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# Harmonisation and Cross-Fertilisation of Socio-Economic Rights in the Human Rights Treaty Bodies: Disability and the Reasonableness Review Case Study

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**Abstract:** In light of the recent adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), there is a necessity for harmonisation among the treaty bodies, particularly in the area of socio-economic rights. The equality norm in the CRPD, including the duty to reasonably accommodate, is an important facilitator of socio-economic rights. This article sets forth the opportunities for cross-fertilisation of socio-economic rights, and disability rights in particular, at the level of international human rights law and beyond, as well as the potential that exists for social change at the domestic level. The CRPD Committee and the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) will undertake the task of assessing measures adopted by States related to alleged violations under the optional protocols and will determine compliance with treaty obligations under the State reporting procedure. In that regard, a framework of “reasonableness review” is proposed, which could provide the opportunity to merge individual rights’ violations with broader issues of socio-economic inequalities and could also lead to coherent implementation of the normative content of socio-economic rights at the domestic level.

**Keywords:** disability; equality; reasonable accommodation; progressive realisation; socio-economic rights; reasonableness review

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## 1. Introduction

There has been a marked shift towards harmonised and integrated human rights treaty body working methods at the international level. The treaty body reform and strengthening process has been ongoing for some time now, with arguably limited success. In light of the established, and expanding, system of individual communications under the core international human rights treaties, the “necessity of harmonization, consistency and coherence of jurisprudence” is deemed to be of “paramount importance” [1]. Nowhere does this statement ring truer than in the realm of disability rights. Rowena Daw notes that “disability was, until very recently, the forgotten dimension of human rights and went unacknowledged as a subject for a right to equality” ([2], p. 8). This situation has changed substantially with the entry into force of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the establishment of the right to adjudication and remedy for claims under the Optional Protocol to the CRPD (OP-CRPD).

The CRPD is a progressive human rights treaty, which endorses a substantive and transformative model of equality. Substantive equality is concerned “with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience” ([3], para. 7). Transformative equality seeks to target the underlying

structural inequalities that hinder the full enjoyment of rights by disadvantaged groups. Within the realm of its substantive equality norm, the CRPD includes the duty to reasonably accommodate persons with disabilities [4]. Reasonable accommodation entails positive measures—adaptations and modifications to the environment and to established practices—to address the unique needs of persons with disabilities in order to ensure the equal right to education and health, among others. The duty to reasonably accommodate persons with disabilities spans all human rights in the CRPD, both civil and political, as well as economic, social and cultural rights.

The equality norm is an important facilitator of socio-economic rights in the context of marginalised groups. Furthermore, socio-economic rights are “an integral means by which systemic disadvantage and inequalities are addressed” ([5] p. 220). Bruce Porter argues that “substantive equality requires a recognition that to realise an equal right to effective remedies for all, [economic, social and cultural rights] adjudication may have to meet different needs and develop new approaches” ([6], p. 41). This article contends that “reasonableness review” is one such approach, which could help to advance the realisation of socio-economic rights for disabled persons. Reasonableness review has evolved at both the national and the international level, with a view to providing a mechanism for adjudicating on the appropriateness of State action or inaction in realising progressively socio-economic rights. It seeks to ensure that the content of socio-economic norms is adjudicated upon in relation to the marginalised group in question, rather than basing an analysis on technical or abstract indicators and benchmarks.

This article sets forth the inter-connectedness of treaty body adjudication and the opportunities for harmonisation and cross-fertilisation of disability rights, and socio-economic rights more generally, at the level of international human rights law (and beyond, at the regional level). This article also addresses the potential that exists for a transformative human rights framework and for social change at the domestic level if the human rights treaty bodies work together towards the realisation of socio-economic rights, particularly in the context of persons with disabilities. The focus of this paper is on the CRPD and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the procedural mechanisms established under the two new optional protocols to those treaties. Those procedural mechanisms harbour the potential to advance disability discrimination and reasonable accommodation claims, provided that such claims are dealt with coherently by the respective treaty bodies. The CRPD Committee and the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) will both undertake the important task of assessing the measures taken by States related to alleged violations under the optional protocols and will determine compliance with treaty obligations under the State reporting procedure.

The core concern of this paper is to set forth the various criteria inherent in the duty to provide reasonable accommodation, contained in articles 2 and 5(3) of the CRPD, and to apply those criteria more generally to a framework of reasonableness review of socio-economic rights. The duty to accommodate, and the obligation to realise progressively socio-economic rights to the maximum of available resources, pursue different objectives—the reasonableness standard concerns the implementation of economic, social and cultural rights in general and the duty to provide reasonable accommodation relates to the prohibition of discrimination against disabled people. Notwithstanding this, both obligations reflect, on the one hand, the needs and interests of persons with disabilities and, on the other hand, the needs and interests of duty-bearers, including resource limitations and other non-financial considerations. It is envisaged that the criteria forming part of the reasonable accommodation norm may provide some degree of insight into the balancing of interests that is implicit in the implementation of other rights and obligations in the disability sphere that are subject to progressive realisation. These criteria will be drawn on throughout this article to shape a framework of reasonableness review, which could provide the relevant committees with the opportunity “to merge considerations of individual rights’ violations with broader issues of socio-economic inequalities” ([5], p. 233) and could also lead to coherent implementation of the

normative content of socio-economic rights at the domestic level. The primary example used throughout the paper to illustrate this framework of reasonableness review is the right to education.

In order to address the foregoing issues, this article is divided into six sections. The second section of this paper provides a brief overview of the treaty body reform and strengthening process. The third section outlines the relevance of the ICESCR and the CRPD, as well as the Optional Protocol to the ICESCR (OP-ICESCR) and the OP-CRPD to advancing the realisation of socio-economic rights in the context of disability. Section 4 details the constituent elements of the reasonable accommodation norm in the CRPD. Those elements can potentially aid in the construction of a harmonised standard of reasonableness review of measures taken to implement socio-economic rights (particularly in the disability context, but also more generally). Section 4 of this article also contains a brief overview of progressive realisation of disability rights via the proposed framework of reasonableness review. Section 5 of this article elaborates on the potential for social change that exists in the disability context, and on a wider scale, through harmonisation and cross-fertilisation of treaty body standards by means of a framework of reasonableness review. Finally, Section 6 contains concluding remarks.

## 2. Treaty Body Reform and Strengthening

It has been acknowledged for some time now that the UN human rights treaty body system “would benefit from institutional and other forms of strengthening in order to render it more efficient and effective” [7]. Treaty body reform has also been the subject of much academic commentary [8]. One of the most pressing challenges for the human rights committees is to ensure coordination of their activities with other treaty bodies and with other mechanisms within the UN seeking to ensure protection and promotion of human rights. Harmonisation of the current *modus operandi* has been high on the agenda of the treaty bodies since the reform and strengthening process began. However, success has been limited. It is not just the treaty body working methods that need to be improved. Most importantly of all, any reform and strengthening process must result in enhanced protection of human rights on the ground.

The state reporting procedure is a central feature of the human rights treaty body system. It offers an opportunity for each State Party to: Review the types of measures it has taken to “harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party”; monitor progress in human rights implementation; assess future needs and goals for more effective implementation of the treaties; and “plan and develop appropriate policies to achieve these goals” [9]. The individual communications system, on the other hand, should provide a mechanism by which to ensure that human rights are given concrete meaning in the context of the lived experiences of disabled claimants.

The extent to which the jurisprudence and recommendations of the international human rights treaty bodies are taken into account at the national, and indeed at the regional level, has long been the subject of debate. Domestic courts and regional adjudicatory mechanisms, such as the European Court of Human Rights, refer intermittently to the views of the treaty bodies. National courts have described the general comments of the UNCESCR as “of importance for the interpretation and jurisprudential development [of the Covenant] though they are not directly binding” [10]. However, not all domestic courts have enthusiastically endorsed this source of international human rights law [11]. Perhaps this is, in part, due to the vagueness of the normative standards emerging from the treaty bodies and their lack of harmonisation *inter se*.

In the disability context, it is imperative that the treaty bodies develop coherent jurisprudence and guidance for States Parties in the assessment of State action in order to ensure a more effective realisation of the object and purpose of the relevant treaties at the national level. This paper seeks to address that issue by setting out defined criteria, drawn from a reasonableness review framework, to be considered by the human rights committees in their deliberations on disability rights, and socio-economic rights generally. Before setting out in section five of this paper the criteria deemed essential for consideration by the treaty bodies, section three of this paper demonstrates the links

between the ICESCR, the CRPD and the advancement of socio-economic rights in the disability context by means of a framework of reasonableness review and section four sets out defined criteria stemming from the reasonable accommodation norm, to be applied and elaborated on in Section 5.

### 3. The ICESCR, the CRPD and their Optional Protocols: Advancing the Realisation of Socio-Economic Rights in the Context of Disability

There are clear overlaps between standards in different human rights treaties and, as a result, harmonisation and cross-fertilisation of the views of the human rights treaty bodies is not only desirable, but essential, in order to ensure coherence of international and regional human rights standards and effective implementation at the domestic level. This section of the paper provides an overview of the relevance of the ICESCR and the CRPD, as well as their individual communications mechanisms, to advancing socio-economic rights realisation in the disability context.

#### 3.1. The ICESCR and Its Optional Protocol

The rights contained in the ICESCR are of great relevance to all marginalised groups, not least persons with disabilities. The prohibited grounds of discrimination [12] listed in Article 2(2) of the ICESCR do not include disability expressly. However, the inclusion of “other status” in Article 2(2) emphasises the fact that the list is not exhaustive. General Comment 5 (1994) of the UNCESCR confirms that disability-based discrimination falls under the label of “other status” in the ICESCR ([13], para. 5). It details the manner in which the treaty should be interpreted in order to ensure the equal enjoyment of the rights specified therein by persons with disabilities. Akin to the CRPD, General Comment 5 endorses the social constructionist approach to disability, by acknowledging the fact that the rights of disabled people are hindered in circumstances where discriminatory societal barriers exist ([13], para. 22). It also acknowledges explicitly the link between equality norms on the one hand, and participation and inclusion in society for persons with disabilities, on the other hand ([13], para. 15). Significantly, it includes within the definition of disability-based discrimination a denial of reasonable accommodation ([13], para. 15).

The UNCESCR has explained the reason for the absence of an explicit disability-related provision in the ICESCR, attributing this “to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago” ([13], para. 6). The mere fact that the ICESCR was drafted without explicit mention of the rights of persons with disabilities demonstrates the necessity for cross-fertilisation and harmonisation among the treaty bodies in the review of State progress on the implementation and realisation of socio-economic rights.

The travaux préparatoires of the OP-ICESCR demonstrate the fact that there was controversy amongst the participating States on the issue of “justiciability” [14]. In spite of this controversy, consensus was reached among delegates at the negotiation sessions regarding the insertion of a standard of review of steps to be adopted under the ICESCR in accordance with Article 2(1) of the treaty (pertaining to progressive realisation of rights to the maximum of available resources). Article 8(4) OP-ICESCR provides as follows:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant [...].

The UNCESCR has acknowledged the fact that measures taken by States to fulfil socio-economic rights must be “adequate” or “reasonable” [15] and has outlined certain factors as being pertinent considerations in assessing whether steps adopted by States are reasonable.<sup>1</sup> Those factors have been

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<sup>1</sup> The factors listed by the UNCESCR as being relevant to a consideration of measures adopted by States are as follows: (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic,

deemed to demonstrate “a strong commitment to the principle of effective remedies” ([6], p. 46). As Lillian Chenwei rightly points out, “the reasonableness standard in the Optional Protocol acknowledges the institutional roles and limitations in giving effect to the right to effective remedies for socio-economic rights violations” ([16], p. 756).

Since many ICESCR rights are relevant to persons with disabilities ([17], p. 80), the standard of reasonableness to be developed by the UNCESCR must be harmonised with the standard of reasonableness to be developed by the CRPD Committee, through its jurisprudence under the individual communication procedure and in its general comments related to the assessment of positive equality claims and socio-economic claims via the reasonable accommodation obligation. Bruce Porter notes that the standard of review to be developed by the UNCESCR under Article 8(4) OP-ICESCR will “inform and be informed by the way in which the principle of reasonableness review of substantive social rights claims evolves at other treaty monitoring bodies, in regional systems and in domestic law” ([6], p. 42).

### 3.2. *The CRPD and Its Optional Protocol*

The CRPD has the potential to be a truly transformative human rights treaty, if its provisions are coherently interpreted and applied. The OP-CRPD allows for individual complaints to be submitted to the CRPD Committee by individuals and groups of individuals, or by a third party on behalf of individuals and groups of individuals, alleging that their rights have been violated under the Convention. In order to ensure that the transformative potential of the CRPD is capitalised upon, it is vital to place a framework around the progressive implementation of CRPD norms, both in terms of resource allocation and programmatic design of socio-economic rights. This would serve to ensure an appropriate balancing of the needs of disabled persons and the tasks of duty-bearers.

As *lex specialis*, the CRPD can be used to contribute to a better understanding of the normative content of socio-economic rights in the context of disabled persons. For instance, Article 24 of the CRPD contains a detailed elaboration on the right of persons with disabilities to inclusive education, whilst the ICESCR articulates the vague right of everyone to the enjoyment of accessible education at all levels in Article 13 thereof. The CRPD can be used as a tool to compel States to include in their reports to the UNCESCR the specific implementation measures adopted by States with respect to ensuring the accessibility, and full enjoyment, of education for persons with disabilities. Moreover, the CRPD Committee can use the Convention to offer guidance to other human rights treaty bodies (both international and regional) in their work in the field of disability.

Of course, it is not only ICESCR rights that should be cross-referenced with the CRPD, nor is it merely in the realm of socio-economic rights that cross-referencing and harmonisation of disability rights should occur. The interpretation of the rights of children with disabilities should also be harmonised under the Convention on the Rights of the Child (CRC) and the CRPD. Moreover, the Human Rights Committee should keep a keen eye on pronouncements made by the CRPD Committee regarding the inter-dependency of civil and political rights and socio-economic rights. Many of the substantive articles in the CRPD can be termed “hybrid” rights on account of the fact that they fuse elements of immediately realisable civil and political rights, as well as progressively realisable socio-economic rights.

The CRPD Committee can potentially advance the actualisation of disability rights by means of a coherent elaboration on the standard of reasonableness to be applied across the substantive rights in the

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social and cultural rights; (b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner; (c) whether the State party’s decision (not) to allocate available resources is in accordance with international human rights standards; (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights; (e) the time frame in which the steps were taken; (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

CRPD. By integration of the equality norm (via the reasonable accommodation duty) in its assessment of measures adopted by States to realise socio-economic rights progressively, the Committee can also put forth a good example, which can serve to enhance the realisation of socio-economic rights more generally. Bruce Porter notes that the CRPD offers an exceptional model of “convergent paradigms of rights and remedies” on account of the “convergence of the right to equality and non-discrimination and the economic, social and cultural rights” ([6], p. 42) of persons with disabilities in the Convention. Furthermore, he draws attention to the fact that the standard adopted by the CRPD Committee will be hugely important “in reviewing the right to positive measures in light of available resources in the context of both equality rights and [economic, social and cultural] rights” ([6], p. 42). In light of the foregoing, the next section of this paper outlines the constituent elements of the standard of review to be adopted under the CRPD, before an elaboration in Section 5 on those various elements.

#### **4. The Duty to Reasonably Accommodate: Its Constituent Elements and the Link to Progressive Realisation of Disability Rights**

In light of the importance of the reasonable accommodation duty to the implementation of the equality norm and, in turn, the importance of the equality norm to the eradication of socio-economic disadvantage, this section provides an overview of the constituent elements of the reasonable accommodation duty ([18], pp. 151–76). These elements could potentially aid the CRPD Committee in outlining its standard of reasonableness review and could serve as a helpful standard of review for the UNCESCR in its assessment of disability-related measures adopted by States Parties to the Covenant. The types of criteria applied to disability rights could also potentially aid the other treaty bodies in their assessment of equality and socio-economic claims by marginalised groups generally.

##### *4.1. The Constituent Elements of the Reasonable Accommodation Duty*

In a similar vein to progressive realisation of disability rights, the reasonable accommodation duty entails “a balancing of needs and interests” ([5], p. 151) between the disabled person and the duty-bearer. It therefore represents a microcosm of the overall measures to be adopted by States Parties to the Convention. The interests of disabled people and duty-bearers are captured by the requirement that all accommodation measures must be “necessary and appropriate” in order “to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” [4]. The interests of duty bearers (States and entities), on the other hand, are spelt out in the requirement that accommodation measures must not impose a “disproportionate or undue burden” [4] on the duty-bearer. The necessity criterion signifies the duty to take all essential measures to ensure access to, and enjoyment of, CRPD rights for persons with disabilities ([5], p. 160). The use of the word “appropriate” in the definition of reasonable accommodation implies that accommodations must be effective in ensuring realisation of the rights of disabled persons, including socio-economic rights ([5], p. 160). The criterion of effectiveness is confirmed by a contextual reading of the Convention. This is borne out by General Obligation 4(1), which links the word “appropriate” with the full realisation of rights [19].

In order to determine the effectiveness of measures adopted under the duty to accommodate, one must also consider the object and purpose of the duty itself. The specific objective of the duty to accommodate is to promote equality and to eliminate discrimination. Equality considerations will therefore be paramount in determining the effectiveness of measures adopted with a view to reasonably accommodating disabled persons. Linked to the criterion of effectiveness and the equality norm is the core notion of the inherent dignity of persons with disabilities. The duty to accommodate is “based on the values underlying the Convention as a whole—human dignity and respect for difference” ([5], p. 175). Where States or entities fail to accommodate a person with a disability, or where they provide an ineffective accommodation, this will inevitably result in marginalisation and exclusion of the disabled person from the enjoyment of rights and will, therefore, harm the inherent dignity of persons with disabilities.

The duty to reasonably accommodate “seeks to balance the rights of, and burdens and benefits to, all persons affected by the proposed accommodation” ([5], p. 176). The primary consideration under the CRPD will be “a detailed balancing of the costs and benefits of the proposed measure to the entity providing it” ([5], p. 176). In addition, third-party benefits should be factored in as a “tangential consideration” ([5], p. 176) in the assessment of the reasonableness of measures adopted under the CRPD. In other words, where granting an accommodation to a particular individual results in benefits to others, this can potentially be used to offset cost arguments advanced by States or entities.

#### *4.2. Progressive Realisation and Reasonableness Review of Socio-Economic Rights in the Disability Context*

The concept of progressive realisation has been described by the Office of the High Commissioner for Human Rights (OHCHR) as “a practical device that acknowledge(s) the real world challenges” and “helps to avoid overburdening [S]tates, employers and other duty-bearers” ([20], p. 5). Much like the (individualised) balancing of burdens and interests inherent in the reasonable accommodation norm, the progressive realisation norm entails a similar balancing act on a larger scale.

The reasonableness review model first evolved in South African jurisprudence as a means by which to evaluate the right to positive measures under the South African Constitution and the actions taken by States thereunder to realise socio-economic rights. There are some criticisms of reasonableness review, particularly related to the fact that it is not an appropriate standard by which to develop the substantive content of socio-economic rights. Fons Coomans, for instance, notes that reasonableness is an “inherently vague” and “elastic” ([21], p. 187) notion. Any use of a reasonableness review standard by the human rights treaty bodies must, therefore, be carefully balanced with the minimum core content of human rights.

Reasonableness review came to the fore at the international level when the UNCESCR created a ‘reasonableness standard’ under Article 8(4) OP-ICESCR. That standard essentially mandates that States use limited resources in a reasonable, non-arbitrary, non-discriminatory manner and, furthermore, that States should be held accountable for the manner in which they use their resources in the implementation of socio-economic rights [22].

Invoking reasonableness review to assess alleged violations of disability rights compels an assessment that is tailored to the specific national context at issue and the socio-economic disadvantage faced by persons with disabilities in that context ([5], p. 210). Under the OP-CRPD and the OP-ICESCR, the respective committees will have to ensure that rights are being realised effectively in the circumstances of the individual’s lived experience, relative to the particular disadvantage experienced by the petitioner. As Bruce Porter and Sandra Liebenberg observe, reasonableness review in the context of the OP-ICESCR provides “for a dialectic between an individual rights claim and the consideration of other needs and interests, to ensure consistency with broader values and purposes of the Covenant in the context of limited resources” ([23], pp. 6–7).

In the next section of this paper, the various components of the proposed reasonableness review framework for disability rights will be elaborated upon, taking (at various junctures) the right to education as an example. It is hoped that this could provide the basis for a transformative human rights framework, provided that the treaty bodies work together towards harmonisation and cross-fertilisation of socio-economic rights in the context of disability. Such a transformative framework could also have a wider impact on the interpretation and implementation of socio-economic rights for other marginalised groups.

### **5. The Potential for Social Change: Harmonisation and Cross-Fertilisation of Disability Rights at the International Level and Beyond**

Reform of the treaty body system should not just result in enhanced efficiency at the international level but should also “strengthen the capacity of rights-holders to enjoy their human rights and support States to carry out their obligations to implement fully these rights” ([7], para. 7). Any standard of review adopted by the treaty bodies should serve to ensure that failures by States to meet

their obligations, for instance, under Article 2(1) of the ICESCR and under Article 4(2) CRPD, result in effective remedies for individual victims of violations.

Since the human rights treaty bodies only began to harmonise the procedural aspects of their working methods in recent times, some authors claim that “widespread formal efforts at substantive coherence are likely far off but not unfathomable” ([24], p. 158). There is already some evidence of harmonisation of standards across the board. For example, General Comment 5 of the UNCESCR was drawn on by many national representatives at the CRPD negotiation sessions in order to forge a link in the CRPD between the duty to reasonably accommodate and the equality and non-discrimination norms [25].

Back in 2002, Gerard Quinn and Theresia Degener conducted several case studies on the use of the ICESCR in the context of disability, specifically analysing State Party reports in that regard. Those case studies revealed that the two key messages of General Comment 5 (equality and participation/inclusion of persons with disabilities in society) had “not percolated through to the point where they influence all (or even most) policies and measures relating to disability in the areas covered by the ICESCR” ([26], p. 112). To date, the overall implementation regime of international human rights law is greatly lacking ([27], p. 358). Invoking a reasonableness standard of review across the core human rights treaty bodies could provide a means by which to harmonise socio-economic rights claims and equality claims, particularly in the context of disability, and this could trickle down to the national level. The core treaty bodies might look to the CRPD Committee’s elaboration of its standard of review via the reasonable accommodation obligation. In turn, the CRPD Committee might draw some guidance from the manner in which interpretation of Article 8 OP-ICESCR unfolds, through statements of the UNCESCR on what constitute “reasonable” measures, as well as decisions of the Committee in which it deals with socio-economic rights claims.

In the following sub-sections of this paper, a framework of reasonableness review will be proposed, taking into account the various criteria highlighted above as being primary objectives of any measures taken to reasonably accommodate persons with disabilities.<sup>2</sup>

### 5.1. *The Effectiveness of Measures Adopted by States*

As highlighted above, the criterion of effectiveness is one of the constituent elements of a standard of review based upon the reasonable accommodation duty in the CRPD. If we take the right to education in both the CRPD and the ICESCR as an example, we can observe that both provisions refer to the criterion of effectiveness. Article 24 of the CRPD provides that States Parties should ensure that “persons with disabilities receive the support required, within the general education system, to facilitate their *effective* education”. Similarly, Article 13(1) of the ICESCR provides that States Parties to the Covenant agree that “education shall enable all persons to participate *effectively* in a free society”. In its concluding observations on States Parties’ reports, the CRPD Committee has already recommended that the Australian authorities should conduct research into the effectiveness of current inclusive education policies, including the extent to which the relevant disability standards in education are being implemented in each State and territory ([28], para. 46b). The Committee has also urged States to “set targets to increase participation and completion rates by students with disabilities in all levels of education and training” ([28], para. 46c). However, the Committee has not commented further on the criterion of effectiveness in the context of education.

In its non-binding (but authoritative) statement outlining criteria pertinent to whether measures taken by States to fulfil socio-economic rights are “adequate” or “reasonable,” the UNCESCR asserts that a relevant consideration is whether the State adopts the option that least restricts Covenant rights, in circumstances where several options are available ([15], para. 8d). However, the UNCESCR has

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<sup>2</sup> Sections 5.1–5.5 of this article draw on, and elaborate on considerably, where relevant to this article, the ideas and the categorisations contained in ([5], pp. 213–31).

not commented to any great extent on this criterion of effectiveness and therefore States are lacking guidance on this vital aspect of fulfilment across each of the substantive socio-economic rights in both the CRPD and the ICESCR.

In order to buttress the substantive and transformative framework of equality in the Convention, and in order to go beyond merely normative discussions, it would be most helpful if the CRPD Committee would elaborate further on the types of positive measures that might be effective in ensuring fulfilment of the socio-economic rights contained in the Convention. The UNCESCR, and the other treaty bodies, should keep a keen eye on the CRPD Committee's standard of review in that regard. There are many tools that can be used by the human rights treaty bodies to monitor the progressive realisation of socio-economic rights [29]. The committees might bear in mind quantitative tools, such as specific indicators, related to each of the substantive rights in the respective treaties and tailor their assessments of measures taken by States to meet those indicators to the domestic context at issue. With regard to the right to education, specific structural, process and outcome indicators, such as those elaborated upon by Inclusion International [30] or by the Right to Education project [31], could be drawn on as a tool to help States measure their progress in realising the right to education. States themselves could tailor the indicators to their national context and collect data for application of the indicators [32]. Such tools could also be used as a basis for the committees to reflect more deeply on the types of measures that might be effective in realising the normative content of inclusive education under Article 24 of the CRPD.

## 5.2. Equality Considerations

The adoption of the CRPD was deemed necessary in order to ensure that *de facto* equality is attained—in other words, that the systemic inequalities and substantive disadvantage experienced by persons with disabilities is remedied. The equality norm runs like a “red thread” through the substantive provisions of the CRPD, and the reasonable accommodation duty breathes new life into the practical application of both civil and political and socio-economic rights for persons with disabilities.

Sandra Liebenberg and Beth Goldblatt contend that “the most severe forms of disadvantage are usually experienced as a result of an intersection between group-based forms of discrimination and socio-economic marginalisation” ([33], p. 339). There are many recognised benefits to including equality as a relevant criterion in the assessment of measures taken by States in the context of realising socio-economic rights generally, and disability rights more specifically ([33], pp. 351–52). If the equality norm were to feature prominently in socio-economic rights adjudication, and also in the consideration of measures adopted by States under the reporting system, States “would be required to provide heightened justifications for any alleged rights’ violations” ([5], p. 223). This is particularly so “in circumstances where denying access to the right(s) in question would cause further entrenchment of inequalities or marginalisation for persons with disabilities” ([5], p. 223). Integration of an equality perspective would also serve to ensure a deeper understanding of the “multi-dimensional disadvantage” experienced by disabled persons in the enjoyment and exercise of socio-economic rights ([5], p. 223).

The link between the actualisation of socio-economic rights and the principles of non-discrimination and equality has been remarked upon by the UNCESCR in its general comments [34]. Furthermore, in its 2007 statement outlining the guiding criteria for interpreting the reasonableness standard incorporated in Article 8(4) OP-ICESCR, the Committee asserts that exercise by a State of discretion in a non-discriminatory and non-arbitrary manner ([15], para. 8) will be relevant in any consideration of whether States fulfil the “reasonableness” criterion under Article 8(4) OP-ICESCR.

Lack of access to education, culminating in unequal opportunities, has been recognised as a “dominant problem in the disability field” [35] for both children and adults with disabilities. The CRPD Committee has emphasised the fact that States Parties to the Convention must intensify their efforts to ensure that disabled children can benefit to the same extent as non-disabled children from any system

of compulsory education established by domestic authorities ([36], para. 38). The Committee should now begin to adjudge any violations of the right to education (and indeed, all other socio-economic rights) with regard to the “position of the claimant group in society, the nature of the resource or service claimed and the impact of the denial of access to the service or resource in question on the claimant group” ([37], pp. 89–90) as mandated by frameworks of reasonableness review. In circumstances where the denial of the right results in entrenched inequalities, as is the case with denial of the right to inclusive education, the committees must apply a heightened standard of review. Among other things, the treaty bodies should enquire whether, in their enjoyment of the right to education, disabled people have been granted equality before and under the law, equal benefit and equal protection of the law. The treaty bodies will also have to enquire into the affirmative action measures adopted by States to guarantee equal access for persons with disabilities to inclusive education. In circumstances where the UNCESCR is adjudicating complaints of discrimination in relation to access to education, it should take into account the specific approach developed by the CRPD Committee with regard to reasonable accommodation.

In light of the overlapping issues that arise in the context of the work of the UNCESCR, on the one hand, and the CRPD Committee, on the other hand, it is essential that the emerging standards of equality, as elaborated upon by the CRPD Committee, should be factored into any consideration by the UNCESCR of the standard of reasonableness it applies to disability rights. More generally, the elaboration by the CRPD Committee of a substantive and transformative framework of equality (through its jurisprudence and general comments) can potentially guide the other human rights treaty bodies in adjudication related to the socio-economic rights of all marginalised groups. At the level of international and regional human rights law, the understanding of the equality norm has evolved greatly in recent times, from embodying the formal model of equality to endorsing a more substantive, and even transformative, conception of equality ([38], pp. 47–64). Thus, there is scope for the treaty bodies to learn lessons from the values underlying the CRPD and the CRPD Committee’s approach to interpretation of the equality norm contained in the Convention.

### *5.3. Dignity Considerations*

In any consideration of the core principle of equality, one must factor into account the inherent dignity of disabled individuals as a pertinent concern. The Preamble of the CPRD recognises that “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person” [39]. The object and purpose of the CRPD includes the promotion of respect for the inherent dignity of disabled persons. Dignity also features as a central concern in General Principle 3(d), which mandates “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity” [40]. The CRPD aims at overturning the stereotyped image of persons with disabilities as lacking capabilities and aims to develop such capabilities and human potential through the provision, by States and public and private entities, of sufficient resources and other forms of assistance. The reasonable accommodation duty, which spans the socio-economic provisions of the CRPD, is also based on the core norm of human dignity.

At the international level, dignity issues can be brought to life by claimants from marginalised groups, including disabled claimants, under the individual communication mechanism. Dignity considerations must therefore be central to any assessment of reasonableness by the respective human rights committees in their adjudication and pronouncements on socio-economic rights. The UNCESCR has already acknowledged, in its General Comment 5, that all services for persons with disabilities “should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity” ([13], para. 34). However, the notion of “dignity” remains a vague normative concept and some guidance is required at the level of the treaty bodies in order to harmonise this fundamental principle for disabled persons (and, by extension, other marginalised groups) in the application of socio-economic rights ([41], p. 20).

In spite of the many criticisms of its use as a normative standard for human rights protection ([42], p. 5), it has been argued elsewhere ([5], pp. 224–28) that there are two strands to the concept of human dignity in human rights law generally, and, particularly, dignity as a guiding normative value under the CRPD. The first strand of human dignity reflects the urgency of needs of marginalised groups and requires that priority consideration be given to those needs by States. This interpretation is mirrored in the various pronouncements of the UNCESCR, among others, related to the necessity to cater for the needs of those in most dire circumstances ([15], para. 4). The second strand of human dignity at the international level correlates with the equality norm and requires consideration of the equal worth of all human beings. States must ensure to implement the rights of persons with disabilities in a manner which respects the differential characteristics and ensures that disabled persons are not forced to endure degrading circumstances in the exercise of their human rights.

Take, for instance, the right to education in both the CRPD and the ICESCR. Article 24 of the CRPD provides that States Parties shall ensure an inclusive education system at all levels and life-long learning directed to “the full development of human potential and sense of dignity [...] and the strengthening of respect for [...] human diversity” [43]. In a similar vein, Article 13(1) of the ICESCR provides that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms” [44]. Without further guidance at the level of the treaty bodies, it is difficult to expand on the notion of human dignity in the context of individual rights.

The CRPD is based upon a human rights-based and capabilities-based approach [45] to disability, which recognises the dignity and worth of each individual ([46], p. 775) and, therefore, the CRPD Committee should always take human dignity into account when determining the reasonableness of measures adopted by States. The CRPD does not provide any guidance as to priority setting - in other words, which measures should be taken when a given State cannot ensure all capabilities immediately in the same timeframe. However, as Caroline Harnacke rightly points out, “the focus of justice is not on the question of what resources the State has to spend on every person but on the question of what outcome is attained” ([46], p. 777).

The domestic case law of the Canadian Supreme Court expands on the notion of human dignity in the context of persons with disabilities. In *Law v Canada (Minister of Employment and Immigration)*, the Court observes that “human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits” and, furthermore, that “it is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences” [47]. In connection with the right to inclusive education, the treaty bodies should maintain a focus on the effects of laws and policies on the needs and capabilities of disabled people. Charles Ngwenya claims that the “repeated emphasis in the CRPD, including in Article 24, on the State’s duty to accommodate human diversity by, *inter alia*, providing individualised support, is the Convention’s greatest transformative modality” ([48], p. 478). He asserts that by placing responsibility on society, rather than on disabled learners and their carers (in terms of the economic cost of accommodation measures), Article 24 seeks to “repair, more holistically, the historical marginalisation and exclusion of disabled learners from not just the education system, but also other socio-economic systems that have been constructed on the assumption of able-bodiedness” ([48], p. 478). He further asserts that “under the CRPD, human dignity cannot depend on functional capacities. Achieving, as a prerequisite, a certain prescribed baseline of functional capacity cannot be what entitles a disabled person to have an equal claim on resources, but the fact of being human” ([48], pp. 478–79). The CRPD Committee should endeavour to frame its own capabilities-based approach and, by that token, evaluate the various measures adopted by States under the right to inclusive education in order to ensure that Article 24 of the Convention is coherently implemented.

In its draft General Comment 9, the CRPD Committee referred to the inherent dignity of persons with disabilities as “a crucial element to be considered, including in the context of reasonable

accommodation" ([49], para. 24). In the provision of reasonable accommodations and in the overall enjoyment of the right to education, full account must be taken of the physical and psychological integrity and empowerment, as well as the equal self-worth of disabled people. Persons with disabilities should not be expected to exercise the right to inclusive education in conditions which are degrading or humiliating.

Interestingly, the concept of dignity has been linked by the CRPD Committee to the notion of costs. When elaborating on measures to be adopted to guarantee the general accessibility of the environment, the Committee stated that "in adapting existing buildings, reasonableness of costs must be balanced against respect for the inherent dignity of persons with disabilities" ([49], para. 24). However, the Committee did not go on to refer to dignity in such terms in the final version of General Comment 9. The CRPD Committee should take the opportunity to expand on this normative value relative to the rights contained in the Convention in order to ensure coherence in their application. This could serve to aid the other treaty bodies in the application of the concept of "human dignity" in relation to socio-economic rights realisation.

#### *5.4. Participatory Processes/Accountability*

In the application of Article 8(4) OP-ICESCR, and in any analysis by the CRPD Committee of the reasonableness of measures adopted by States under the State reporting procedure and the individual communications mechanism, the fundamental notion of participatory processes should be factored into account. General Obligation 4(3) of the CRPD recognises the pivotal importance of participation of persons with disabilities and their representative organisations in every aspect of implementation of the Convention. In order to achieve full and effective participation in society, the UNCESCR has noted that "the specific measures necessary to realise the rights of persons with disabilities must be developed in cooperation with representatives of persons with disabilities" ([13], para. 14). Furthermore, the UNCESCR has asserted that the reporting process should also "encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and constructive engagement with civil society [...]" ([9], para. 10).

Bruce Porter contends that in order to realise socio-economic rights more effectively, the UNCESCR "may have to create procedures that are new to treaty bodies, in order, for example, to hear the evidence of rights claimants, access independent experts, or hear from NGO interveners" ([6], p. 53). Porter and Sandra Liebenberg contend that the OP-ICESCR "provides a new opportunity for claimants to assist the Committee in elaborating on the content of rights, properly informed by the voice and understanding of those affected." The onus would then shift "to the respondent to explain the basis for its policies or decisions" ([23], p. 7). In the context of the CRPD, non-State actors play an important role, in particular in the implementation of the individualised reasonable accommodation duty. On account of this, it will be vitally important that the respective treaty bodies develop new processes to ensure that adequate weight is given to the voice of disabled applicants and their representative organisations, as well as to non-State actors (who often have a great impact on ensuring respect for human rights) [50], in the application of human rights norms in particular national contexts and in the implementation of appropriate remedies. In arguing for aligned models of interaction between treaty bodies, national human rights institutions and civil society, Suzanne Egan notes that "there is much room to harmonise [the treaty body] working practices so as to create a less confusing landscape for these key contributors to the process" ([51], p. 228).

A consultative process of exchange of views between all stakeholders would make it easier for the treaty bodies to determine whether steps taken by States are reasonable in conception and implementation and, moreover, whether they are in compliance with the obligations contained in the respective human rights treaties. Involving persons with disabilities in socio-economic rights realisation, through, for example, drafting human rights action plans, results in increased potential for actual needs to be met and also serves to ensure that remedies are moulded to address the particular needs and contextual background against which claims have been advanced. In the context of the right

to education, such plans can serve to ensure that barriers to inclusive education are eradicated and that goals towards achievement of fully inclusive systems are met, taking into account the recommendations of the human rights treaty bodies. However, these plans must not merely be a token gesture on the part of States and must be followed through on.

In addition, outcome accountability is essential. The focus of Article 24 of the CRPD is on both equality of opportunities and outcomes. In order to ensure that these objectives are being met, accountability provisions must be enacted in national laws and policies to enhance the effectiveness of services for pupils with special educational needs, as well as to enhance the outcomes for all learners. Outcomes for students with special educational needs must be consistently monitored in order to ensure that learners with disabilities are making progress commensurate with their ability and that State resources are being used to optimal effect. With regard to implementation and monitoring tools, Gauthier de Beco points to the fact that the CRPD Committee could also “encourage international collaboration to provide an overall review of relevant experiences to date and to undertake an examination of the way in which these experiences could help to improve such tools within their particular context” ([52], pp. 58–59). Disabled people should naturally be involved in all of these processes. In order to measure progress towards the full realisation of the right to inclusive education for disabled people, de Beco maintains that “when national human rights action plans and human rights indicators are available, the Committee could request [State Parties] to provide information on them and evaluate the [State Party’s] capacity to implement Article 24 of the CRPD” ([52], pp. 58–59). The Committee could then “indicate to [State Parties] which targets [within their national human rights plans] need to be achieved by the national human rights action plans and evaluated by the human rights indicators for the next reporting cycle” ([53], p. 276).

##### 5.5. *Disproportionate Burden and Third-Party Benefits*

The notion of disproportionate burden contained in the reasonable accommodation norm requires an individualised balancing act between the needs and interests of disabled persons, on the one hand, and duty-bearers, on the other hand. A balancing of needs and interests also takes place in the context of the obligation to realise disability rights progressively to the maximum of available resources, albeit on a different scale. There is little research available on the latter obligation and this has inevitably hindered the realisation and enforcement of rights at the national level. As de Beco points out, the progressive realisation of socio-economic rights remains problematic on account of both timing and prioritisation issues, in particular which criteria will be applied “in determining whether a State’s priorities are acceptable” or the “best option” in the context of the maximum of available resources ([53], p. 276).

Without principled guidelines in human rights implementation, Jos Philips maintains that “priority setting risks becoming an ad-hoc exercise, which may harm the cause of disabled persons as well as the cause of human rights” ([54], pp. 150–51). While budget analysis is a “powerful tool for understanding government’s priorities” ([55], p. 36), many questions remain unanswered with regard to “how effectively or efficiently the money is being spent, or whether the resources allocated are reaching their intended purpose” ([55], p. 36). Concerning the duty to use the maximum of available resources, Sandra Fredman has stated that three elements of government appropriations are capable of concrete assessment, namely (a) the sufficiency of government spending/investment; (b) the equity of expenditure patterns; and (c) the efficiency of expenditure ([56], p. 82). The human rights treaty bodies can look to these various aspects of resource allocation by States Parties to the Convention in determining the reasonableness of State action. The committees must look to the resource prioritisation and resource optimisation efforts of States and should pay close attention to arguments brought forward by non-governmental organisations, in particular, regarding State capacity and failure to meet benchmarks set for the full realisation of disability rights. National authorities should develop performance-based budgets, which seek to allocate resources for the achievement of certain objectives

and, thereby, allow assessment of the cost-effectiveness of measures taken relative to achieving the desired result for all those in need.

In addition to consideration of the financial and other costs imposed by particular measures on States or private entities, another potentially relevant consideration is the issue of the benefits of the requested measures accruing to persons other than the disabled individual in question. In the wider context of progressive realisation, the treaty bodies might consider whether measures adopted for the benefit of one particular target group could result in benefits to a wider cohort of individuals and this may be a factor mitigating against cost arguments advanced by States. Christopher Brown notes that courts (and, by extension, the treaty bodies) could “correct the asymmetric treatment of costs by recognizing the existence of positive externalities of accommodation and taking these into account when evaluating whether a proposed accommodation is reasonable” ([57], p. 329). In that regard, Brown elaborates on the positive externalities inherent to third-party benefit analysis of reasonable accommodations on three levels in the context of employment, namely benefits to all disabled employees, benefits to the firm itself and the net social benefits model ([57], p. 329). A similar analysis could apply in the context of the progressive realisation of inclusive education. It has been argued elsewhere ([5], p. 231) that “ensuring accessibility of the educational curriculum arguably benefits other students in terms of learning outcomes (both disabled students and non-disabled students)” ([5], p. 231). Therefore, “measures taken to ensure accessibility of the curriculum could contribute to the implementation of the right to education for all” ([5], p. 231). In addition, ensuring that disabled people receive an appropriate education, and can therefore transition to full employment, has clear net social and economic benefits [58].

While each treaty body will be directly concerned with the rights of those bringing the particular claim at issue, the treaty bodies may factor into account the issue of third-party benefits in the overall consideration of whether a measure constitutes a disproportionate burden for a State or entity. This may prove to be another area in which the human rights treaty bodies can learn from each other in order to harmonise implementation of socio-economic rights and to ensure a more effective implementation at the domestic level.

## 6. Conclusions

This article has demonstrated the necessity for cross-fertilisation and harmonisation of socio-economic rights in the context of the international human rights treaty bodies and beyond. A particular focus was maintained on cross-fertilisation of disability rights under the CRPD and the ICESCR. It was argued throughout this article that the intersection of equality and socio-economic rights in the CRPD may provide a key to unlocking the structural inequalities which disabled people, and by extension other marginalised groups, have encountered for too long now. In turn, this has the potential to result in a transformative application of socio-economic rights at the international, national and regional levels.

As Janet Lord and Rebecca Brown point out, the OP-CRPD taken in conjunction with the OP-ICESCR “provide new entry points for claimants with disabilities and their representative organizations with the opportunity to enrich human rights advocacy through the application of reasonable accommodation across all spheres of life” ([59], p. 273). The interpretation of the CRPD by the CRPD Committee can inform socio-economic rights interpretation by all of the treaty bodies. Furthermore, the CRPD Committee might learn from the UNCESCR in its elaboration of the standard of reasonableness to be applied under the OP-ICESCR. This has the potential to advance socio-economic claims, and to harmonise disability rights (and indeed the rights of other marginalised groups), at the level of the human rights treaty bodies.

Bruce Porter argues that “the guiding principle of reasonableness review should be the right to adjudication and effective remedies” for socio-economic rights claimants, with “a particular focus on the claims advanced by marginalised and disadvantaged groups” [60]. The CRPD, as a transformative human rights treaty, taken together with the OP-CRPD and the OP-ICESCR, holds great potential for

social change in the realm of socio-economic rights. The CRPD Committee and the UNCESCR, in particular, should set out coherent criteria based, *inter alia*, on the types of criteria outlined in this article and should tailor them to diverse national contexts. It should, furthermore, require from each State an account of how these criteria are being applied and implemented at the domestic level relative to socio-economic rights. This would allow the CRPD Committee to judge the diverging priority choices of States according to their overall reasonableness. Then, and only then, can persons with disabilities (and other marginalised groups) begin to enjoy their human rights on an equal basis with others.

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## Abbreviations

The following abbreviations are used in this manuscript:

CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICESCR	International Covenant on Economic Social and Cultural Rights
OHCHR	Office of the High Commissioner on Human Rights
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to the International Covenant on Economic Social and Cultural Rights
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights

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