, the set rights in the CRC are tailored to the specific requirements, situations and patterns of human rights abuses of members of a particular group: children.

Like the ICESR and the ICCPR, the set CRC rights are complemented by a prohibition of discrimination. The concept of equality and non-discrimination is thus not put to use in the CRC to frame its primary purpose: Attaining child justice. Instead, it is used in Article 2 only to prohibit different levels of enjoyment of human rights *among* children. The CRC supplements the protection of the rights of the child *qua* child with a second layer of protection against inequality on other grounds. Article 2 (1) requires states to "respect and ensure the rights set forth in the present Convention *to each child* within their jurisdiction *without discrimination of any kind*, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".[23] In doing so, the CRC recognises that each child embodies multiple forms of diversity and therefor potentially faces multiple forms of oppression. This amounts to a legal recognition that it is only in the interaction of all these factors that the situation, requirements and wishes of a child, as well as the obstacles between the child and human rights, can be properly understood and acted upon. Here the CRC, without calling it as such, introduces a general prohibition of *multiple discrimination.* The CRC thereby expands on the concept of equality and non-discrimination in the two Covenants, as well as in CEDAW and ICERD.[24]

Article 2 (2) CRC also expands the concept of equality and non-discrimination by explicitly prohibiting the discrimination of children linked to "the status, activities, expressed opinions, or beliefs of the child's parents, guardians or family members". In doing so, the CRC introduces, without calling it as such, a conception of *discrimination by association*. The expansion of equality and non-discrimination in terms of discrimination by association answers to the fact that the status and situation of children in a very real way are determined by factors as well as choices attributable to their parents, guardians and family members. By virtue of being *de facto* as well as *de jure* dependants, children tend to face whatever oppression targets those close to them, more so than adults. Through this protection against discrimination by association the CRC expands on the concept of equality and non-discrimination in the two Covenants as well as in CEDAW and ICERD.

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[23] Emphasis added.

[24] The multiple identities of children are also addressed in tailored rights: Article 22 on the child asylum-seeker or refugee child, Article 23 on the child with disabilities and Article 30 on the minority or indigenous child. This has precedence in CEDAW Article 14, addressing the situation of rural women.

1.2 Diversity Specific Conventions Continuously Expand IHRL and Equality

Expansion of the concept of equality and non-discrimination is visible under all the conventions analysed above. ICERD introduced the active privileging of the disprivileged to counteract the effects of longstanding oppression as *special measures*. CEDAW expanded the concept of equality and non-discrimination through adding an obligation to *accommodate diversity* in terms of some women's requirements relating to the biological ability to give birth. CRC in turn expanded the concept of equality and non-discrimination to harbour also *multiple discrimination*: When different axes of oppression interact and shape the discrimination targeting the individual child. An additional expansion in the CRC was the recognition of *discrimination by association*: When the discrimination of those close to the child affects the child themselves.

Fault lines of state obligations closely related to the protection against equality and non-discrimination were also expanded. ICERD created an obligation of *awareness-raising*, calling for states to engage with the ideology behind racial discrimination. ICERD also transcended *the public/private distinction* by obliging the state to counteract discrimination on behalf of individuals and organisations. ICERD in addition displaced the division between categories of rights by including civil and political as well as economic, social and cultural rights. Further on categories of rights ICERD shifted the corresponding division of the temporality of obligations by *attaching immediate obligations* also to violations of economic, social and cultural rights, when these amount to racial discrimination. In addition, ICERD left no doubt that racial discrimination affecting civil and political rights gives rise to obligations of active measures.

In addition to these conventions as such, expansions of the concept of equality and non-discrimination were effectuated by the committees overseeing their implementation. The CERD Committee interpreted the concepts of equality and non-discrimination to cover *disparate impact discrimination*: Racial disprivilege flowing from apparently neutral rules and practices. Sometimes a prior shift of a connected fault line in state obligations was a precondition for the *expansion of the ambit of rights* effectuated through interpretation by the committees. This was the case when the expansion of state obligations into the private sphere in CEDAW Article 2 (e) paved the way for the inclusion of gender-based violence by the CEDAW Committee.

IHRL did in effect continuously expand through the negotiation and interpretation of the diversity specific conventions that came before the CRPD. Each convention broke new ground, expanding the realm of the concept of equality and non-discrimination. Through these diversity specific instruments and their interpretation, general boundaries delimiting state obligation and equality were moved. As a consequence, with each instrument additional barriers came within the purview of IHRL and specific rules, practices and situations previously out of reach for IHRL become potentially unlawful.

1.3 Concentrated Attention to Diversity and the Promise of Universal Relevance Drives the Expansion of IHRL

As per above, each new convention addressing diversity justice for members of a disprivileged group marks the beginning of a growth spurt of IHRL. This expansion is provoked by the revealing light suddenly shone on the situation and experiences of members of a disprivileged group. Living conditions, denial of valuable life opportunities and patterns of abuse are exposed, visible for all to see. Racial, gender and child justice are explicitly regulated in the two generic Covenants. The former two aspects of justice as explicitly prohibited grounds for discrimination, the latter aspect as tailored rights. The point here is that it is only in the negotiations of diversity specific conventions that IHRL truly engages with the situation of members of the disprivileged group. Then, and only then, does IHRL change in a meaningful way. When the severe daily effects of disprivilege are no longer invisible, the identification of barriers to the enjoyment of rights is prompted, as is the search for solutions capable of eradicating those barriers. When the entitlements and obligations deemed necessary to address the grievances of members of the group are found *outside of the perimeters of the concept of equality and non-discrimination or on the wrong side of fault lines of state obligation*, the latter start appearing problematic and are put into question. Expansion then takes place because existing IHRL cannot hold the solutions required to end the disprivilege of members of the group.

When a required entitlement or obligation finds itself outside of the purview of existing IHRL and the question is one of human diversity the onus to shift the perimeters of the law is particularly strong. There are always valuable life opportunities and corresponding barriers knocking on the door to become recognised by the legal human rights framework, particularly as the ways of and preconditions for human life are constantly changing. What sets apart the expansion propelled forward by members of groups previously un- or ill attended to by IHRL are the disproportionately negative effects of general boundaries on members of these groups *compared to others*. The force to alter is stronger when the quarrel is not only between the frames of IHRL and alternative views of what is central to ever-changing human life, but between these frames and the central promise of IHRL to be of universal relevance to all human being, founded on all of us possessing the same worth and inherent dignity. Furthermore, accusations of inefficiency of IHRL with reference to discrepancies between rights on paper and rights in practice can be countered with the fact that implementation of diversity justice takes time. It is much more difficult for IHRL to appear legitimate when the very boundaries constructed by the system itself are the obstacles to diversity justice. This arguably is the reason why the boundaries of IHRL tend to end up shifting more easily in relation to questions of human diversity. Indeed, as argued in the introductory paragraph of this chapter, this is also the reason why they should.

1.4 The Relay Race of Equality Between Conventions

Each convention contributes with its own addition to the expansion of the concept of equality and non-discrimination, as demonstrated above. Each

convention also to a large, albeit varying, extent harnesses the victories of its predecessors. On the trajectory from formal to substantive equality, the ground gained by each disprivileged group effectively becomes the starting point for the next disprivileged group.

CEDAW reproduced the expansion of the concept of equality and non-discrimination in ICERD by explicitly covering "special measures" in Article 4 (1). As described above, such measures temporarily treat members of disprivileged groups better than others, in order to undo the contemporary effects of long-term oppression. The mandate to take special measures was also later confirmed by the committees monitoring the two Covenants; the Committee on Economic, Social and Cultural Rights (CESCR Committee) in stronger terms than the Human Rights Committee (HRC).[25] In addition to travelling from one convention to the next, expansions made by diversity specific conventions and committees are consequently harnessed by other committees. The CEDAW Committee followed the CERD Committee's example in extending discrimination to include "unjustifiable disparate impact"[26], albeit under another name: "indirect discrimination".[27] Through copying the CERD Committee, disadvantage caused by the different life patterns of women and men combined with the discriminatory privileging of male life patterns over those of women came under the purview of CEDAW. Also in this case, the HRC and the CESCR Committee later followed suit and recognised "indirect discrimination" as prohibited discrimination under their respective Covenant.[28] In addition, the

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[25] Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2 of the International Covenant on Economic, Social and Cultural Rights), 2009, para. 9: "In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved."

Human Rights Committee, General Comment No. 18: Non-discrimination, 1989, para. 10: "[A]ffirmative action may […] involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

[26] Committee on the Elimination of Racial Discrimination General Recommendation No. 14 on article 1, paragraph 1, of the Convention, 1993, para. 2.

[27] Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, note 1: "Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria [and] may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men." The CERD Committee later adopts the same terminology in L.R. v. Slovakia, Communication No. 31/2003, 7 March 2005, para. 10 (4). See also Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, Heading II B "Direct and indirect discrimination".

[28] Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, para. 10 (b): "Indirect

CEDAW Committee provided novel expansions by outlawing gender-based violence through subsuming it under the concept of equality and non-discrimination. The two mainstream Committees subsequently recognised gender-based violence as a violation of their respective Covenant; the CESCR Committee explicitly as a form of discrimination.[29]

Not only expansions of the concept of equality and non-discrimination, but also expansions of related fault lines of state responsibility travelled from one convention to the next. CEDAW followed ICERD with respect to all the fault lines of state obligations bridged by the latter. CEDAW explicitly extended its coverage to the private sphere in Article 2 (e).[30] The mainstream committees followed suit at a later stage.[31] Following the example of ICERD, CEDAW Article 5 created an explicit obligation for states to take pro-action to combat the mechanisms and prejudice *behind* the discrimination of women, and not just its manifestations. Again like ICERD, CEDAW did not replicate the division between categories of rights and the corresponding division concerning the temporality of obligations in the two Covenants. Instead, CEDAW attributed immediate effect to violations of economic, social and cultural rights, when these violations amount to gender discrimination. The CESCR Committee followed suit in 1990.[32] Similarly, CEDAW copied ICERD in leaving no doubt that

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discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination."

Human Rights Committee, Althammer et al. v. Austria, Communication No. 998/2001, 8 August 2003, para. 10 (2): "The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate."

29 Committee on Economic, Social and Cultural Rights, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 2005, para. 27: "Gender based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality."

30 CEDAW Article 2 (e): "States Parties [undertake to] take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."

31 Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, para. 11: "Private sphere[:] Discrimination is frequently encountered in families, workplaces, and other sectors of society. […] States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds."

Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 2000, para. 4: "Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights."

32 Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) 1990, para 1: "[ICESCR] also imposes various obligations which are of immediate effect. […] One of these, […] is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination[.]".

discrimination affecting civil and political rights gives rise to obligations of active measures.[33] The HRC followed suit in 2004.[34]

Moving on to the CRC, this convention does not display the same relay race effect detectable from ICERD to CEDAW. The CRC's inheritance presents more of a mixed picture, arguably because of its form of tailored standards, rather than a non-discrimination convention. For example, unlike ICERD and CEDAW, the CRC does not define discrimination, nor does it mention special measures as a way to even out the disprivileged position of children caused by historical and systematic disprivilege *vis-à-vis* adults. The Committee on the Rights of the Child (CRC Committee) has later underlined "the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination".[35] Notably, this is applied *among children*, not as a way to end the disprivilege of children *vis-à-vis* adults. Another example of the CRC Committee following earlier examples, in this case that of older Committees, is the recognition of discrimination as "overt or hidden".[36] This corresponds to what the CERD Committee earlier had referred to as "disparate impact" and the CEDAW Committee had named "indirect discrimination". Again, the CRC Committee applies this concept to conceptualize and provide protection against apparently neutral yet disprivileging rules and measures *among children*, not as a way of targeting the disprivileging relationship between children and adults.[37] Finally, the general protection against multiple discrimination included in the CRC have been followed by other committees in the interpretation of their respective conventions.[38]

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33 CEDAW Article 2 (Chapeau).

34 Human Rights Committee, General comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, paras. 6-7: "The legal obligation under article 2, paragraph 1, is both negative and positive in nature. […] Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."

35 Committee on the Rights of the Child General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6), 2003, para. 12.

36 Committee on the Rights of the Child General Comment No. 1 on Article 29 (1) The Aims of Education, 2001, para. 10.

37 Committee on the Rights of the Child General Comment No. 1 on Article 29 (1) The Aims of Education, 2001, para. 10: "Discrimination *on the basis of any of the grounds listed in article 2 of* the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities." Emphasis added.

38 Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, para. 7: "The "grounds" of discrimination are extended in practice by the notion of "intersectionality" whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention."

Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, para. 12: "Certain groups of women, in addition to suffering from discrimination directed against them as

The tailored rights in the CRC followed ICERD and CEDAW over some of the fault lines displaced by the latter, such as the expansion of state obligations into the private sphere. While there is no general recognition that the CRC applies between private individuals and organisations, many provisions in the CRC are situated in this relationship.[39] CRC stayed on the traditional side of others fault lines displaced under ICERD and CEDAW, such as the one between the manifestation of disprivilege and the ideological mechanisms behind it. The CRC consequently does not explicitly oblige states to address ideological barriers in terms of prejudice and stereotypes about children and childhood leading to rights violations.

To conclude, expansions of the concept of equality and non-discrimination as well as related fault lines largely travel from one diversity specific instrument to the next. In addition, expansions by diversity specific conventions and committees are harnessed by the other committees, including the mainstream committees monitoring the two Covenants. The HRC and the CESCR Committee have followed suit in their interpretations of their respective standards on equality and non-discrimination, examples including special measures, indirect discrimination, multiple discrimination and (in the case of ICESCR) gender-based violence as discrimination. Diversity specific displacement of related fault lines of state obligations have also made their marks on the two mainstream Committees, including the expansion into the private sphere, the attachment of immediate obligations onto discrimination relating to economic, social and cultural rights and the requirements of active measures to combat discrimination in relation to civil and political rights. On sum, the concept of equality and non-discrimination, as well as fault lines of state obligations, prove exceptional vessels for carrying expansions from one convention to the next.[40]

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women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them."

Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 2000, para 30: "Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status".

Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, para. 17: "Multiple discrimination [:] Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying."

[39] An example in point here is the obligation of the state to protect a child from violence at the hands of "parents, legal guardians or any other person who has the care of the child" in CRC Article 19.

[40] Tentatively, the format of tailored rights is not equally apt to carry forward expansions. This issue will be explored elsewhere as part of the larger question how the view of a group's requirements and experiences determines what form is chosen for the corresponding diversity

1.5 Pre-CRPD Equality Translates into Substantive Equality

ICERD, CEDAW and the CRC expanded the concept of equality and non-discrimination through the explicit inclusion of aspects such as special measures, disparate impact discrimination, multiple discrimination and discrimination by association. These, working together with expanded fault lines of state obligations such as the extension into the private sphere and onto the ideological precursors to discrimination, can conceptually be cast as *the movement from formal to substantive equality*. This movement is captured by many names in the equal rights discourse, including as the transition *from* "formal" or "legal" equality, or "equality of treatment" *to* "substantive",[41] "de facto",[42] transformative",[43] "inclusive",[44] or "multidimensional disadvantage"[45] equality, or equality of "opportunity"[46] or "result"[47].

The reference to that which equality *was* tends to have both fewer names and unanimous meaning: Equality was limited to the law consistently treating everyone the same. The only demand such formal legal equality could carry was one amounting to similar legal treatment, which in turn was only available when members of disprivileged groups could qualify as *similar* to members of privileged groups and thereby proving themselves deserving of identical legal

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specific convention: equality and non-discrimination standards *or* tailored rights. Not the choice of form of instrument per se, but the larger connection between how disability is viewed and which rights the CRPD protects was previously explored by the same author in Anna Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (MediaTryck 2014).

41 Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009, para. 8 (b); Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, para. 6; and Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, para. 8.

42 CEDAW Article 4 (1); Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, para. 6.

43 Sandra Fredman and others 'Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No. 6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities' Oxford Human Rights Hub 2017 <https://research-information.bris.ac.uk/files/139971033/CPRD_Submission_Final.pdf> accessed 13 January 2022, Title.

44 Committee on the Rights of Persons with Disabilities General comment No. 6 on Equality and Non-discrimination, 2018, para. 11.

45 Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009).

46 CEDAW Article 4 (1); CRPD Article 3 (e).

47 Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, para. 8.

benefits.[48] References to what equality is *now* are significantly more multifaceted. Sandra Fredman notes that "whereas it is clear that the right to equality should move beyond a formal conception that likes should be treated alike, a substantive conception resists capture by a single principle."[49] The mixed championing of these many principles translates into the many terms listed above, as well as yields a multitude of conceptions of each one.

As a starting point however, all understandings of substantive equality with the ambition to *mirror actual IHRL* by necessity draw on the developments charted in this Part. As the term substantive equality appears as the most generic one, it is here the chosen term to portray where the concept of equality in IHRL is heading. Such substantive equality clearly requires *more than similar treatment*. Instead, substantive equality requires alternative treatment on a group basis, when the social position of members of a group has been affected by systemic historical disadvantage (through mandating special measures). Substantive equality also requires alternative treatment on an individual basis, when persons in a disprivileged group have unmet requirements which differ from the requirements of the norm (through mandating systematic and individual accommodation of difference).

Further, substantive equality is *asymmetrical*: It focuses on those who end up on the wrong side of the privileged/disprivileged division. The creation of conventions focusing women and children (and not men and adults), is evidence to this, as is the requirement of alternative treatment to forward the collective position of members of disprivileged groups (through mandating special measures). This asymmetrical focus is buttressed by the recognition that the way society is organised is not neutral (through mandating protection against indirect discrimination). Instead, general rules and practices tend to favour the requirements of members of privileged, and not disprivileged, groups. Substantive equality consequently requires *addressing seemingly neutral rules and practices* which disproportionately disadvantage individuals from disprivileged groups.

The concept of substantive equality is *contextual*, addressing that disadvantage is structural (through mandating special measures) and, if approached as if it were not, will reproduce itself. In addition, the concept of substantive equality recognises that *identities and oppressive structures interact* in one and the same person, and requires attention to this, both in the finding of and in the remedy to inequality (through mandating protection against multiple discrimination). Finally, the concept of substantive equality recognises the *linkages between people* and extends protection to persons disadvantaged on account of the ground for disprivilege of someone close to them (through mandating protection against discrimination by association).

The overarching intuition underlying the development of substantive equality is poignantly expressed by Fredman when she notes that "the right to equality should be located in the social context, responsive to those who are

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[48] See e.g., Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, para. 8.

[49] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) ICON 712, 713.

disadvantaged, demeaned, excluded, or ignored."[50] A central feature of the concept of substantive equality directly speaking to this is its operationalization of the second section of the equality formula: The requirements that *relevantly different situations be treated differently* in a way that is conducive to human rights. When I now turn to the CRPD as the latest diversity specific convention developed under the auspices of the UN, it is with a particular focus on how the CRPD upgrades human diversity (being relevantly differently situated) as a legitimate source for rights claims.

2 CRPD Continues the Tradition of Reinventing IHRL

The CRPD was adopted in 2006, forty years after the two Covenants. It contains tailored rights covering different areas of life (like the CRC) *and* a standard of equality and non-discrimination to be applied in tandem with each tailored right and beyond (like ICERD and CEDAW). The CRPD thus emerged from its negotiations as the first of a kind; an unprecedented 'hybrid' of the forms of earlier diversity specific conventions.

This Part begins by noting the ever presence of the concept of equality and non-discrimination in the CRPD and how the victories won by earlier diversity specific conventions have travelled to the CRPD. The concept of "[e]quality of opportunity" (the valor of equality specified in CRPD Article 3 (e)) is then compared with the legacy of earlier diversity specific conventions conceived of above as substantive equality. Finally, while the CRPD has come quite some distance towards upgrading human diversity on par with human commonality as a ground for rights claims, reflections are made on room for further development.[51]

2.1 Equality and Non-discrimination Permeate the CRPD

The heavy reliance on the concept of equality and non-discrimination is clearly visible in the text of the CRPD, so much that Oddný Mjöll Arnardóttir in a seminal text fittingly referred to equality as the "leitmotif" of the CRPD.[52] Out

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50 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) ICON 712, 713.

51 In addition to the final text of the CRPD, this Part of the chapter traces the development of the concept of equality and non-discrimination and the approach to diversity specific requirements in *the negotiations* of the CRPD. Here I rely on my participation in the 4th through the 7th Session of the Ad Hoc Committee tasked with drafting the CRPD. I also refer to various documents from this process consisting of 8 sessions, as well as one session of a smaller Working Group convened between the 2nd and 3rd sessions. These documents include official documents by the Ad Hoc Committee, written proposals by negotiating parties and daily summaries of the deliberations. All these documents are available at the web site of the UN Department of Economic and Social Affairs: https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html.

52 Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with*

of the thirty three substantive provisions of the CRPD, all but 8 provisions use the language of equality and/or non-discrimination to express the entitlements and obligations they create.[53] Parallel to these, Article 5 CRPD was created as a general standard of equality and non-discrimination, to be applied in conjunction with all the tailored rights, as well as beyond.[54]

In addition, the concept of equality and non-discrimination makes up two of the General principles in Article 3 CRPD: (b) Non-discrimination and (e) Equality of opportunity. The concept of equality and non-discrimination as a key principle to guide the interpretation of every article in the CRPD is further emphasized through its frequent use in the Preamble.[55] Finally, Article 1 on Purpose expresses the goal of the CRPD in terms of equality at the very highest level by requiring the "full and *equal*" enjoyment of the rights in CRPD.[56]

2.2 The Gains of Earlier Conventions Travelled Safely to the CRPD

The standard on equality and non-discrimination in the CRPD clearly reproduces the gains in earlier diversity specific conventions in IHRL. To a large extent this was secured through the modus of the negotiations, where previous conventions, in particular CEDAW and CRC, were mined for entitlements and obligations.[57] To begin with, following ICERD and CEDAW, Article 5 (4) of the CRPD mandates collective preferential treatment of persons with disabilities on a group basis:

> Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.[58]

Disabilities: European and Scandinavian Perspectives (Martinus Nijhoff Publishers 2009) 42.

53 Exceptions are Article 8 on Awareness-raising; Article 11 on Situations of risk and humanitarian emergencies; Article 16 on Freedom from exploitation, violence and abuse; Article 20 on Personal mobility; Article 26 on Habilitation and rehabilitation; Article 31 on Statistics and data collection; Article 32 on International cooperation; and Article 33 on National implementation and monitoring.

54 This broad reach comes from CRPD Article 1 on Purpose requiring the "full and equal enjoyment of *all human rights and fundamental freedoms*". Emphasis added.

55 The Preamble uses the notion of equality and/or non-discrimination thirteen times. Preamble (a-b) ((b) uses the expression "distinction"), (c-f), (h), (k), (p), (r) and (x).

56 Emphasis added.

57 See e.g., Convention Document Legal Analysis: A Legal Commentary on the Draft Convention Text produced by the Working Group for the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, submitted after the Working Group Session (2004) Landmine Survivors Network. This document served to provide negotiating states with a comparison of the draft CRPD with existing IHRL and to raise any omissions.

58 In addition, CRPD Article 27 (1h) on Work and employment explicitly suggest the use of "affirmative action programmes".

Further like ICERD and CEDAW, indirect discrimination is not explicitly included in the definition of discrimination in the CRPD, but flows from its interpretation. Express references in previous drafts were removed in the final text of the CRPD.[59] The lack of consensus to include an explicit reference to indirect discrimination was however not due to an unwillingness to outlaw the kind of situations broadly understood as constituting indirect discrimination. Instead, this omission can be put down to a perceived lack of clarity as to the exact meaning of "indirect" and "direct" discrimination and the delineation between these two concepts.[60] To leave no doubt that Article 5 did include a prohibition of indirect discrimination, the operative phrasings of ICERD and CEDAW ("purpose or effect") was included in the definition of discrimination in Article 2 on Definitions. In addition, this inclusive intent came through as a reference to that the CRPD prohibits "all forms of discrimination":[61]

> "Discrimination on the basis of disability" means 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.[62]

The CRPD also harnessed the developments of the concept of equality and non-discrimination in the CRC. The CRPD reproduces the general protection against multiple discrimination in the CRC, through demanding in Article 5 (2)

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59 CRPD Draft Article 7 (2b) on Equality and non-discrimination, Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Annex I to Report of the Working Group to the Ad Hoc Committee, 27 January 2004, p. 13. In the text of the CRPD as it stood after the 7th session, the reference to "direct and indirect discrimination" is in brackets, indicating lack of consensus on its future inclusion. Draft Article 2 on Definitions International Convention on the Rights of Persons with Disabilities, Working Text, 7th Session, 2006, Annex II to Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its 7th Session, 13 February 2006, p. 8.

60 See e.g., a footnote to CRPD Draft Article 7 (2b) on Equality and non-discrimination in the Draft Convention by the Working Group: "Some members of the Working Group considered that the Convention should have a specific reference to both direct and indirect discrimination. Other members considered that the distinction between the two forms of discrimination was not sufficiently clear." Draft Comprehensive and Integral International on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Annex I to Report of the Working Group to the Ad Hoc Committee, 27 January 2004, p. 13, note 24.

61 See e.g., a footnote to CRPD Draft Article 7 (2b) on Equality and non-discrimination in the Draft Convention by the Working Group: "[Members of the Working Group who opposed] a specific reference to both direct and indirect discrimination […] considered that both a reference to "all forms of discrimination" in paragraph 1, and the reference to the "effect" of discrimination in paragraph 2(a), would cover the concept of indirect discrimination." Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Annex I to Report of the Working Group to the Ad Hoc Committee, 27 January 2004, p. 13, note 24.

62 Emphasis added.

that persons with disabilities be protected against discrimination "on all grounds":

> States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination *on all grounds.*[63]

Through Preamble (p), the CRPD is also the first UN convention to explicitly name this aspect of discrimination as "multiple or aggravated forms of discrimination".[64]

> States parties are [c]oncerned about the difficult conditions faced by persons with disabilities who are subject to *multiple or aggravated forms of discrimination* on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status[.][65]

In contrast to the CRC, there is no explicit protection against discrimination by association in the CRPD.[66] It was however put forward in the negotiations that the wording "discrimination on the basis of disability" (as opposed to discrimination of *persons* with disabilities) in the definition quoted just above purposefully signalled a broader inclusion of beneficiaries under the protection offered by Article 5, potentially including those close to persons with disabilities.[67]

The concept of equality and non-discrimination in the CRPD also includes a 'first' when it comes to explicit general recognitions of forms of protection against discrimination. Article 5 (3) requires states to provide "reasonable accommodation"[68], which is defined in Article 2:

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63 Emphasis added.

64 The CRPD also reproduces the form of multi-focus tailored rights in the CRC through Article 6 on Women with disabilities and Article 7 on Children with disabilities.

65 Emphasis added.

66 See e.g., proposals of text to this effect by Australia during the 3rd session, Compilation of Proposed Revisions and Amendments Made by the Members of the Ad Hoc Committee to the Draft Text Presented by the Working Group as a Basis for Negotiations by Member States and Observers in the Ad Hoc Committee, Annex II to Report of the 3rd Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 9 June 2004, 3rd session, p. 18. The inclusion of text to this effect was proposed by IDC as late as the 7th session. See Daily Summaries, 31 January 2006, 7th Session. The inclusion of explicit text to this effect however met with some opposition. During the 4th session Canada is recorded as stating that "[i]t opposes the proposal of Australia to reference "or by association with a person with a disability" in 7(2)(b) as it may detract from the ultimate focus of the convention which is PWD [persons with disabilities] and not families or support persons". Daily Summaries, 25 August 2004, 4th Session.

67 Discrimination "against" persons with disabilities was recognised as "narrower" than "discrimination on the basis of disability", the term which eventually was chosen in Article 5 (2). See statement by New Zealand, Daily Summaries, 2 September 2004, 4th session.

68 CRPD Article 5 (3): "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

> "Reasonable accommodation" means 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.

The gist of the concept of reasonable accommodation is that it creates a right for an individual to demand alterations to the social context, be it the built environment, modes of communication or any other standard for conducting life. This right requires its direct translation into an enforceable demand in the national laws of States parties. While it is heavily qualified (measures asked for must be "necessary" and not impose "a disproportionate or undue burden" on the provider), it amounts to a principled recognition of the right to adjustments, to *differential treatment qua individual,* as part and parcel of the prohibition of discrimination.

The right to reasonable accommodation was recognized as part of the right to non-discrimination on the basis of disability already in 1994 by the CESCR Committee.[69] This explicit recognition by a UN monitoring committee was indeed one of the reasons why the explicit demand for reasonable accommodation in the CRPD found consensus in the negotiations.[70] A related precedent is the explicit recognition in CEDAW that differential treatment related to the experience of pregnancy, childbirth and maternity does not amount to the discrimination of others.[71] A notable difference here is that in the CRPD, alternative treatment is cast as *required* by the concept of equality and non-discrimination, while CEDAW only safeguards against the concept of equality and non-discrimination casting alternative treatment as discrimination of others (men and women who do not experience pregnancy, childbirth or maternity).

On sum, the concept of equality and non-discrimination in the CRPD harvests much of what was sown under earlier conventions if not explicitly, so with a clear intent of inclusion on behalf of negotiating states. The notable advancement of the concept of equality and non-discrimination in the CRPD is the explicit recognition of a right to reasonable accommodation - a right to beneficial treatment accessed through calling down one's difference from the norm. While the explicit right to reasonable accommodation is a noticeable leap in the expansion of the concept of equality and non-discrimination in IHRL, and one of great conceptual as well as practical importance, it should be noted, as is above, that it is not without precedence. Consequently, I concur with Arnardóttir's point that the standard of equality and non-discrimination in the CRPD is the "legitimate child" of earlier conventions, made by her to illustrate precisely the linear heritage of the CRPD from these conventions.[72]

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69 Committee on Economic, Social and Cultural Rights General Comment No. 5 on Persons with Disabilities, 1994, para. 16.

70 For attention drawn to this General Comment see e.g., Daily Summaries, 31 January 2006, 7th session.

71 This is generally expressed in CEDAW Article 4 (2): "Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

72 Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009)

Moving on to central fault lines of state obligations related to the protection against inequality and discrimination, the CRPD profits from the ground gained by pre-existing diversity specific conventions. To begin with, the CRPD copies verbatim from CEDAW the obligation to curb discrimination by *private actors.*[73] The CRPD also harnesses expansions in ICERD and CEDAW which sidestepped the CRC, such as the explicit obligations in the CRPD's Article 8 on Awareness-raising to pro-actively combat the *stereotypes and prejudice* laying behind discrimination of persons with disabilities. In relation to the temporality of obligations, the CRPD's Article 4 (2) on General obligations explicitly allows for the progressive realization of economic, social and cultural rights, much like the CRC. However, consensus on Article 4 (2) not applying to obligations of equality and non-discrimination, such obligations being instead *immediate,* emerges crystal clear from the negotiations of the CRPD.[74] This means that the immediate effect of obligations to eliminate inequality and discrimination in ICERD and CEDAW is effectively reproduced in the CRPD.

The above illustrates that these fault lines were already destabilized by the diversity specific human rights conventions preceding the CRPD. What is noticeable however, is how the space thusly made was put to work in the negotiations on the tailored rights in the CRPD, arguably like never before. As Frédéric Mégret puts it, the CRPD "rides roughshod over the many neat divisions, both theoretical and practical, upon which human rights are often implicitly premised."[75] This being so, Part 1 of this chapter draws attention to how these divisions were in fact already quite blurry at the outset of the negotiation of the CRPD, thanks to earlier diversity specific conventions and monitoring committees.

2.3 "Equality of Opportunity" in the CRPD Reflects Substantive Equality[76]

The contents of the standard of equality and non-discrimination in the CRPD presented in the previous section make clear that the CRPD reflects a substantive

47. Arnardóttir's text approaches the legal developments in focus for this chapter as closely connected to developments in legal theory and analyses them through a framework of four legal eras.

73 CRPD Article 4 (1) (e): "To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise[.]". The only changes is the substitution of "on the basis of disability" for "against women".

74 For deliberations amounting to consensus on that this was implicit in what became Article 4 (2), see Daily Summaries, 30 August 2004, 4th Session, ending with the Chair of the Ad Hoc Committee concluding that "[t]here is an obligation for States to implement […] as they are able. Nevertheless, there are other obligations in the convention that countries do need to implement immediately, such as non-discrimination."

75 Frédéric Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights?' (2008)12(2) Int. J. Hum. Rights 261, 274. This article provides a thorough and analytical account of this displacement seen through the spectrum of entitlements and obligations in the CRPD.

76 This section is partly based on Anna Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (MediaTryck 2014) 226-237.

concept of equality, as understood in this chapter. This is visible through the concept of equality and non-discrimination in the CRPD being clearly *asymmetrical* in its approach, protecting as it does the rights of persons with disabilities rather than providing a neutral protection for all against 'discrimination based on physical, mental, intellectual or sensory functioning'. Protection is reserved for the rights of those who, as a rule, end up on the wrong side of the division between privilege and disprivilege: persons with disabilities. This asymmetrical approach is further reflected in the provision of specific measures in Article 5 (4), calling for preferential *alternative treatment* of persons with disabilities on a group basis in areas of life where systemic historical disadvantage has left persons with disabilities collectively in exposed social positions. Alternative treatment is also required on an individual basis in the form of reasonable accommodation in Article 5 (3), when a person with disabilities has unmet requirements that differ from the requirements of the normate.[77] In line with the concept of substantive equality, equality and non-discrimination according to the CRPD is thus not limited to simply demanding the extension to persons with disabilities from now on of treatment moulded after the requirements of persons without disabilities. Instead, the effects of previous injustices must be reversed, and exceptions have to be made when societal structures do not work for individuals with disabilities.

In addition to the right to an exception, the concept of equality and non-discrimination in the CRPD, by prohibiting indirect discrimination in Article 5 (1-2), also requires the whole sale change of systems, rules and practices that *appear neutral* but unduly favour persons without disabilities. Also, through Article 5 (2) the concept of equality and non-discrimination requires attention to that identities and oppressive structures *interact* in one and the same person (multiple discrimination), as well as arguably extends protection to when the effects of the disadvantages of a person with disabilities extends to someone *close to them* (discrimination by association). Finally, as part of the recognition of oppressive structures, Articles 8 on Awareness-raising requires *pro-active measures* of states to target ideological patterns contributing to the inequality and discrimination of persons with disabilities.

The CRPD, like earlier conventions, does not explicitly refer to equality as substantive equality. The text of the CRPD instead uses two other terms to specify equality: "[e]quality of opportunity" as a general principle in Article 3 (e) and "de facto equality" in article 5 (4) portraying the goal of "[s]pecific measures". While these two terms are not defined in the CRPD, proposals in the negotiation confirm that "equality of opportunity" as well as "de facto equality" were understood as *demanding standards*, in line with the meaning attached to substantive equality in this chapter. The following proposal by India illustrates this point:

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[77] This term was coined by Rosemarie Garland Thomson, in Rosemarie Garland Thomson *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York Columbia University Press 1997) 8. "The term *normate* usefully designates the social figure with which people can represent themselves as definite human beings. Normate, then, is the constructed identity of those who, by bodily configurations and social capital they assume, can step into a position of authority and wield the power it grants them." Emphasis in original.

> "[E]quality of opportunity" means the condition in which society treats each individual with a disability as a person equal in dignity and rights and removes any restrictions or limitations by appropriate means, adjustments and allocations, and by affirmative action, reasonable accommodation or "special measures" and provides enabling environments to ensure de facto equality between persons with and without disability.[78]

Some statements in the negotiation indicated a weaker understanding of "equality of opportunity". During the 4th session of the negotiations, Canada proposed that ""substantive equality" should be added after "equality of opportunity" because equality of opportunity should not be interpreted as sameness of treatment".[79] It is notable that while this implies that Canada believed that "equality of opportunity" may reasonably be understood as entailing only "sameness of treatment", Canada's intention was to make sure that the concept of equality and non-discrimination in the CRPD *not* be thusly limited.

Irrespective of the illustrations provided by these positions taken by negotiating states, the *traveaux preparatoire* remain a supplementary means of interpretation, to be turned to only when application of the general rule of interpretation in Article 31 in the Vienna Convention on the Law of Treaties "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".[80] A contextual interpretation of Article 3 (e) yields beyond doubt that "[e]quality of opportunity" in the CRPD for all intents and purposes mirrors the meaning attributed to substantive equality in this chapter. As elaborated above, this includes, but is not limited to, Canada's call for extending the concept of equality beyond "sameness of treatment".

Perhaps the demanding understanding of "[e]quality of opportunity" broadly displayed in the negotiation is partly due to a heritage from the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.[81] This was

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78 Proposal by India, Various contributors, Compilation of Proposals for Elements of a Convention, Working Group Session, 15 January 2004, p. 44. Mexico attributed a similarly demanding meaning to "equality of rights and opportunities" in stating that "[i]n order to guarantee equality of rights and opportunities for persons with disabilities, States Parties shall promote, among others, positive or compensatory measures". Proposal by Mexico, Various contributors, Compilation of Proposals for Elements of a Convention, Working Group Session, 15 January 2004, p. 76.

79 Daily Summaries, 24 August 2004, 4th Session.

80 Vienna Convention on the Law of Treaties (VCLT). Adopted 23 May 1969. Entered into force 27 January 1980. 1155 UNTS 331. Article 32 Supplementary means of interpretation.

81 Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Adopted by the UN General Assembly 20 December 1993. UN doc: A/RES/48/96. The European Disability Forum (EDF) called for attention to the Standard Rules in the Working Group: "A definition of equal opportunities needs also to be included in the Convention. Any such definition should be based on the definition included in the UN Standard Rules." Various contributors, Compilation of Proposals for Elements of a Convention, Working Group Session, 15 January 2004, p. 40. A link between the CRPD and the Standard Rules is created through CRPD Preamble (f) "[r]ecognizing the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes

the reigning UN disability rights document before the CRPD and conceptually nudges the concept of equal opportunities towards 'whatever it takes to create disability justice':

> The term "equalization of opportunities" means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. […] The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.[82]

The upshot is that the concept of equality and non-discrimination, captured in General principle 3 (e) CRPD as "[e]quality of opportunity", by virtue of the explicit contents of Article 5 on Equality and non-discrimination, mirrors the concept of substantive equality as understood in this chapter. Indeed, so do the intentions of the states negotiating the CRPD.

2.4 CRPD Gravitates towards Upgrading Human Diversity

A central feature of substantive equality is that it operationalizes the second half of the equality formula; *to treat differently those who are differently situated.* Substantive equality consequently holds an obligation of and a claim to alternative treatment when one has requirements which are different from those systematically and routinely accommodated by social organization. In the following, two expansions to this effect in the CRPD are styled as creating such obligations and claims: reasonable accommodation and specific measures.

2.4.1 Reasonable Accommodation in the CRPD: Difference as A Road to Rights

From the perspective of upgrading diversity, explicitly prohibiting denial of reasonable accommodation as a form of discrimination in Article 4 (3) is central. Difference from the norm is no longer something that only can serve those who seek to rationalize and legitimize disadvantage. Instead, difference can be held up as a badge to demand change. Conceptually, this is the coming of age of the rights protecting potential of the second section of the formula for equality: Relevantly different situations should be treated differently *to the advantage* of those different from the norm.

It is undeniable that the explicit demand in CRPD for reasonable accommodation across all rights makes a serious dent in any unspoken remnants of formal equality. It establishes, in treaty text, that 'differentiation', or 'differential treatment' is not a synonym for inequality and discrimination -

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and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities[.]".

82 Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Adopted by the UN General Assembly 20 December 1993. UN doc: A/RES/48/96, Introduction, paras. 24- 25.

uniform treatment can just as easily as differential treatment violate the right to equality and non-discrimination.[83] To revert to the revealing point made by Canada in the negotiations mentioned above: If "equal" is meant to convey adherence to the right to equality and non-discrimination, then the term "equal treatment" can no longer be understood and employed to connote "same treatment". The answer to the question if a situation or treatment is "equal" or "unequal" according to the CRPD thus lies in the choice between similar and different treatment; the answer is no longer available *a priori.* From this flows that the concept of equality in the CRPD explicitly balances the right to be treated the same as others with the right to be treated differently from others. "Equal treatment" entails starting from the requirements and realities of persons with disabilities and finding ways to stop rules and practices from causing disproportionate disadvantage, be this through similar or different treatment.

Through the concept of reasonable accommodation, the CRPD forefronts needs different from those of the normate like no other convention before it. Some precedence for this can be found, such as the explicit recognition in CEDAW that differential treatment related to the experience of pregnancy, childbirth and maternity does not amount to the discrimination of others. However, this demand was presented in CEDAW *not as a requirement* of the right to equality and non-discrimination, but as an *exception*, albeit a mandated one.[84] While CEDAW thus only went as far as saying that the fulfilment of requirements particular to (some) women are *not* discrimination against others, the standard of equality and non-discrimination in the CRPD holds that failing to fulfil requirements particular to (some) persons with disabilities *amounts to* inequality and discrimination. From the point of view of bolstering non-conformity with the norm as a ground for demands from members of out-groups, the CRPD thus significantly improves on CEDAW.

2.4.2 Specific Measures in the CRPD – Downplaying the Priority of Socially Created Requirements

Moving on to the mandate to take "specific measures" in CRPD Article 4 (4), this also represents a strengthening of the recognition of human diversity on par with human commonality. At face value, it may seem questionable to bring up the mandate to take specific measures as an example of the CRPD upgrading claims stemming from an individual diverging from the norm. Indeed, both the CERD and CEDAW Committees emphasize that the function of the mandate of

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[83] For an example of the use of differentiation as synonymous with inequality and discrimination see the elaboration of the HRC on what does *not* amount to discrimination (here equated with "differentiation"): "Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." Human Rights Committee, General Comment No. 18: Non-discrimination, 1989, para. 13.

[84] CEDAW Article 4 (2): "Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity *shall not be considered* discriminatory." Emphasis added.

"special measures" as they call it, is to remedy *requirements that are socially created* and in no way inherent to individuals.

CEDAW addresses requirements stemming from socially created injustice in Article 4 (1) and requirements stemming from the features of individual women, such as pregnancy, in Article 4 (2). The CEDAW Committee, in a General Recommendation elaborating the importance of special measures according to 4 (1), underscores the difference between these:

> There is a clear difference between the purpose of the "special measures" under article 4, paragraph 1, and those of paragraph 2. The purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary nature. […] Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review.[85]

According to this logic, the latter category of requirements is due to that (some) women carry and bear children, a biological fact. That *requirement as such* will not disappear through it being met. In contrast, the former category of requirements, created by social injustice, will disappear once these requirements are met. For this reason, the mandate to take special measures *is temporary:* Once the consequences of the social injustice created over centuries is eradicated, the need for and thus the mandate to take special measures disappears.

The CERD Committee has likewise issued a General Recommendation underscoring the significance of "special measures", taking pains to emphasize the importance for states of clearly distinguishing such "special measures" from "permanent rights".[86] There is no question of race creating diversity specific requirements which will remain once society achieves racial justice. The impetus for the CERD Committee to emphasize this arguably goes beyond stating the obvious. Instead, it is testament to the push to distance even the requirements of different treatment as far away as possible from ideas of differences inherent in individuals.

The unfulfillment of permanent requirements and the unfulfillment of the requirements of special measures *both* amount to unjust responses to diversity in the eyes of IHRL; lest fulfillment would not be included as human rights obligations. Even so, a line is drawn between them, and socially created requirements are bolstered by the connotation that they are unrelated to human diversity.

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[85] Committee on the Elimination of Discrimination against Women General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 2004, paras. 15-16.

[86] Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, 2009, para. 15.

The CRPD intentionally diverts from protocol here, in a way which renders the mandate to take "specific measures" an example of upgrading claims stemming from an individual diverging from the norm. As opposed to ICERD and CEDAW, a conscious decision was taken in the negotiations of the CRPD *not to include a temporal limitation* in the call for specific measures in Article 5 (4). This was due to concerns that such a sunset clause would call into question the right to fulfilment of needs specific to persons with disabilities by virtue of impairment.[87] By omitting the temporal aspect of specific measures the CRPD blurs the line delineated above, in direct opposition to CEDAW and ICERD. To the CRPD all disadvantage is socially created and unjust, irrespective of what the underlying requirement can be traced to. In this way the CRPD gravitates towards forefronting human diversity in a way that earlier conventions do not, implicating that related requirement are as legitimate and urgent as any requirements created by social injustice.

2.5 Apprehensiveness towards Diversity and the Inbuilt Reproduction of the Norm in Negotiating Diversity Specific Conventions

Calling down difference has traditionally not been a workable route to rights, not in national law nor in IHRL. Being perceived as different from the norm has instead led to IHRL being regarded as irrelevant. The long-time coming inclusion of persons with disabilities in IHRL is testament to this.[88] Not until members of an out-group are perceived as similar enough to the norm to be 'human right material', do the gates of IHRL open wide enough to be more than a theoretical promise.

Once the negotiations of the CRPD commenced, the tables had however turned. Now, it was presumably up to IHRL to prove its relevance to persons with disabilities, and no longer the other way around. The distance between the requirements and situation of the out-group (persons with disabilities) and those of the in-group (the IHRL normate) reasonably now indicated the expansions that IHRL had to make in order to have the same relevance for all. Forefronting difference should at this point have promised to serve as the empirical and legal basis for the expansion of IHRL, and no longer as threatening to counteract the inclusion of persons with disabilities in the IHRL framework. Along these lines of reasoning, once it was decided to create the CRPD, it appears to have been by calling on different, as opposed to norm-conforming experiences, that the shortcomings of IHRL were to become visible and, hopefully, amended.

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87 See e.g., proposal by Japan before the 4th Session, making an analogy to the protection of maternity rights in CEDAW 4 (2): "As with the protection of maternity in CEDAW article 4.2, which is not considered a temporary measure, there are similarly valuable measures in disability policy that should be maintained." This was opposed by Korea, calling for "keeping the discontinuance clause; otherwise the measures could be "too special". Daily Summaries, 24 January 2005, 5th session.

88 For an illustration of this process in relation to disability, see Gerard Quinn and Theresia Degener with Anna Bruce and others, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations Press 2002) pp. 29-240.

After finally being let in the gates of IHRL through emphasizing similarity to the norm, the calling down of difference however easily appears counterintuitive. This is expressed in the following quote from Sweden in the negotiations, emphasizing that "the main goal is to get rid of the notion that PWD [persons with disabilities] are different than other people."[89] Similarity had, after all, been the ticket to inclusion in the human rights framework. Similarity had also been the only available line of defense against rights restrictions imposed on persons with disabilities by reference to the difference of impairment, including guardianships, institutions, segregated schooling and denial of political rights. In a norm-privileging world, it never seems without risk to emerge as 'different' from the norm, not even in the negotiations of a diversity specific convention in IHRL.

Another reason that calling attention to difference may not have sat quite right in the negotiations of the CRPD is the widespread contention that the unitary experience of humans is the moral and ideological foundation of IHRL. Against this backdrop, calling on diverse experiences is likely to appear a slippery slope towards eroding this legitimacy and standing of the framework of IHRL per se.[90] Calling attention to the failure of IHRL to accommodate diversity would be avoided due to similar concerns.

Lifting the gaze for a moment, one wonders if it would have been possible for the CRPD to be created outside of the 'similar or different spectrum' within which the account above appears trapped. Is it possible for the negotiations of diversity specific conventions in IHRL to sidestep what Martha Minnow named the "dilemma of difference": When the very act of calling attention to difference in order to address unjust consequences of difference in itself has adverse effects on those designated as different?[91] If the negotiations were to have taken their starting point firmly in the human requirements and experiences of persons with disabilities *qua humans*, could this not, at least in theory, temporarily have removed the requirements and experiences of the normate from view? Being thusly freed from a comparator, again in theory, would have made it not only irrelevant but nonsensical to cast the human requirements and experiences of persons with disabilities as 'similar' or 'different'.

The requirements, experiences and patterns and instances of oppression of persons with disabilities were conveyed to the negotiating parties through the presence of the International Disability Caucus (IDC), a coalition of organizations of persons with disabilities. Could the knowledge imparted not have been approached as a blueprint for 'human' and been directly transformed

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89 Daily Summaries, 7 January 2004, Working Group Session.

90 Mégret makes this point succinctly: "To summarize my intuition here: I see human rights as fundamentally making a point about the sameness and unity of human beings. From these ideas are derived those of equality and universality. It is this sameness, this belonging to a unique species, which forms the hard core of human rights normative ambition. Group-specific treaties conversely, if my hypothesis is correct, can be seen as at least partly making a point about difference and pluralism. Difference and pluralism are obviously in tension with the ideas of equality and universality." Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30(3) HRQ 494, 496.

91 Martha Minow, *Making all the Difference*: *Inclusion, Exclusion, and American Law* (New York Cornell University Press 1990) Chapter 2.

into entitlements and obligations capable of translating into reality the overarching principles of IHRL such as dignity, liberty, security and social recognition?

Returning abruptly from this thought experiment to the negotiations of the CRPD, these were from the outset firmly shackled to what, and who, had gone before them. The concept of 'human' was so to speak taken, and all that was left for persons with disabilities was to seek to join it, to be 'human too'. Practically, this played out by earlier conventions being the point of departure for every issue put on the table in the negotiations. The ICESCR, the ICCPR, ICERD, CEDAW and the CRC in particular were scrutinized for language to be re-used. The human requirements and experiences of persons with disabilities were thus in constant communication with the norm. A central characteristic of every requirement and experience became its 'similarity to' or 'difference from' those of the IHRL normate harbored in older conventions. This anchoring practice was built into the negotiation process by the very mandate of the Ad Hoc Committee creating the CRPD: "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, *based on* the holistic approach in *the work done* in the fields of social development, human rights and non-discrimination".[92] In addition, the unwillingness of states to explicitly take on obligations not unequivocally uttered under the conventions they were already bound by, twinned with the many headed fear of difference explored just above, meant that every discussion automatically anchored itself to pre-existing law, trying to stay as close as possible to the language of older conventions. While the onus in theory was on IHRL to wrap around the actual grievances of persons with disabilities and not the other way around, the actual process was otherwise wired.

Irrespective of this set-up, many gains were made in the CRPD, as elaborated above from the perspective of equality and non-discrimination. While earlier IHRL did set norm-conforming frames, the reality check provided by the IDC made its mark on the negotiations.[93] The principled positions and level of detail in the CRPD hold promises that the requirements of persons with disabilities, be they 'similar' or 'different', now stand a better chance of realization through implementation of IHRL.

On some level, as human beings, many requirements and experience are of course common to us all. We all covet and require respect for dignity, liberty, security and social recognition. The abstract life opportunities in each article have some relevance to all: Even the right to play, cast as a typical child right, is valuable for adults. Indeed, this 'whole life' approach of IHRL has been seminal in combatting limiting essentialized and stereotypical roles assigned members of disprivileged groups such as the designation of women predominately as mothers and persons with disabilities predominately as health care patients. The point here is not to deny or devalue any of this, or to essentialize persons with

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92 Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, General Assembly Resolution 56/168 of 19 December 2001, UN doc A/RES/56/168, para 1.

93 The Chair of the Ad Hoc Committee negotiating the CRPD estimated at its adoption that as much as 70% of the final text originated from the IDC. Stefan Trömel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2009) 1 Eur YB Disability L 115, 117.

disabilities or members of any other out-group. Instead, the drive for what risks to appear as harping on about difference is to recognize that the force to appear 'similar', to confirm to the norm, is built into even the system of negotiating diversity specific IHRL conventions. This system produces some requirements and experiences as 'different', which in turn lands them, and the reality they reflect, with a heightened burden of proof. The ambition of this chapter is, by recognizing this, to shift this burden of proof from members of out-groups onto *the system that has failed them*: To place the problem where it belongs.

3 Conclusions

The narrow norms of humanity and equality accommodated by the two Covenants forced the negotiations of each diversity specific convention that followed to expand IHRL. Unable to turn away from the severe denial of life opportunities forced upon the members of each disprivileged group, IHRL had little choice but to expand further through each negotiation process. Anything less would have been irreconcilable with the foundational premise of IHRL: One and all human beings possessing the same value and inherent dignity. In addition, the expansion of the concept of equality as applied to states requires IHRL to scrutinize its own apparently neutral concept and boundaries for disparate impact on members of disprivileged groups.

The concept of equality, as well as generic expressions of state obligations, make exceptional vessels for transporting the expansions of IHRL from one convention to the next. Against this background, the substantive equality and shifted fault lines in the CRPD emerge with clarity as a relay baton handed from earlier diversity specific conventions. While the CRPD admittedly grabbed this baton and ran head down with it to flesh out what equal human rights meant from a disability perspective, this is in no way a 'new' or 'exceptional' phenomenon. It is part of the constant expansion of IHRL when faced with its less than universal relevance.

The negotiations of all diversity specific conventions, by virtue of being in effect an afterthought, are premised to reproduce status quo. It does not appear doable to circumvent the 'dilemma of difference'. This did however not stop the CRPD from protecting claims grounded in diversity, such as the right to reasonable accommodation. The contribution of the CRPD to the expansion of IHRL is square in the second section of the equality formula; *to treat differently those who are differently situated*. The CRPD makes good strides in demanding that IHRL recognize humanity as diversely situated *and* identically entitled. CRPD Article 3 (d) General principles offers guidance here, by explicitly requiring "[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity[.]". Difference will remain a double-edged sword – susceptible to justifying both rights enhancements and rights restrictions. However, as injustice will not end without first becoming visible, the sword must be wielded still. IHRL's promise of universal relevance will not be satisfied with less.