


## Article

# Disability-Specific Sporting Competitions and the UN CRPD: Segregation as Inclusion?

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**Abstract:** Since the UN Convention on the Rights of Persons with Disabilities (CRPD) was created, segregation of persons with disabilities is no longer allowed. Separate schools, sheltered workshops, and isolated social care homes impede inclusion and must be banned. Sport is a remarkable exception to this general principle. The CRPD explicitly states that persons with disabilities should have the opportunity to organize, develop, and participate in disability-specific sporting activities. This contribution—focusing on the Paralympics and Special Olympics—examines why the CRPD allows and encourages disability-specific sporting competitions, despite (or perhaps due to) its radical choice for inclusion. Beyond that, this contribution asks the obvious follow-up question: if disability-specific competitions are allowed, how can the criteria for participation be determined in a manner consistent with the CRPD? The CRPD opposes a medical approach to disability, yet that approach is often used in selection criteria. Although this contribution primarily focuses on sports, the impact is wider: it raises questions on inclusion and how to assess disability.

**Keywords:** disability; inclusion; UN-CRPD; Paralympics; Special Olympics; Olympics



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## 1. Introduction

This contribution looks at the impact of the UN Convention on the Rights of Persons with Disabilities (CRPD) on disability-specific sports competitions such as the Paralympics and Special Olympics. Because the CRPD strives for inclusion and disability-neutral policies, competitions that could be seen as segregating disabled persons from non-disabled persons no longer seem to be sustainable. However, nothing could be further from the truth; Article 30 of the CRPD explicitly allows disability-specific sporting activities. It differs from all other rights in the CRPD that are only fully realized if a segregated circuit for persons with disabilities is abandoned. Separate competitions can exist, however, which leads to a tricky issue. How can the criteria for participation in these competitions be determined in a manner consistent with the CRPD?

This contribution focuses on the Paralympics and Special Olympics and consists of three sections. In the first section, we give a brief explanatory history of persons with disabilities' position in these sports competitions.<sup>1</sup> In the second section, we explore why the CRPD still allows and even encourages these competitions, despite its radical choice for inclusion. To learn about the objective and the purpose of the CRPD, we look into the preparatory works on the convention and we fill in the gaps with literature on the

<sup>1</sup> Besides the Special Olympics and the Paralympics, other international competitions are organized as well. For example, the Deaflympics is specifically organized for persons with a hearing disability (Burns 2021, pp. 38–39; Legg 2018, p. 418; International Committee of Sport for the Deaf 2018, p. 3).

“inclusion spectrum” in sports. Finally, in the third section, we address the thorny issue of determining who may participate in the competitions. To do so, based on the CRPD committee’s concluding observations and general comments, we develop criteria for disability-assessment. These criteria are subsequently applied to evaluate the selection procedures for the Paralympics and Special Olympics.

Although this contribution primarily focuses on sports, the impact is wider. First, explaining why separate sports competitions are allowed gives more insight into the concept of inclusion applied in the CRPD. Understanding the exception can provide insight into the general rule. Second, the issue of measuring disability and determining criteria for inclusion and exclusion is not unique to sport but arises in other domains. For example, in social security or determining who is entitled to certain forms of disability-specific support.

## 2. A Brief Introduction to Disability and Sport

### 2.1. In General

The development of modern sports dates back to 1840. At first, those sports were a part of the education of young men in the British aristocracy and middle class (Kidd 2021, p. 337; Marcellini 2018, pp. 91–98). The development of sport for other groups took longer. Although women were first allowed to compete in the Olympics of 1900 (International Olympic Committee 2022), equality has been a struggle.<sup>2</sup> For persons with disabilities, the rise of the so-called “silent sports” was one of the first milestones. In 1899, a cycling club for persons with hearing disabilities was established (Marcellini 2018, p. 98). In 1924, the International Committee for Sports of the Deaf was established, and the first “Silent Games” were organized (Kidd 2021, p. 340; Marcellini 2018, p. 98). In this section, we take an explanatory look back at the origins of the Paralympics and Special Olympics as disability-specific sports competitions. We examine how and why they were created. As their existence cannot be separated from the existence of the Olympic Games, we also examine the position of persons with disabilities within this mainstream sports competition.

### 2.2. The Paralympics

The most well-known sporting event for athletes with disabilities is the Paralympics, during which athletes with a physical, visual, and/or intellectual impairment compete. The International Paralympic Committee (IPC) organizes both the Paralympic Summer Games and the Paralympic Winter Games, including a total of 28 Paralympic sports (Tweedy and Vanlandewijck 2011, p. 259). Since 1988, the Olympic Games and Paralympic Games have been held in the same city consecutively (Legg 2018). To participate in the Paralympics, an athlete should have one of the ten functional impairments recognized by the Paralympic Committee (Burns 2021, p. 34). Additionally, the impairment should be severe enough to impact the athlete’s performance (Burns 2021, p. 34).

For persons with physical disabilities, sports evolved throughout the 1940s (Marcellini 2018). One of the first innovations was three-track skiing, in which an athlete with a unilateral amputation above the knee uses one ski and two outriggers (Marcellini 2018, p. 98). After World War II, attention for persons with physical disabilities grew. The life expectancy of people with spinal cord injuries improved thanks, amongst other things, to the invention of penicillin; therefore, rehabilitation became more important (Brittain 2010, pp. 7–8; Legg 2018, p. 418; Legg and Steadward 2011, p. 1101). One of the most famous examples is the Stoke Mandeville Hospital in London. In this hospital, Doctor Ludwig Guttman organized some sport-related activities in a newly established spinal cord center (Legg 2018, p. 418). Wheelchair sports arose. Although those sports were at first a part of rehabilitation, they evolved into competitions in the 1960s and 1970s, of which the Paralympics is the most well-known (Marcellini 2018, pp. 98–99).

<sup>2</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Intersection of race and gender in sport, UN Doc. A/HRC/44/26 (2020), §24; (Kidd 2021, p. 338; Lemmon 2019, pp. 240–41).

The participation of persons with an intellectual disability in the Paralympics has had a turbulent history. After a few years of separate events for athletes with intellectual disabilities, the 1996 Paralympics in Atlanta was the first time that a limited program for persons with an intellectual disability was organized during the main event (Burns 2018, p. 423; Legg and Steadward 2011, p. 1102). During the Paralympics of 2000 in Sydney, persons with an intellectual disability were allowed to compete in a larger number of sports, including track and field, swimming, and basketball (Burns 2018, pp. 423–24). However, a scandal in the basketball competition put an end to the inclusion of persons with intellectual disabilities. It became known that the winning basketball team included athletes without intellectual disabilities (Brittain 2010, p. 150; Burns 2018, p. 423). Although persons with intellectual disabilities bore no blame for this corruption whatsoever, they were excluded from the following Paralympics until a new system of selection was found (Burns 2018, p. 424; Corr 2008, pp. 128–29). Since 2012, athletes with an intellectual disability have once again been allowed to compete in the Paralympics (Dean 2012, p. 18).

### 2.3. Special Olympics

Special Olympics is the largest sports organization for persons with an intellectual disability (Werner 2015, p. 167). Once every two years, the Special Olympics World Games are organized (Werner 2015, p. 167). This event is specifically organized for persons with an intellectual disability, a cognitive disability, or a closely related developmental disorder.<sup>3</sup> To compete in the Special Olympics, an athlete should be eight years of age or older and possess a statement from a professional that they belong to the target group (Brittain 2010, p. 147; Burns 2018, p. 421).

Sports for people with intellectual disabilities arose in the 1960s, mostly at the request of parents, caretakers, and non-profit groups, who fought for the inclusion of persons with intellectual disabilities (Marcellini 2018, pp. 98–99). The Special Olympics was established in 1968 by Eunice Kennedy Shriver, who had organized summer camps for persons with intellectual disabilities since the early 1960s (Asunta et al. 2022, pp. 1–2; Brittain 2010, p. 144; Burns 2018, pp. 419–20; Marcellini 2018, p. 99). The Special Olympic World Games first took place in 1968 and now includes 29 official sports, with athletes often competing in more than one sport (Corbin and Holder 2016, pp. 2188–89). The Special Olympics focuses on the creation of opportunities, the demonstration of skills, personal development, and friendship, as implied in the Special Olympics Oath that has remained the same ever since its establishment: “Let me win, but if I cannot win, let me be brave in the attempt.” (Corbin and Holder 2016, p. 2189).

### 2.4. The Olympics

The existence of the Paralympics and Special Olympics as disability-specific sporting competitions cannot be separated from the position of persons with disabilities at the Olympics. Moreover, their position at the Olympics is important for assessing inclusion under the CRPD in the next section.

Having a disability is thankfully not an exclusion criterion for participation in the Olympics. However, the number of athletes with disabilities who have managed to compete seems limited. Although Borato et al. have identified a total of 28 athletes with disabilities who have competed in the Olympics since 1904 (Borato et al. 2019, p. 45), it is difficult to verify this number. As discussed in Section 4, the concept of disability is neither easily measured nor defined, making it difficult to access the number of athletes with disabilities participating in mainstream events. Moreover, having a disability does not necessarily coincide with having a diagnosis. However, there are some barriers for athletes with disabilities who wish to compete in mainstream events.

<sup>3</sup> Lord and Stein (2009, p. 272); Special Olympics, Article 2: Special Olympic Athletes, <https://resources.specialolympics.org/governance/special-olympics-general-rules/article-2> (accessed on 16 January 2023).

For some athletes, their disability does not influence their performance. For example, a table tennis player (Legg and Steadward 2011, p. 1110) who, despite having been born without a right hand and forearm, competed in the Olympics. For other athletes, adaptive equipment is necessary for their participation, leading to discussions on unfair advantages. Article 30 (5) (a) of the CRPD (see below) explicitly includes the right to participate in mainstream sporting activities. Under Article 5 (3) of the CRPD, when doing so, they are entitled to reasonable adjustments, such as adaptive equipment. This raises a thorny question: up to what point does adaptive equipment lead to a level playing field neutralizing the impact of an impairment, and from when does it become an unfair advantage? One of the most famous cases dealing with this question is that of Oscar Pistorius, a South African sprinter with a double leg amputation who wanted to compete in the 2012 Olympics in London (Weston 2017, p. 31). In 2008, he had been excluded from participation by the International Association of Athletics Federations (IAAF, now known as World Athletics) (Weston 2017, p. 31). According to the IAAF, his prosthesis was considered an unlawful technical device, which gave him an unfair advantage over his competitors (Brittain 2010, p. 103; Weston 2017, p. 31). Pistorius took his case to the Court of Arbitration for Sport (CAS) (Weston 2017, p. 32). The CAS examined whether Pistorius, with his specific prosthesis, competed on the same level as others without such a prosthesis. CAS decided that it was not proven that Pistorius received any unfair metabolic or biomechanical advantage by competing with his prosthesis.<sup>4</sup> Therefore, he was allowed to compete in IAAF events (Wild 2010, pp. 1378–79), including the Olympics, where he went on to participate in the 400 m and 4 × 400 m.

Of course, for many other athletes, participation is not possible at all. An impairment may affect the athlete's performance, which impacts their ability to compete at the highest level. Additionally, the adaptive equipment needed to compete might be incompatible with the sport in which they wish to compete; for example, the use of a wheelchair in a contact sport might lead to injuries.

Persons with disabilities in the Olympic Games are the exception rather than the rule. This in itself may affirm the need for disability-specific sporting competitions. Given this finding, there may be a question as to whether the Olympics is doing enough to include persons with disabilities. One consideration could be that more reasonable accommodations are needed. However, even reasonable accommodations might not be enough. In some cases, it may be necessary to focus on universal design, for example, by adapting the rules of certain sports to facilitate inclusion of persons with disabilities. These important questions regarding mainstream sports competitions are not addressed in what follows. Rather, we focus on the *raison d'être* of disability-specific sports under the CRPD.

### 3. Separate Sports Competitions under CRPD Scrutiny

#### 3.1. The Right to Sport

Whereas the previous section showed that disability-specific sports competitions exist, this section addresses why they continue to exist under the CRPD. Art. 30 (5) of the CRPD consists of a right to sport that is essentially twofold. First, to the fullest extent possible, persons with disabilities should be able to participate in mainstream sporting activities at all levels.<sup>5</sup> Second, persons with disabilities must have the opportunity to organize, develop, and participate in disability-specific sporting activities.<sup>6</sup>

Within the context of the CRPD, this dual right seems odd. The CRPD aims to ensure that persons with disabilities have the full enjoyment of human rights and fundamental freedom on an equal basis with others. Eliminating legal and social barriers to guarantee full and effective participation and inclusion in society is essential.<sup>7</sup> However, in the field

<sup>4</sup> CAS 16 May 2008, 2008/A/1480, Pistorius/IAAF, §46–47; (Brittain 2010, p. 32; Wild 2010, p. 1378).

<sup>5</sup> Article 30 (5) (a) CRPD.

<sup>6</sup> Article 30 (5) (b) CRPD.

<sup>7</sup> Article 3 CRPD (including the general principles).

of sport, persons with disabilities should be integrated ‘to the fullest extent possible,’ and separate sports activities should continue to be allowed. At first glance, this goes against the general principles of the convention, namely, the aim for full inclusion, rejecting any form of segregation.

In this section, we look into the creation process of this dual right to sport to understand where it comes from and how it fits within the broader convention. That process started in December 2001 with General Assembly Resolution 56/168, which assigned to an Ad Hoc Committee the task of preparing a convention on the rights of persons with disabilities. Within the committee, a Working Group was established to prepare a draft version of the future convention. That group consisted not only of representatives of the Member States but also of national human rights institutions and non-governmental organizations representing persons with disabilities.<sup>8</sup> The motto “nothing about us without us” was therefore also included in the legislative process, giving people with disabilities a voice. After eight sessions of the Ad Hoc Committee (from 2002 to 2006), the CRPD was adopted on 13 December 2006 by the General Assembly of the UN. The CRPD is the fastest-negotiated UN convention and the UN convention with the highest number of signatories on its opening day.

In preparation for this section, we examined the preparatory works of the Working Group and the Ad Hoc Committee. Given the general rules on treaty interpretation, they are the most appropriate source in this context for finding out the objectives pursued by the CRPD right to sport.<sup>9</sup> We systematically searched the website and all documents available on this website on the preparation process (from 2002 to 2006) for aspects related to sports.<sup>10</sup> What we found can be categorized into two different issues. First, why does a separate stream for persons with disabilities fit within the logic of the CRPD? And second, what is the relation between disability-specific and ‘mainstream’ sport? These two questions are addressed in the following subsections. For both questions, however, the preparatory works are insufficient for understanding the position of the right to sport within the convention. For the first question, we therefore additionally turn to the literature on inclusion in sport. For the second, a recent report by the Human Rights Commissioner is reviewed. For both questions, we also consulted the general comments and concluding observations (until March 2023) of the CRPD committee. There, however, we note that these aspects of the right to sport are not addressed.

### 3.2. The Existence of Disability-Specific Sport Competitions

Regarding the first question, there seems to have been little or no discussion on the fact that disability-specific sports activities must exist. This is also consistent with an earlier Resolution 48/96 of the General Assembly on Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which states the following:

*“Sports organizations should be encouraged to develop opportunities for participation by persons with disabilities in sports activities. In some cases, accessibility measures could be enough to open up opportunities for participation. In other cases, special arrangements or special games would be needed (...).”* (rule 11)

In the early stages of the legislative process of the CRPD, it was affirmed that persons with disabilities should have the equal opportunity to *organize and participate in* sporting activities.<sup>11</sup> In the second session of the Ad Hoc Committee, the discussion on cultural rights for persons with disabilities started. Referring to the seminar of Quito (IGO), it was suggested to add to the draft text that persons with disabilities should not only be integrated into routine sports activities, but also in competitions designed especially for

<sup>8</sup> <https://www.un.org/esa/socdev/enable/rights/ahcwg.htm> (accessed on 28 April 2023).

<sup>9</sup> Article 31–32 Vienna Convention of 23 May 1969 on the law of treaties.

<sup>10</sup> <https://www.un.org/esa/socdev/enable/rights/adhoccom.htm> (accessed on 28 April 2023).

<sup>11</sup> Report of the Working Group to the Ad Hoc Committee, <https://www.un.org/esa/socdev/enable/rights/ahcstata30wgtext.htm> (accessed on 31 March 2023).

persons with disabilities.<sup>12</sup> In addition, in the report of the Working Group, which was further discussed at the third Ad Hoc Committee in 2004, certain members argued that the prioritized obligation to include persons with disabilities in mass sporting activities should go hand in hand with the promotion of specific sporting activities adapted to the needs and abilities of persons with disabilities, as well as the establishment of sports especially designed for persons with disabilities (Cevra and Landmine Survivors Network 2007, p. 14). China<sup>13</sup>, for example, already mentioned in its draft text at the Working Group sessions that State Parties should take measures to encourage and promote persons with disabilities to participate in national and international tournaments especially organized for persons with disabilities, while India and Mexico, for example, only (but strongly) mentioned the need for adaptations for persons with disabilities.<sup>14</sup> Not only did State Parties favor, or not explicitly oppose, including this in the treaty, but also the disability organizations involved in the drafting process thought this was important. For example, the Landmine Survivors Network (LSN) believes that this two-fold approach is key to achieving true inclusion and equality. It could be said that the establishment of disability-specific sports is necessary to give persons with disabilities a forum. At the same time, the LSN believes that international sport activities for the disabled and non-disabled (like the Olympics and the Paralympics) should be merged, and all national teams should be composed of both sectors in one tournament with separate competitions. This will help to raise awareness, remove stereotyping regarding the capabilities of people with disabilities, and promote the sports of people with disabilities.<sup>15</sup> The European Disability Forum and Disability Australia Limited also stated that special sporting activities should be provided for.<sup>16</sup> In the synthesis of proposals of the fourth session of the Ad Hoc Committee, it became clear that the language of the sports article should include integrative as well as disability-specific sports. During the sixth session of the Ad Hoc Committee in 2005, it was stressed by several participants<sup>17</sup> that persons with disabilities should have the choice of participating in mainstream or disability-specific sports activities.<sup>18</sup>

It is noteworthy that the existence of disability-specific sports activities was not questioned during the creation of the CRPD. The drafters seem to assume that disability-specific sports, which at first appear segregating, are (unlike separate schools) ultimately inclusive. Why this is the case, and why it is not the case for separate schools or workplaces, is not clarified. However, an explanation is given in the literature, which, when dealing with sports, talks about an “inclusion spectrum.” (Kiuppis 2018, pp. 4–21)

Since sport is associated not only with social inclusion but also with physical well-being and raising self-esteem, it is crucial to consider sport as a right and access to and participation in sport—unlike in education—as a matter of individual choice within a continuum of segregated, integrated, and inclusive approaches rather than as placement in a context chosen by professionals.

<sup>12</sup> Compilation of proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp13.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp13.htm) (accessed on 28 April 2023).

<sup>13</sup> Thailand also supported the concern of China.

<sup>14</sup> Comprehensive and integral International Convention to promote and protect the rights and dignity of persons with disabilities: Working paper submitted by Mexico, <https://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w1e.htm> (accessed on 28 April 2023); Comprehensive and integral International Convention to promote and protect the rights and dignity of persons with disabilities: Draft Convention—India, 5 January 2004, <https://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w1e.htm> (accessed on 28 April 2023).

<sup>15</sup> Daily Summary related to Draft Article 24 of 13 January 2004, <https://www.un.org/esa/socdev/enable/rights/wgsuma24.htm> (accessed on 28 April 2023); see also in (Weston 2017, pp. 33–34).

<sup>16</sup> Daily Summary related to Draft Article 24 of 13 January 2004, <https://www.un.org/esa/socdev/enable/rights/wgsuma24.htm> (accessed on 28 April 2023).

<sup>17</sup> F.e. China, Kenya, The Republic of Korea, Thailand, Uganda and The North-Eastern Center for the Study of Sport & Society.

<sup>18</sup> Daily Summary of discussions on the UN Convention on the Rights of People with Disabilities at the Sixth session of the Ad Hoc Committee of 10 August 2005, [https://www.un.org/esa/socdev/enable/rights/ahc6\\_sum10aug.htm](https://www.un.org/esa/socdev/enable/rights/ahc6_sum10aug.htm) (accessed on 23 March 2023).

“Inclusion” thus means something different in sport than in education, since not participating in sport does not immediately imply social exclusion (meaning that individuals who want to participate cannot participate). The goal should therefore be to help persons with disabilities make their own choice to participate in sport in the way that they want (Misener 2014, pp. 1–7). The inclusion spectrum is about considering a range of options available and adapting these to suit the needs, goals, and capabilities of the participants. Inclusion is thus the goal, but several approaches can lead to this goal.

The inclusion spectrum proposes five modalities of practice: (1) separate activities (e.g., Special Olympics); (2) parallel activities (e.g., sport for all, with separate subsections); (3) disability sports activities (as a way of reverse integration, whereby non-disabled persons engage in disability-specific sports together with persons with disabilities, e.g., wheelchair basketball); (4) open (inclusive) activities (whereby anyone can participate without much adaptation, e.g., capoeira); and (5) modified activities (which are designed for everyone, with specific adaptations for persons with disabilities, e.g., baskin) (Black and Williamson 2011, pp. 195–224). This spectrum of opportunities is covered by the human rights-based approach of Article 30 (5) of the CRPD. Article 30 (5) (a) of the CRPD acknowledges the fact that the total integration of persons with disabilities in mainstream sports is not always possible. Indeed, in some cases, taking action to ensure integration would result in a fundamental alteration of the game or endangering the safety of others. By using the wording “on an equal basis with others” in subsection b) of Article 30 (5) of the CRPD, the treaty reflects the fact that in sports (and disability in general), sometimes different treatment is needed to ensure a level of equality (Roy 2007, pp. 1–12).

The question remains, however, to what extent this conceptual approach also leads to inclusion in practice. In this respect, the efficacy of the Paralympic Games, for example, is questioned, not only because of its limited target groups (see also below), but also, among other things, because it promotes a cultural agenda rather than being a sports event (Ling Goh 2020, pp. 42–43). Regarding the implementation of the right, it is at least remarkable that the CRPD committee today pays little attention, for instance in the concluding observations, to operationalizing the right to sport in an inclusive manner. This was also raised recently by the Human Rights Commissioner.<sup>19</sup>

### 3.3. *The Relation between Disability-Specific and Mainstream Sport*

An inclusion spectrum seems to explain why disability-specific activities can (and even should) exist. The ensuing question is how to articulate this in the convention. The current wording stating that State Parties must “encourage and promote” participation in “mainstream sporting activities” “to the fullest extent possible” and must “ensure” that “disability-specific sporting activities” are possible has been heavily debated.

Whether a right to disability-specific sport activities should be explicitly part of the convention was already a point of discussion in the Working Group and remained a point of discussion during the third, sixth, and seventh sessions.<sup>20</sup> The difficult balance here was that it should be sufficiently clear that there should be a specific focus on sports for persons

<sup>19</sup> Report of the Office of the United Nations High Commissioner for Human Rights on Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A.HRC/46/49 (2021), §13.

<sup>20</sup> Report of the Working Group to the Ad Hoc Committee, <https://www.un.org/esa/socdev/enable/rights/ahcstata30wgtext.htm> (accessed on 31 March 2023); Report by the Chairman at the Sixth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2005, <https://www.un.org/esa/socdev/enable/rights/ahcstata30ssrepchair.htm> (accessed on 23 March 2023). See, for example, the proposed modifications to article 24 by Canada at the Sixth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2005, <https://www.un.org/esa/socdev/enable/rights/ahc6contgovs.htm> <https://www.un.org/esa/socdev/enable/rights/ahcstata30ssrepchair.htm> (accessed on 23 March 2023), <https://www.un.org/esa/socdev/enable/rights/ahcstata30sscomments.htm>. (accessed on 23 March 2023); Daily summary of discussion at the seventh session, 27 January 2006, <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm> (accessed on 31 March 2023).

with disabilities without giving the impression that persons with disabilities do not belong in the “mainstream” sports circuit. States should not require persons with disabilities to participate in disability-specific sports. Thus, the right to inclusion in non-disability-specific activities remains and is in no way restricted by the recognition of disability-specific sporting activities.<sup>21</sup>

The need for clarity on the specific focus on disability-specific sports seems to have prevailed over the potential risk of misinterpretation that may arise by distinguishing non-disability-specific and disability-specific sporting activities.

The implication of the choice made is the current text of the convention, which—somewhat contrary to the general approach—states that “mainstream sporting activities” are to be provided only “to the fullest extent possible.” This wording is not without controversy, but it is legitimized today as follows.

First, according to some, using the words “to the fullest extent possible” could be seen as limiting the participation of persons with disabilities, contradicting the core principles of the convention.<sup>22</sup> The Committee on the Rights of Persons with Disabilities has not yet developed an interpretation regarding this wording. However, it should be stated that this wording has the objective to emphasize that adjustments and appropriate support should be provided to ensure that persons with disabilities can enjoy the benefits of physical activity and sports on an equal basis with others.<sup>23</sup> So this could be seen as a reference to the idea of reasonable accommodation or an encouragement of governments to take affirmative measures to enable persons with disabilities to participate in mainstream sports. However, by using the verbs “encourage and promote” instead of the verb “ensure” (which is used in other articles of the convention), the CRPD seems to explicitly recognize that full participation in mainstream society sometimes cannot be reached in sports.

Second, during the negotiations, it was also suggested that the word “mainstream” be removed from the article.<sup>24</sup> Yet this was deliberately retained to emphasize the basic principle of inclusion in the convention.<sup>25</sup> According to the United Nations High Commissioner for Human Rights, “mainstream” should be understood to be qualifying sports in which any person is entitled to participate, including persons with disabilities. Consequently, initiatives that promote inclusive sport, such as Special Olympics Unified (where athletes with and without disabilities play sports together), are also encouraged.<sup>26</sup>

In summary, in the process of creating the CRPD, the discussion seemed to be not whether disability-specific activities can exist but how to articulate their existence in a way that is consistent with the philosophy of the CRPD. This results in the current wording, which can be declared CRPD-compliant but at the same time feels alien given the general approach for the convention. Moreover, the question remains as to whether the inclusion spectrum underlying Article 30 (5) (a) and (b) is sufficiently operationalized in practice. Currently, attention to the implementation of this article by the CRPD committee is almost

<sup>21</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/46/49 (2021), §23.

<sup>22</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/46/49 (2021), §11–13.

<sup>23</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/46/49 (2021), §12.

<sup>24</sup> 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 sixth session, UN Doc. A/60/266 (2005), §144, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/463/96/PDF/N0546396.pdf?OpenElement> (accessed on 28 April 2023).

<sup>25</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/46/49 (2021), §13 and §21.

<sup>26</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/46/49 (2021), §72.



nonexistent. To the extent that the CRPD committee addresses the issue, it is not at all opposed to separate disability-specific sports competitions such as the Paralympics and Special Olympics. On the contrary, the Committee even praises countries for organizing and participating in them.<sup>27</sup> Separate sports competitions are taken for granted. Unlike separate schools and separate workplaces, they are not seen as segregating but as a gateway to inclusion.

#### 4. Measuring Disability

It is surprising how few questions are asked about the position of disability-specific sports within a CRPD framework.<sup>28</sup> Even if the starting point is that disability-specific sports competitions are inclusive, the question remains of how to organize them in a manner consistent with the CRPD. Organizing sports competitions requires choices about who can participate and on what basis. The organization of a sports event is inseparably linked to classification. The goal of it is to limit the impact of an impairment on the results of the competition (Connick et al. 2018, p. 389). Although classification is used in mainstream sports for the same reason (Connick et al. 2018, p. 389; Marcellini 2018, p. 100; Woodward 2021, p. 45)—for example, to level out the impact of sex and weight—in disability sport, this classification is more extensive (Marcellini 2018, p. 100). It is precisely assessing a disability and linking consequences to it that is a very sensitive issue in human rights in general—see, for example, the debate on gender testing<sup>29</sup>—and the CRPD in particular.

In the section that follows, we first develop criteria that a CRPD-compliant disability assessment should meet and then evaluate the Paralympics and Special Olympics against these criteria. The criteria themselves are not a given because, at present, little is known about how disability assessment can be done in a CRPD-compliant way. In order to develop these criteria, we first consulted information on the process of creating the convention. However, we found that during the process of creation, the issue was barely addressed (Section 4.1). We therefore used the next step to see how the CRPD committee is currently dealing with this issue and derived four criteria (Section 4.2), which we subsequently use to evaluate the Paralympics (Section 4.3) and Special Olympics (Section 4.4).

##### 4.1. Disability Assessment in the Process of Creation

Disability classification systems and disability assessment are unavoidable when determining access to social benefits and social services and when making classifications in sports. Nonetheless, an analysis of the drafting process by the Ad Hoc Committee<sup>30</sup> leads to the finding that the issue of how to design and apply these classification systems was hardly addressed when drafting the CRPD.

Diversity among persons with disabilities—one of the principles in the preamble—was recognized very early on in the drafting process.<sup>31</sup> However, how this principle of diversity impacts classification and whether it justifies a diversified approach based on types of impairments was not addressed.

To the extent that the topic of classification was addressed, it was in the context of the quest for a definition of disability and whether such a definition was needed. It was regularly debated whether the World Health Organization's International Classification of

<sup>27</sup> Concluding Observations on the Initial Report of the Islamic Republic of Iran, UN Doc. CRPD/C/IRN/CO/1 (2017), §3; Concluding Observations on the Initial Report of France, UN Doc. CRPD/C/FRA/CO/1 (2021), §61 (c).

<sup>28</sup> Also the Human Rights Commissioner seems to have noticed and calls the CRPD-committee to action: Report of the Office of the United Nations High Commissioner for Human Rights on Participation in physical activity and sport under article 30 of the Convention on the Rights of Persons with Disabilities, UN Doc. A.HRC/46/49 (2021), §13.

<sup>29</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Intersection of race and gender in sport, UN Doc. A/HRC/44/26 (2020), §34 (a); (Woodward 2021, p. 48).

<sup>30</sup> Based on the following: <https://www.un.org/esa/socdev/enable/rights/adhoccom.htm> (accessed on 27 April 2023).

<sup>31</sup> Preamble 9; UNCRPD; See Sweden in Daily Summary related to Article 1 and 2, purpose and general principles, 5 January 2004, <https://www.un.org/esa/socdev/enable/rights/wgsuma2.htm> (accessed on 30 March 2023).

Functioning, Disability, and Health (hereafter: ICF) could be used to substantiate such a definition.<sup>32</sup> The ICF is a common language and a framework for measuring functioning and the impact of disease and impairment on that functioning. In the ICF the impact on functioning is not only determined by personal factors but also by environmental factors.<sup>33</sup> In doing so, the ICF moves away from a purely medical classification, where disability would be the result of personal deficiencies; it also involves societal barriers stemming from the social model of disability, and that model also inspired the CRPD. However, because the ICF also attaches importance to personal (mostly medical) factors, there is not a full implementation of a social model of disability. That, though, was not the reason for questioning the ICF during the creation process of the CRPD. While some countries and organizations of persons with disabilities were in favor of the ICF, those who rejected its use mainly referred to the lack of attention to mental illness and for the risk of exclusion linked to the application of the ICF.<sup>34</sup> It is only after the creation of the CRPD that the still partly medicalized approach in the ICF is criticized, in particular by the CRPD committee (infra, Section 4.2).<sup>35</sup>

It was eventually decided not to define disability at the convention. As a consequence, discussions on the use of the ICF faded into the background. Although during the drafting process, it was often stated that a definition and a classification system are different things that need to be distinguished,<sup>36</sup> the somewhat paradoxical situation arises whereby disability has no definition, while disability classification systems are necessary to identify persons with disabilities.

#### 4.2. Disability Assessment as Approached by the CRPD Committee

An analysis of the process of creation offers little guidance on how to assess disability in conformity with the CRPD. The issue was simply not adequately addressed. In the search for criteria, we therefore shift our focus to the current approach of the CRPD committee. The CRPD committee has not yet formulated substantive guidelines on disability assessment, but indirectly, criteria can be derived. We looked at all general comments (nos. 1–7) and searched through all concluding observations published up to March 2023. After going through a dozen concluding observations in full, we found that the issue of classification is mainly assessed in the section on “General principles and obligations (arts. 1–4)”. We therefore went through those sections in all concluding observations. Additionally, based on what we found in the concluding observations we read in full, we searched the rest of the concluding observations with the search terms “assessment”, “classification”, and “certification” and their derivatives. Relevant passages were selected and looked at in more depth. We then thematized them, leading to the four criteria below.

<sup>32</sup> See, for example, discussion between Australia, Serbia, Montenegro, Norway, Chile, and IDC in Daily summary of discussion at the seventh session, 31 January 2006, <https://www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm> (accessed on 30 March 2023).

<sup>33</sup> Towards a common language for Function, Disability and Health, UN Doc. WHO/EIP/GPE/CAS/01.3 (2002), p. 10.

<sup>34</sup> See, for example, draft of article 3, definitions, <https://www.un.org/esa/socdev/enable/rights/ahcwgreporta3.htm#footnote12> (accessed on 30 March 2023); also see discussion between Colombia, World Federation of the Deaf, World Federation of the Deafblind, in Daily Summary related to Draft Article 3, 13 January 2004, <https://www.un.org/esa/socdev/enable/rights/wgsuma3.htm> (accessed on 30 March 2023). Also see European Disability Forum in Comments on the draft text of article 3, <https://www.un.org/esa/socdev/enable/rights/wgdca3.htm> (accessed on 30 March 2023) and Cuba and Korea in Daily summary of discussions related to Article 3, 23 August 2004, <https://www.un.org/esa/socdev/enable/rights/ahc4sumart03.htm> (accessed on 30 March 2023). Also see Australia, Serbia, Montenegro, Norway, Chile, and IDC in Daily summary of discussion at the seventh session, 31 January 2006, <https://www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm> (accessed on 30 March 2023).

<sup>35</sup> Concluding observations on the initial report of Mongolia, UN Doc. CRPD/MNG/CO/1 (2015), §5–6; Concluding observations on the initial report of Nepal, UN Doc. CRPD/NPL/CO/1 (2018), §7.

<sup>36</sup> Concluding Observations on the Initial Report of Austria, UN Doc. CRPD/AUT/CO/1 (2013), §9; see also reaction of Lebanon in Daily Summary related to Draft Article 3, 13 January 2004, <https://www.un.org/esa/socdev/enable/rights/wgsuma3.htm> (accessed on 30 March 2023).

The CRPD committee has repeatedly confirmed that every country should have standardized criteria to certify disability.<sup>37</sup> That is necessary to implement the rights in the convention and to monitor that implementation. So, disability assessment and classification are not problematic in themselves; on the contrary, they are even obligatory.<sup>38</sup> According to our analysis, disability assessment should meet four criteria.

1. **Human-rights-based criteria.** First, classification criteria must arise from a so-called ‘human-rights-based approach’.<sup>39</sup> This means that the focus should be on the barriers that persons with disabilities face in society and not on a person’s impairment.<sup>40</sup> Categorizing persons based on medical criteria is out of the question<sup>41</sup> since that is not in line with the convention’s starting point: disability is not a medical condition but a social construct resulting from legal and environmental barriers that persons with disabilities encounter in society.<sup>42</sup> For instance, it is not permissible to categorize someone as ‘unemployable’ merely on the basis of medical criteria<sup>43</sup> or to make access to and the level of a pension dependent on a medical diagnosis.<sup>44</sup> Making assessments on the basis of impairments only seems acceptable for data collection and monitoring.<sup>45</sup> Unfortunately, the UN committee gives no detailed guidance on what constitutes human-rights-based criteria. It only provides some more general clues. For example, according to the observations on Ecuador, it should include criteria such as ‘independence’ and ‘autonomy’ of persons with disabilities within their environment and being on an equal footing with others;<sup>46</sup> according to the observations on Korea, criteria should be needs-based,<sup>47</sup> the observations on Moldova refer to criteria that make reference to a person’s individual requirements, will, and preferences.<sup>48</sup> Although attention in the literature on disability classification is beginning to increase, the development and operationalization of human rights-based criteria is currently an unexplored area.<sup>49</sup>
2. **Non-discriminatory.** Second, classification must be non-discriminatory. It must include all persons with disabilities.<sup>50</sup> Many countries are addressed because the assessment criteria currently used result in some disabilities not being acknowledged,

<sup>37</sup> Concluding Observations on the Initial Report of Uruguay, UN Doc. CRPD/URY/CO/1 (2016), §10; Concluding observations on the initial report of Honduras, UN Doc. CRPD/HND/CO/1 (2017), §10.

<sup>38</sup> Concluding observations on the initial report of Guatemala, UN Doc. CRPD/GTM/CO/1 (2016), §9–10.

<sup>39</sup> See repeatedly in concluding observations. Concluding observations on the initial report of Colombia, UN Doc. CRPD/COL/CO/1 (2016), §13; Concluding observations on the initial report of Nepal, UN Doc. CRPD/NPL/CO/1 (2018), §8; Concluding observations on the initial report of Guatemala, UN Doc. CRPD/GTM/CO/1 (2016), §10; Concluding observations on the initial report of Latvia, UN Doc. CRPD/LVA/CO/1 (2017), §7; Concluding observations on the initial report of the Republic of Moldova, UN Doc. CRPD/MDA/CO/1 (2017), §7.

<sup>40</sup> Concluding observations on the initial report of Chile, UN Doc. CRPD/CHL/CO/1 (2016), §6; Concluding observations on the initial report of Panama, CRPD/PAN/CO/1 (2017), §8; Concluding observations on the combined second and third periodic reports of Ecuador, CRPD/ECU/CO/2-3 (2019), §10.

<sup>41</sup> For example: Concluding observations on the initial report of the Republic of Korea, UN Doc. CRPD/KOR/CO/1 (2014), §8; Concluding observations on the initial report of Costa Rica, UN Doc. CRPD/CRI/CO/1 (2014), §5; Concluding observations on the initial report of Portugal, UN Doc. CRPD/PRT/CO/1 (2016), §7.

<sup>42</sup> General comment No. 6 on equality and non-discrimination, UN.Doc. CRPD/C/GC/6 (2018), §59.

<sup>43</sup> Concluding observations on the initial report of Turkmenistan, UN Doc. CRPD/TKM/CO/1 (2015-), §41; Concluding observations on the initial report of the Republic of Moldova, UN Doc. CRPD/MDA/CO/1 (2017), §6.

<sup>44</sup> Concluding observations on the initial report of Colombia, UN Doc. CRPD/COL/CO/1 (2016), §12.

<sup>45</sup> General comment No. 6 on equality and non-discrimination, UN.Doc. CRPD/C/GC/6 (2018), §34.

<sup>46</sup> Concluding observations on the combined second and third periodic reports of Ecuador, CRPD/ECU/CO/2-3 (2019), §10.

<sup>47</sup> Concluding observations on the initial report of the Republic of Korea, UN Doc. KOR/CO/1 (2014), §8.

<sup>48</sup> Concluding observations on the initial report of the Republic of Moldova, UN Doc. CRPD/MDA/CO/1 (2017), §7; similar “needs, will and preferences” in Concluding observations on the initial report of Latvia, UN Doc. LVA/CO/1 (2017), §7.

<sup>49</sup> See in particular (Waddington and Priestley 2021).

<sup>50</sup> General comment No. 6 on equality and non-discrimination, UN.Doc. CRPD/C/GC/6 (2018), § 59.

either because they are not considered to be disabilities or because they are considered insufficiently impactful.<sup>51</sup> Elderly persons should not, by definition, be excluded from disability assessment, and psychosocial disabilities must not be overlooked.<sup>52</sup>

3. **Standardized, user-friendly, and involved.** In order to reduce the burden on persons with disabilities and enhance consistency, multiple assessments should be avoided.<sup>53</sup> This implies a standardized ‘single disability certification system’ that can be used for multiple purposes.<sup>54</sup> Moreover, that assessment must be user-friendly. This requires that accessible information is distributed and that persons with disabilities are involved in information on the assessment scale and assessment process.<sup>55</sup> That involvement should go even further; persons with disabilities and their representing organizations should be involved in creating assessment scales as well.<sup>56</sup>
4. **Aimed at inclusion.** Finally, the goal of assessing disability is to include persons with disabilities in our society. Assessing disability is a way of identifying needs, which can then be met through support systems.<sup>57</sup> An assessment should not have the effect of excluding a person from society, for example, by providing a basis for access to sheltered work.<sup>58</sup> In addition, categorization also has the purpose of collecting data. In that respect, categories need to be sufficiently precise, for example, to be able to map intersectional discrimination.<sup>59</sup>

Whether the aforementioned ICF meets these criteria is a question that remains open. In any case, the CRPD committee itself judges that it does not. In both the reports on Mongolia and Nepal, the CRPD committee rejects the use of the ICF criteria because they emphasize the limitations of the person rather than the legal and environmental barriers raised by society.<sup>60</sup>

#### 4.3. Paralympics

The International Paralympic Committee is not a contracting party to the CRPD, but promoting the implementation of the CRPD and striving for a more inclusive world are among its objectives.<sup>61</sup> In that respect, there may be a question as to what extent the way participation in the Paralympics is decided is in line with the CRPD. To answer that question, we first briefly discuss the classification system used by the International Paralympic Committee. We then reflect on that system, applying the above criteria.

In the Paralympics, classifying persons with disabilities has a double aim: first, to determine who is eligible to compete in the Paralympics; and second, to group athletes into competition classes in order to minimize the impact of the impairment on their performance.

<sup>51</sup> Concluding observations on the initial report of the Republic of Korea, UN Doc. KOR/CO/1 (2014), §8; Concluding observations on the initial report of Latvia, UN Doc. CRPD/LVA/CO/1 (2017), §6–7.

<sup>52</sup> Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session, UN Doc. CRPD/AUS/CO/1 (2013), §5–6.

<sup>53</sup> Concluding observations on the initial report of South Africa, UN Doc. CRPD/ZAF/CO/1 (2018), §4; Concluding observations on the initial report of Poland, UN Doc. CRPD/POL/CO/1 (2018), §5–6; Concluding observations on the initial report of the former Yugoslav Republic of Macedonia, UN Doc. CRPD/MKD/CO/1 (2018), §6; Concluding observations on the initial report of Malta, UN Doc. CRPD/MLT/CO/1 (2018), §6; Concluding observations on the initial report of Algeria, UN Doc. CRPD/DZA/CO/1 (2019), §7; Concluding observations on the initial report of Turkey, UN Doc. CRPD/TUR/CO/1 (2019), §6.

<sup>54</sup> Concluding Observations on the Initial Report of Uruguay, UN Doc. CRPD/URY/CO/1 (2016), §10; Concluding observations on the initial report of Honduras, UN Doc. CRPD/HND/CO/1 (2017), §9.

<sup>55</sup> Concluding observations on the initial report of the former Yugoslav Republic of Macedonia, UN Doc. CRPD/MKD/CO/1 (2018), §6; Concluding observations on the initial report of Poland, UN Doc. CRPD/POL/CO/1 (2018), §6; Concluding observations on the initial report of Malta, UN Doc. CRPD/MLT/CO/1 (2018), §6.

<sup>56</sup> See notes 55 above.

<sup>57</sup> Concluding observations on the combined second and third periodic reports of the Republic of Korea, UN Doc. CRPD/KOR/CO2-3 (2022), §6.

<sup>58</sup> Concluding observations on the initial report of the Czech Republic, UN Doc. CRPD/CZE/CO/1 (2015), §52.

<sup>59</sup> General comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6 (2018), §32.

<sup>60</sup> See notes 35 above.

<sup>61</sup> International Paralympic Committee, Constitution, 24 August 2022, 3 and 4.2.13.

As a result, athletes with not necessarily the same impairments, but impairments that have a more or less equal impact on performing a specific sport, are in the same competition group.<sup>62</sup> To achieve these goals, a *functional classification* system is applied (Burns 2021, p. 34; Connick et al. 2018, p. 394). Unlike prior classification systems (Connick et al. 2018, pp. 391–93), persons are not classified on the basis of their medical diagnosis or on the functional impact of an impairment in general life but on the effects of an impairment on a *specific* sport (Van Biesen et al. 2021, p. 19).

The classification of an individual athlete is a three-step process.<sup>63</sup>

1. First, it must be determined whether there is any impairment at all. That impairment should fit into at least one of the ten ‘Eligible Impairment Types’, subdivided into three groups: physical impairments, visual impairments, and intellectual impairments (Burns 2021, p. 34). The latter is defined as a limitation in intellectual functioning and adaptive behavior as expressed in conceptual, social, and adaptive practical skills. To be eligible, an intellectual impairment should have originated before the age of 18.<sup>64</sup> The group of physical impairments is further subdivided into eight type of physical impairments, including *Limb Deficiency* (a total or partial absence of bones or joints as a consequence of trauma, illness, or a congenital limb deficiency)<sup>65</sup> and *Ataxia* (an increase in muscle tension and a reduced ability of a muscle to stretch caused by damage to the central nervous system).<sup>66</sup> The existence of a closed list of ten eligible impairments implies that there are also impairments that are, by definition, not eligible for the Paralympics.<sup>67</sup> Moreover, international federations may specify in their classification rules that certain health conditions do not in themselves lead to an eligible impairment.<sup>68</sup> In addition, in general, as per the International Paralympic Committee, certain health conditions are excluded, for example, chronic fatigue syndrome.<sup>69</sup> Having an eligible impairment is a generic prerequisite to entering the Paralympics. However, not everyone who has an eligible impairment can participate in any sporting competition. The ‘minimum impairment criteria’ must be met (see second step, just below), and not every eligible impairment has access to every sport. For example, intellectual impairments only provide access to swimming, athletics, and table tennis (Lemmey et al. 2021, p. 100).
2. Second, the impairment must be severe enough to impact the athlete’s performance in the sport (Burns 2021, p. 34). Minimum impairment criteria, such as the level of amputation in cases of limb deficiency, are applied. These are scientifically based and sports-specific. In general, minimum impairment criteria do not consider the potential impact of using equipment on the ability to execute specific tasks and activities fundamental to any given sport.<sup>70</sup> If an athlete does not meet the minimum impairment criteria, he is to be considered ineligible for that sport.<sup>71</sup>

<sup>62</sup> Connick et al. (2018, pp. 389–91); International Paralympic Committee, Athlete Classification Code, November 2015, introduction and 2.1.

<sup>63</sup> Connick et al. (2018, p. 396): It should be noted that the current Classification Code is under review and that a new code is expected in 2024. It remains to be seen to what extent the analysis below will still apply up from that point. The creation of the new code is a phased process that is publicly communicated (<https://www.paralympic.org/classification-code-review> (accessed on 27 April 2023)). On the date this contribution was written (April 2023), it seems that the core of the classification process will remain unaltered and that concepts such as non-eligible impairment, underlying health condition, and the distinction between an impairment and disease will remain essential.

<sup>64</sup> International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 3.1.10.

<sup>65</sup> International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 3.1.3.

<sup>66</sup> International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 3.1.7.

<sup>67</sup> See International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 4.10.

<sup>68</sup> International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 5.1.

<sup>69</sup> International Paralympic Committee, International standard of Eligible Impairments, 3 February 2015, 5.2.2.

<sup>70</sup> International Paralympic Committee, International Standard for Athlete Evaluation, September 2016, 4.4.1.

<sup>71</sup> I International Paralympic Committee, International Standard for Athlete Evaluation, September 2016, 4.6.

3. Third, an athlete who meets the minimum impairment criteria is assigned to a sports class (Burns 2021, p. 34). In a sports class, athletes are grouped based on the impact of the eligible impairment on the fundamental tasks and activities of the sport.<sup>72</sup> At this stage, the (permitted) use of adaptive equipment is taken into account to allocate an athlete to a sports class.<sup>73</sup> While for physical impairments, sports classes join athletes with similar limitations irrespective of their eligible impairment, for visual impairments and intellectual impairments, the classes do not transcend eligible impairment types. Moreover, there is only one class for those competing with an intellectual impairment.<sup>74</sup>

It is not difficult to see that the way the Paralympics classifies competition candidates does not meet the criteria based on the CRPD committee's activities, as developed above. First, although it can be said that the criteria are standardized and, to some extent, involved, their complexity hinders user friendliness. Second, classification is not geared towards inclusion, as the concept is set out in the criteria above. According to the criterion of inclusion, disability assessment should aim at the identification of needs that, in the next phase, can be met through support that ultimately leads to participation in society. However, although inclusion in society might be a side effect, the aim of the IPC classification process is not to enable participation for as many persons with disabilities as possible, if necessary by offering support, but simply to categorize them. Third, the exclusion of certain health conditions, the eligibility of only ten impairment types, and the requirement to meet minimum impairment criteria are definitely not in line with the requirement that criteria should be non-discriminatory, i.e., that they should aim to include all persons with disabilities (rather than exclude them). For example, athletes with a mental or psychosocial disability cannot participate in the Paralympics (Burns 2021, p. 37). Additionally, there is very little to no room for comorbidities. For example, an athlete who has both a visual limitation and spasticity, must decide in which category they wish to compete (Burns 2021, p. 35). This makes competing especially difficult for athletes with an intellectual disability, as almost all of them suffer from comorbidities (Burns 2021, p. 35; Kinnear et al. 2018, p. 3). Fourth, the criteria applied are not human-rights-based; the IPC classification focuses on *personal* barriers and not on societal barriers. The classification system is comparable to the ICF, which was rejected by the CRPD committee. Consequently, there is a tension between the International Paralympics Committee classification system and the criteria for a CRPD-based disability assessment developed on the basis of the CRPD committee's activities.

#### 4.4. Special Olympics

The question here is whether the same is true for the Special Olympics. The Special Olympics takes a very different view on classification. The starting point is that everyone with an intellectual disability should be able to participate and win at the highest level.

Every person with an intellectual disability who is at least eight years of age is eligible to participate in the Special Olympics, irrespective of whether or not they have other mental or physical disabilities.<sup>75</sup> To compete, the athlete has to be identified by an agency or professional as having an intellectual disability, has to have a cognitive delay (mostly determined by means of IQ testing), or has to have a closely related developmental disability. A physical, behavioral, or emotional disability or a specific learning or sensory disability is not eligible in itself.<sup>76</sup> In exceptional cases, the general rules may be deviated from to admit a person who does not formally have an intellectual disability.<sup>77</sup>

<sup>72</sup> International Paralympic Committee, International Standard for Athlete Evaluation, September 2016, 5.4.

<sup>73</sup> International Paralympic Committee, International Standard for Athlete Evaluation, September 2016, 5.2.

<sup>74</sup> See in more detail: (Lemmey et al. 2021, pp. 99–100; Van Biesen et al. 2021, pp. 19–20; Burns 2018, pp. 424–30).

<sup>75</sup> Special Olympics, Official General Rules, 2022, art. 2.01(a) and (c).

<sup>76</sup> Special Olympics, Official General Rules, 2022, art. 2.01(d).

<sup>77</sup> Special Olympics, Official General Rules, 2022, art. 2.01(e).

Starting from the premise that athletes of all levels of ability should be able to participate and compete, the Special Olympics has a different approach for classification based on a technique called divisioning.<sup>78</sup> Athletes of every level are encouraged to compete, and the competition is organized in such a way that every athlete has the same chance to win a medal. First, the athletes are divided based on age and sex. Next, a further division is made based on ability. That ability is determined on the basis of a score from a prior competition, a seeding round, or a preliminary event.<sup>79</sup> Within each division, the minimum number of competitors or teams is three, and the maximum number is eight.<sup>80</sup> In principle, there may be no more than a 15% variance between the highest and lowest scores within any division.<sup>81</sup>

On first sight, the technique applied by the Special Olympics—divisioning—seems more compliant with the CRPD as it focuses on performance instead of impairment. Thus, it seems more inclusive and needs-based. Moreover, the classification technique is more user-friendly and less invasive. There is also flexibility in the application of the criteria. At the same time, the Special Olympics' approach is also not in line with the requirement of non-discrimination; despite its flexibility, the group of persons with disabilities targeted by the Special Olympics remains limited. Furthermore, the primary selection criterion (an intellectual disability) is not human rights-based but medically-oriented. Moreover, the very thing that makes the Special Olympics seemingly inclusive—everyone wins—goes against exactly what sports competitions are about: the need to have an ultimate winner. It is precisely this aspect that is strongly debated in the literature, partly because it could fuel further segregation, paternalism, and ableism.<sup>82</sup>

#### 4.5. Assessing Disability Differently?

Both the Paralympics and Special Olympics are in tension with the disability assessment criteria developed on the basis of the CRPD committee's concluding observations and general comments. That raises the question of whether disability-specific sports competitions need a thorough reconsideration of their selection criteria or whether the concept of disability assessment that the CRPD committee generally applies does not fully apply to disability sports. To us, the answer seems nuanced.

On the one hand, the fact that, contrary to the CRPD principle, separate competitions may be developed leads us to believe that certain aspects of disability sports classification are not problematic, even though they counteract the general CRPD-based disability assessment criteria. This is, in particular, the case for functional classification. If the starting point is that disability-specific competitions are allowed, the classification of athletes into groups based on the impact of their impairment constitutes a process similar to classifications in mainstream sports, where, by categorizing athletes, the impact of certain physical characteristics (weight, sex, etc.) on competition is eliminated as well. Making a distinction based on physical attributes in sport to create a level playing field is accepted by the Human Rights Commissioner, for example, in his report on gender in sport. Although questions are raised regarding the methods used for categorization, the existence of different categories based on sex is not deemed a problem.<sup>83</sup> In the same way, functional classification—although it does not use human rights-based criteria—does not seem problematic. In addition, the fact that a competition such as the Special Olympics highlights one specific disability (contrary to the criterion of being non-discriminatory) seems to be inherent in the CRPD's choice to

<sup>78</sup> Special Olympics, "Divisioning", <https://resources.specialolympics.org/sports-essentials/divisioning> (accessed on 16 January 2023).

<sup>79</sup> Brittain (2010, pp. 147–48), Burns (2018, p. 421); Special Olympics, Article 1 Sport Rules, October 2022, 10.2.2.1.

<sup>80</sup> Special Olympics, Article 1 Sport Rules, October 2022, 10.2.2.2.

<sup>81</sup> Special Olympics, Article 1 Sport Rules, October 2022, 10.2.1.

<sup>82</sup> See the often cited article of (Storey 2004, pp. 35–42); also see (Counsell and Agran 2012, pp. 245–56). See, on the other hand, a common critique against the Paralympics: the fact that it is a high performance sports competition implies that many of the participants are not vulnerable. See (Howe 2019, pp. 205–6).

<sup>83</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Intersection of race and gender in sport, UN Doc. A/HRC/44/26 (2020).

allow disability-specific sports as a means to raise awareness. Moreover, it does not seem illogical to us (contrary to the principle of inclusion) that assessment should not be used to accommodate persons with barriers (e.g., by adjusting the rules or providing assistive devices) to the extent that this would affect the level playing field.

On the other hand, there are still a number of issues that—despite the specificity of sport in the CRPD—raise questions. We named what we think are the three most important ones.

1. The first is that contrary to the criterion of non-discrimination, a sporting event such as the Paralympics that claims to be there for all persons with disabilities excludes persons because they are deemed to have no disability, because the disability is not severe enough, or because they fall between two conditions. Regardless of how classification happens, anyone who cannot access mainstream sports competitions due to a disability should have the opportunity to participate in disability sports competitions.<sup>84</sup>
2. The second is that within the Paralympics, physical impairments, visual impairments, and intellectual impairments are grouped and, by definition, do not compete with each other. Thus, persons are categorized on the basis of their impairment, while its impact on their performance in a specific sport could be similar. Although historically explainable, it is doubtful whether this form of grouping within one event can still be justified. Although the UN convention recognizes diversity among persons with disabilities, the needs-based approach underlying the convention seems to preclude distinctions made on the basis of impairment in cases of similar needs.
3. The third is the position of persons with intellectual impairments, both in the Paralympics and the Special Olympics. For this group (and more broadly, for visual impairments), a functional approach is abandoned, and athletes compete on the basis of a medical diagnosis. In the Paralympics, the intellectual impairment selection criteria are based on the WHO definition of ‘intellectual disability’. For each athlete, a portfolio is made which include: a written report by a psychologist or doctor, an IQ test, a report of a clinical observation, and proof that the disability manifested before the age of 22 (Burns 2018, p. 424). Thereafter, this portfolio is judged by two or three independent psychologists who decide whether the athlete is allowed to compete (Burns 2018, p. 425). Thus, a purely medicalized approach is taken. Moreover, because there is currently only one class, the impact of impairment on performance plays a role in determining whether a person with an intellectual disability meets the minimum impairment criteria. By determining the threshold, they serve both as a gateway and a stopping point. Once that threshold is met, no further classification is made. Even though the current IPC Classification Code is under review, and the definition of intellectual impairment is potentially about to broaden,<sup>85</sup> full incorporation of persons with intellectual disabilities still seems a long way off. Meanwhile, in the Special Olympics, the technique of divisioning based on past performance leads to so many distinctive categories that it is no longer possible to appoint one ultimate winner, possibly fuelling further segregation, paternalism, and ableism.

## 5. Conclusions

This contribution looked at the relationship between the UN Convention on the Rights of Persons with Disabilities (CRPD) and disability-specific sports competitions such as the Paralympics and Special Olympics. In particular, it first considered why the CRPD allows and encourages disability-specific sports competitions, despite (or perhaps due to) its radical choice for inclusion. Second, it asked the obvious follow-up question: if disability-

<sup>84</sup> See similarly in (Ling Goh 2020, pp. 42–43).

<sup>85</sup> The definition proposed after the second consultation phase is: “a restriction in general mental functions required to understand and constructively integrate the various mental functions including all cognitive functions and their development over the life span.” See art. 8.1.7 in the draft classification code, version July 2022, Consultation Phase 2. [https://www.paralympic.org/sites/default/files/2022-07/2022\\_07%20Draft%20IPC%20Classification%20Code.pdf](https://www.paralympic.org/sites/default/files/2022-07/2022_07%20Draft%20IPC%20Classification%20Code.pdf) (accessed on 27 April 2023).



specific competitions are allowed, how can the criteria for participation be determined in a manner consistent with the CRPD?

Regarding the first issue—the existence of disability-specific sports competitions—the convention recognizes pre-existing practices in the sports scene and thus supports the idea of allowing disability-specific sports. After all, in competitive sports, it can be established that many persons with disabilities cannot participate equally in mainstream sports without a fundamental alteration of the game or endangering the safety of others. When the convention was established, there was no discussion about this.

Although no specific reason is given in the CRPD or in the preparatory works for allowing a disability-specific circuit, based on the inclusion spectrum, it can be argued that inclusion means something different in sport than in other areas of (social) life, such as education and work. To achieve true equality, persons with disabilities should have the choice of participating in mainstream or disability-specific sports activities. The question that remains, however, is whether that choice truly exists or can exist and whether the idea of inclusion still allows the competitive events to be organized separately. It is striking that the CRPD committee currently pays too little attention to this.

The example of sports teaches us that inclusion and separate facilities for persons with disabilities are not necessarily in conflict. Full participation in society can, in some cases, go hand in hand with the existence of a separate circuit for persons with disabilities. Sport is not the only possible example; a similar question might arise, for example, in relation to the right to culture, which is also included in Article 30 of the CRPD. What is essential, however, is that the spectrum of inclusion does not legitimize separate circuits but rather foregrounds the choices of persons with disabilities. The question that remains is whether similar reasoning can be applied to other domains in which separation is no longer permitted under the CRPD. Is it necessary to prohibit segregated schools and workplaces for persons with disabilities as long as they exist only as options for persons with disabilities to choose from, alongside the right to full inclusion in the mainstream circuit?

Regarding the second issue, if one accepts that disability-specific sports competitions may exist, it inevitably leads to the question of how to determine the criteria for participation in conformity with that convention. Assessing a disability and linking consequences to it is a very sensitive issue for the CRPD.

Starting from the concluding observations of the CRPD, we derived four criteria for disability assessment: First, disability assessment must be based on human rights assessment criteria. Barriers in society, not a person's medically assessed impairment, are at the forefront. Second, disability assessment must be non-discriminatory. It may not exclude disabilities, either because they are not considered to be disabilities or because they are considered insufficiently impactful. Third, disability assessment must be standardized, user-friendly, and involved. Fourth, disability assessment must be aimed at including persons with disabilities in society, not at segregation. These criteria are general criteria that can be applied to assess other legal fields, for example social security law, as well.

Nevertheless, reviewing the classification process of the Paralympics and Special Olympics, it is hard to see how these general criteria for disability assessment apply to classification in disability-specific sports competitions. If the aim is to create a level playing field and preserve the element of competition, assessing an impairment (which is not human rights-based) and excluding some levels of impairment(s) (which is not non-discriminatory) is unavoidable. Thus, the general criteria do not seem entirely applicable to this subject. Nevertheless, they can still offer a critical lens for questioning certain existing practices. Examples are the exclusion of certain disabilities, the differentiation between physical, intellectual, and visual impairments, and the treatment of persons with intellectual disabilities.

Nevertheless, it remains difficult to pinpoint precisely how exclusion and inclusion relate in this very atypical domain from a disability perspective. To this end, more research and insights from the CPRD committee are needed.

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