

The Recast Reception Conditions Directive and the Rights of Asylum Seekers with Disabilities: Opportunities, Challenges and the Quest for Reform

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Abstract

In recent years, the European Union (EU) has, like much of the developed world, experienced a sustained period of inward migration from refugee-producing States in Africa and the Middle-East. This 'refugee crisis' has placed a strain not only on the political will of the EU institutions and Member States to find a satisfactory resolution to deal with the flow of migrants, but also on their ability to put in place fair processes for any resulting claims for asylum and to adequately support the needs of asylum seekers while those claims are being processed. This article discusses the latter issue from a discreet angle, focusing on how the EU has addressed the needs of asylum seekers with disabilities. As a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which enjoys sub-constitutional status within the EU legal order, the EU is obligated to interpret all legislation in light of the Convention. Thus, this article seeks to assess the degree to which Directive 2013/33/EU on the material reception conditions for asylum seekers can protect and promote the rights of asylum seekers with disabilities and fulfill the 'human rights model of disability' embedded within the CRPD. It also assesses the most recent proposal to replace the Directive, and examines whether the potential shortcomings within it have been addressed thus far. Ultimately, it finds that the ambiguities and lack of procedural certainty within the current Directive provide too much room to derogate from the standards

arguably mandated by the Convention, and these have yet to be addressed within the new Proposal.

Keywords

asylum – persons with disabilities – reception conditions – Directive 2013/33/EU – CRPD – human rights model of disability

1 Introduction

In recent years, the European Union (EU) has experienced a sustained period of inward migration from refugee-producing States in Africa and the Middle-East. This ‘refugee crisis’ has placed a strain on the political will of the EU and its Member States to find a satisfactory resolution to deal with the flow of migrants. Under the constant pressure of far-right anti-immigration parties, however, current EU migration policy seems to have focused more towards a securitization of borders, rather than ensuring the human rights of migrants.¹ Even though the Commission has recently undertaken an infringement proceeding against Hungary² for violation, *inter alia*, of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive) and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection otherwise known as the Recast Reception Conditions Directive (hereinafter the ‘RRCD’),³ the most recent

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- 1 Rizcallah, C. 2019. A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights. *European Journal of Migration and Law* 21(2), pp. 238–260; Gammeltoft-Hansen, T., 2018. International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law. *European Journal of Migration and Law* 20(4), pp. 373–395; Guild, E., Brouwer, E., Minderhoud, P. and Van Oers, R., 2010. Liberty and Law: the EU’s 21st Century. In: Bigo, D., Carrera, S., Guild, E. and Walker, R.B.J. (eds.), *Europe’s 21st Century Challenge*. Farnham: Ashgate, pp. 217–236. For a general discussion of this trend, see Baldacinni, A., Guild, E. & Toner, H. (eds.) 2007. *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*. Oxford: Hart Publishing.
 - 2 European Commission. 2019. *Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants*, 24/01/2019, available at https://europa.eu/rapid/press-release_IP-19-469_EN.htm (last accessed 09/10/2019).
 - 3 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection *OJ L* 180, 29.6.2013, pp. 96–116.

actions adopted by the Union's institutions are undoubtedly aimed at ensuring greater control of external borders and migration flows.⁴

With 581,000 fresh applications for asylum in 2018,⁵ the ability of the EU and its Member States to put in place fair processes for asylum claims, to adequately support the needs of asylum seekers while those claims are being processed, and, more generally, to protect and ensure the rights of asylum seekers when they are in Europe remains of paramount importance. In this context, it is also vital to focus on how the rights and the needs of the most vulnerable groups of asylum seekers (as they face structural inequalities and greater risk of their rights being violated) can be protected. In that vein, an analysis of how the rights of asylum seekers with disabilities are best addressed in the EU is essential in order for the Union to comply with its obligations under the United Nations Convention on the Rights of Persons with Disabilities⁶ (CRPD). The critically fêted CRPD, which embeds the official recognition of disability as a human rights issue, was ratified by the EU approximately ten years ago.⁷ By ratifying the CRPD, the EU has undertaken the international obligation to implement the Convention within the sphere of its own competences,⁸ and to realize the 'human rights model of disability' envisaged within it.⁹ Moreover, the CRPD has become an 'integral part of EU law' and enjoys a quasi-constitutional

4 On the externalization of EU migration policies, see Oliveira Martins, B. and Strange, M., 2019. Rethinking EU external migration policy: contestation and critique. *Global Affairs*, 5(3), pp. 195–202; Carrera, S., Santos Vara, J. and Strik, T., 2019. *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*. Cheltenham: Edward Elgar.

5 Eurostat, *Asylum Statistics*, 2019. available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#cite_note-1 (last accessed 31/08/2019).

6 UN Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 03 May 2008, UN Doc. A/RES/61/106.

7 Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35. The ratification of the Convention was formally completed with the deposit of the instrument of ratification, which occurred in December 2010. Following the ratification of the CRPD by Ireland in March 2018, all of the EU Member States have ratified the CRPD.

8 Waddington, L., 2011. The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences. *Maastricht Journal of European and Comparative Law* 18(4), pp. 431–453; Ferri, D., 2010. The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective. In: Waddington, L. and Quinn, G. (eds.), *European Yearbook of Disability Law* (2), pp. 47–71.

9 CRPD Committee, *General comment No. 6 (2018) on equality and nondiscrimination* (CRPD/C/GC/6), see *infra* Section 2.

status, in that it operates above secondary law but below the Treaties,¹⁰ meaning that all secondary law must be interpreted in light of the CRPD.¹¹ Any interpretation adopted by the Court of Justice of the European Union (CJEU) in respect of EU law must subsequently comply with the CRPD, as far as practicable. This is particularly true where more than one interpretation is possible. Moreover, this sub-constitutional status mandates the EU institutions to refrain from any active infringement of the rights contained within the Convention, vertically extending down to the Member States when they transpose those EU law nationally. It also mandates the EU institutions to implement the CRPD by enacting legislation and policy that is informed by the principles enshrined in the Convention. Consequently, the CRPD has come to represent a benchmark by which the EU must assess its own laws and policies where they relate to disability in some way.

With its accession to the CRPD, the Union marked the first formal incorporation of an international human rights treaty into its legal order. In fact, while the EU's accession to the European Convention on Human Rights (ECHR) has been the topic of political discussions since the 1970s, and is now provided for by the Treaty,¹² it has yet to occur.¹³ Therefore, while the ECHR remains a source of special significance and is the most commonly cited by CJEU,¹⁴ the EU has not (yet) formally become a party to it. It remains the position of the Court, that the final arbitrator of conflicts between European Union law and the Union's international obligations should be the CJEU itself, and this has created some difficulty in acceding to the ECHR in recent years despite its special significance within the EU legal order.¹⁵ It is also not uncommon for the Union's institutions to use other international human rights instruments as an interpretive tool in implementing its own policies.¹⁶ Yet, those instruments

10 Case C-239/03 *Ex multis, Etang de Berre* EU:C:2004:46.

11 Joined cases C-335/11 and C-337/11, *HK Danmark*, EU:C:2013:222.

12 Article 6(2) TEU.

13 On the accession among many others see Jaqué, J.P., 2011. The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms. *Common Market Law Review* 48(4) pp. 995–1023.

14 Case 29/69 *Stauder v Stadt Ulm* EU:C:1969:57; Case 4/73 *Nold KG v Commission* EU:C:1974:51; Case 44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290; Case 136/79 *National Panasonic v Commission* EU:C:1980:169; Articles 2 and 6(2) of the Treaty on the European Union; and Schütze, R., 2016. *European Constitutional Law*. Cambridge: Cambridge University Press, p. 437.

15 See, for example, *Opinion 2/13 of the Court* (Full Court) EU:C:2014:2454.

16 European Commission, 2006. *Towards an EU Strategy on the Rights of the Child*, COM(2006) 367, 4.7.2006; European Commission, 2009. *Implementation of the European Union's Strategy on the Rights of the Child: State of Play—November 2009*, Brussels: European

do not form an integral part of EU law in the same manner as the CRPD, and the EU is not internationally obliged to comply with them.

Thus far, the CRPD has displayed a significant influence on EU non-discrimination legislation,¹⁷ and beyond.¹⁸ However, a field in which the CRPD has not, as yet, displayed a profound effect in either the policies or the actions of the EU is that of asylum. According to Conte,¹⁹ the current Common European Asylum System (CEAS),²⁰ as it stands, fails to adequately take into account 'asylum seekers with disabilities especially with regard to the minimum standards for their reception and the safeguards to access a fair and efficient asylum procedure', and 'the legal framework for qualifying as refugee presents a lot of obstacles for persons with disabilities'. There is no evidence, as yet, of the current CEAS being interpreted by the CJEU (and other EU institutions)²¹ *secundum Conventionem*, although such an interpretation has been advanced by

Commission; Council of the European Union, 2008. *Note from the Praesidium, Explanations Relating to the Charter of Fundamental Rights of the European Union*, CHARTER 4473/00, 11 October 2008; European Commission, 2009. *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights*, COM(2009) 205, 29.4.2009; Commission Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union COM(2010) 573 final, 19/10/2010.

- 17 Waddington, L. and Lawson, A., 2016. The Unfinished Story of EU Disability Non-Discrimination Law. In: Bogg, A., Costello, C. and Davies, A.C.L. (eds.), *Research Handbook on EU Labour Law*. Cheltenham: Edward Elgar, pp. 474–449; Waddington, L., 2018. The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law. In: Belavusau, U. and Henrard, K. (eds.), *EU Anti-Discrimination Law beyond Gender*. Oxford: Hart Publishing, pp. 339–336.
- 18 Broderick, A. and Ferri, D. 2020. (eds.), *Research Handbook on EU Disability Law*. Edward Elgar, Cheltenham, United Kingdom.
- 19 Conte, C. 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* (18)(3), pp. 327–349, pp. 349.
- 20 The Common European Asylum System was initiated in 1999, in order to provide harmonised common minimum standards in all aspects of the asylum process to ensure that asylum is granted in a fair and appropriate manner to all individuals who apply for it. See European Commission, Common European Asylum System, available at <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum> (last accessed 31/08/2019).
- 21 The Commission in its Progress Report, which also includes answers to concerns raised by the CRPD Committee, affirms that asylum and migration was not included in the European Disability Strategy and that '[t]his issue was not picked up in 2010 given its limited relevance at the time but the change on priorities needs to be acknowledged'. See European Commission, Staff Working Document, *Progress Report on the implementation of the European Disability Strategy (2010–2020)*, SWD(2017) 29 final. Brussels: European Commission.

scholars.²² Even if such an interpretation occurs, the CEAS presents gaps and inconsistencies when it comes to the protection of the rights of asylum seekers and refugees with disabilities.²³ Thym has argued, based on an in-depth analysis of over one hundred CJEU judgments, that the Luxembourg Court has yet to adopt a consistent approach towards cases on immigration, asylum and border issues in an overarching sense,²⁴ and this will inevitably cause further issues when the CJEU attempts to implement international instruments such as the CRPD.

Against this background, this article furthers scholarly and policy-orientated debates surrounding the CEAS by focusing on the reception conditions of asylum seekers within the EU.²⁵ It aims to re-read the RRCD through the lens of the 'human rights model of disability' purported by the CRPD. In doing so, this article endeavours to highlight how the Union and its Member States can be held to a higher standard of protection for persons with disabilities, and inform the political debate on the Commission's current proposal for reform in the area.²⁶ Whereas previous works have predominantly taken a structural view of the CEAS and disability,²⁷ this contribution focuses exclusively on the RRCD. Furthermore, in differentiating itself from previous works, it does not provide an analysis of the compliance of the RRCD with the obligations contained within the CRPD as such. Instead, it utilizes the 'human rights model of disability' embraced by the Convention as both a theoretical benchmark and interpretive tool. This approach has already been used to test convergence and divergences between the standard of protection for persons with disabilities

22 Conte, C., 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* (18)(3), pp. 327–349.

23 *Ibid.* See also, Ferri, D., 2017. The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities. In: Baldin, S. & Zago, M. (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*. Trieste: University of Trieste Press.

24 Thym, D., 2019. A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases. *European Journal of Migration and Law* 21(2), pp. 166–192.

25 Conte, C. 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* (18)(3), pp. 327–349.

26 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) Brussels, 13.7.2016, COM(2016)465 final 2016/0222 (COD).

27 Conte, C., 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* (18)(3), pp. 327–349; Ferri, D., 2017. The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities. In: Baldin, S. and Zago, M. (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*. Trieste: University of Trieste Press.

afforded by the CRPD and the ECHR,²⁸ and proves useful in understanding the extent to which the RRCD can substantially provide a standard of protection which is compliant with the CRPD. This approach is also based on the understanding that, as the harsh criticism raised in relation to the CJEU's case law demonstrates,²⁹ the attempt to interpret EU legislation consistently with the CRPD is necessary but not sufficient if not accompanied by a full embracement of the rationale, values and model of protection embedded within the CRPD.

In order to achieve these aims, the article will be structured as follows. Section Two will briefly outline the core tenets of the 'human rights model of disability' purported by the CRPD and its relationship with the concept of inclusive equality. This section does not aim to discuss the complexities of the Convention or to examine its provisions in detail. Rather, it seeks to contextualize and critically assess the importance of this model for the development of a system of disability law and policy which is compliant with the CRPD. The third and fourth sections address respectively the RRCD's content relating to disability generally and its compliance to the 'human rights model of disability'. In particular, Section Three focuses on the scope and most relevant provisions of the Directive, whilst Section Four attempts to reconcile the Directive with the 'human rights model of disability' and the concept of 'inclusive equality' embedded within the Convention, highlighting the shortcomings within the procedural guarantees afforded to asylum seekers with disabilities currently under the law. This, then, leads into Section Five, which provides a succinct evaluation of the current Proposal to recast the RRCD once more, and the extent to which it addresses the issues which exist at present. To conclude, the article offers some brief remarks, bringing each of these strands together. Ultimately, the article argues that the text of the RRCD is often too vague or too 'distant' to allow for the CRPD to be read into it. Addressing these issues would require a recasting of the Directive, but the current proposal fails to address the issues highlighted herein.

2 The 'Human Rights Model of Disability'

2.1 *The Core Tenets of the 'Human Rights Model of Disability'*

The CRPD aims to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability,

28 Ferri, D. and Broderick, A., 2019. The European Court Of Human Rights And The Human Rights Model Of Disability. *Convergence, Fragmentation and Future Perspectives. European Yearbook of Human Rights*, pp. 263–294.

29 O'Brien, C., 2017. Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability. In: Kochenov, D., *EU Citizenship and Federalism*. Cambridge: Cambridge University Press, pp. 509–539.

and to promote respect for their dignity'.³⁰ With this in mind, the Convention adopts a broad scope, and covers a wide spectrum of rights (both civil and political rights, as well as economic, social and cultural rights). Whilst this is not novel in and of itself, Kayess and French argue that the CRPD incorporates a disability-specific interpretation of existing human rights,³¹ which is groundbreaking.

The CRPD signaled a shift away from what the 'medical' model of disability, which viewed disabilities as arising from 'a disease, trauma or health condition that impairs or disrupts physiological or cognitive functioning'.³² It instead places an emphasis on the capabilities and personhood of the individual in question, embracing the view that disability stems from the interaction between individual impairments and external barriers.³³ This has been referred to as the 'social-contextual model of disability'.³⁴ Degener has argued that the CRPD even exceeds the social-contextual model and embraces a 'human rights model of disability'.³⁵ In its *General Comment No. 6*,³⁶ the CRPD

30 Inter alia Ferri, D. and Broderick, A., 2019. The European Court of Human Rights and The Human Rights Model of Disability. Convergence, Fragmentation and Future Perspectives. *European Yearbook of Human Rights*, pp. 263–294.

31 Kayess, R. and French, P., 2008. Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review* (8), pp. 1–34.

32 Drum, C.E., 2009. Models and Approaches to Disability. In: Drum, C.E., Krahn, G. and Bersani, H., *Disability and Public Health*. Washington: American Public Health Association/American Association on Intellectual and Developmental Disabilities.

33 Article 1 of the CRPD reads as follows: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. Moreover, Para e) of the preamble states that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

34 The social-contextual model represents a refined elaboration of the 'pure' social model. The term 'social-contextual model' has been used first by Broderick, A., 2015. *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*. Antwerp: Intersentia, pp. 77. For further details see Broderick, A. and Ferri, D., 2019. *International and European Disability Law: Texts Cases and Materials*. Cambridge: Cambridge University Press.

35 Degener, T., 2017. A New Human Rights Model of Disability. In: Della Fina, V., Cera, R. and Palmisano, G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*. New York: Springer, pp. 41–60.

36 The Committee had however mentioned the human rights model of disability in a few concluding observations. For instance in its Concluding observations on the initial report of China and those of Brazil (CRPD/C/BRA/CO/1). In the later document the Committee 'recommends that the State party develop a disability strategy to implement the human rights model of disability' (para. 7). References to the human rights model appear several times in the Concluding Observation on the initial report of Poland (29 October 2018, CRPD/C/POL/CO/1, at paras. 6, 14, 55).

Committee itself refers to the 'human rights model of disability' as informing the Convention,³⁷ somewhat settling the terminological debate. The CRPD Committee, albeit in a cursory manner, outlines that:

the human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.³⁸

What is evident in the CRPD Committee's approach is that the 'human rights model' does not focus solely on societal barriers. Instead, it places an emphasis on the human dignity of persons with disabilities and views impairments as a part of human diversity. In this vein, Degener suggests that the 'human rights model' also acknowledges the importance of public health policies that focus on the prevention of impairments.³⁹ Moreover, the 'human rights model' 'encompasses both sets of human rights, civil and political as well as economic, social and cultural rights', which are considered deeply interconnected, and constitutes a 'tool to implement the CRPD' and to achieve social justice.⁴⁰ This focus on ensuring that persons with disabilities are allowed to participate on a more equal basis within society is carried throughout the Convention. Article 3 of the CRPD reflects this, by highlighting that non-discrimination is an essential element of implementing the obligations contained within the Convention as a whole. Non-discrimination in this sense must be implemented in civil, political, social, economic and cultural contexts.⁴¹ In that connection, De Beco underlines the degree to which these rights are bound together and incapable of being separated from one another,⁴² as a

37 CRPD Committee, *General Comment No. 6 on Equality and Non-Discrimination*, UN Doc. CRPD/C/GC/6, 26.04.2018, para. 9.

38 Degener, T., 2017. A New Human Rights Model of Disability. In: Della Fina, V., Cera, R. and Palmisano, G., (eds.), *The United Nations Convention on the Rights of Persons With Disabilities: A Commentary*. Springer, New York, United States, pp. 41–60.

39 *Ibid.*, p. 52.

40 Quinn, G. and Degener, T., 2002. *Human Rights and Disability*. New York: United Nations.

41 Arrnadottir, O.M., 2009. A Future of Multidimensional Disadvantage Equality. In: Arrnadottir, O.M. and Quinn, G., *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. Leiden: Martinus Nijhoff, p. 41.

42 De Beco, G., 2009. The Indivisibility of Human Rights in Light of the Convention on the Rights of Persons with Disabilities. *International and Comparative Law Quarterly* 68(1),

combination of these rights will often be required in order to ensure that persons with disabilities can fully engage in public life. Whether positive intervention is specifically mandated within the CRPD is often immaterial, as ensuring the integration of persons with disabilities within society will generally necessitate such actions and the spending of State monies.⁴³

Not only does the ‘human rights model of disability’ posit the dignity of people with disabilities as a cornerstone of its intended outcomes, it also emphasizes that civil and political rights are fundamentally intertwined with social, economic and cultural rights and are of equal importance in the pursuit of a fairer society. In this respect, the ‘human rights model’ is anchored in the concept of inclusive equality,⁴⁴ formulated by the CRPD Committee, which is broader than the traditional notion of substantive equality in that it encompasses:

(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.⁴⁵

Consequently, inclusive equality will require States Parties to engage in active policies which encompass positive actions, awareness-raising, and ensuring reasonable accommodation as a gateway to the enjoyment of all human rights. The latter is unequivocally incorporated within the non-discrimination and equality principles enshrined in Article 5 CRPD and is defined in Article 2 as ‘necessary and appropriate modification and adjustments’, ‘where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

In *General Comment No. 6*, the CRPD Committee clarified that the word ‘reasonable’ concerns the effectiveness of the accommodation in removing the

pp. 141–160.

43 It should be noted that rights like that of education (Article 24) which is more easily classified as a socio-economic right will require the same kind of positive measures as the right to liberty (Article 14) which would be considered a civil or political right—both are cast as requiring a degree of reasonable accommodation.

44 CRPD Committee, *General Comment No. 6 on Equality and Non-Discrimination*, UN Doc. CRPD/C/GC/6, 26.04.2018, para. 11.

45 *Ibid.*

individual disadvantage that the person with disabilities is facing, and 'the role of the accommodation in countering discrimination'.⁴⁶ An important point to highlight in terms of what 'reasonable accommodation' *should* mean in a practical sense, is that it will be relative to the experience and needs of the individual in question.⁴⁷ Consequently, duty-bearers are arguably obligated to consult with the individual seeking the accommodation,⁴⁸ and it 'requires duty-bearers to resist making assumptions as to what might be most appropriate for a particular individual and demands that instead they engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled'.⁴⁹ This ensures that the 'reasonableness' of the intervention is focused on ensuring that the rights-holder is granted the most relevant and effective intervention possible to guarantee that the specific barrier that they are facing is removed. The duty to provide reasonable accommodation is qualified by the defense that a request may be disproportionate in nature, and cannot ultimately create an undue burden for the bearer of the request.⁵⁰ This potentially gives State Parties a degree of latitude in assessing the reasonableness of a claim for reasonable accommodation so long as the refusal can be justified.⁵¹

The participatory dimension of inclusive equality is also linked to accessibility, which is one of the general principles of the CRPD. Namely, the Convention requires States Parties to take appropriate measures to ensure that persons with disabilities have access to environments, facilities, information and services on an equal basis with others. Accessibility duties are 'generalized' (group-based) and 'anticipatory' (not triggered by an individual request). The CRPD Committee has also highlighted that 'the obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities'.⁵²

On the whole, the full realization of the 'human rights model of disability', which is intertwined with the concept of 'inclusive equality', obliges Parties to

46 Ferri, D., 2018. Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg. *Social Inclusion* 6 (1), p. 40.

47 CRPD Committee, *General Comment No. 2 on Accessibility* (UN Doc. CRPD/C/GC/2).

48 Ferri, D. and Lawson, A., 2016. *Reasonable accommodation for disabled people in employment contexts*. Luxembourg: Publications Office of the European Union.

49 Lawson, A. 2012. Disability equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies. *The International Journal of Human Rights*, 16(6), pp. 845–864.

50 CRPD, Article 5(3).

51 CRPD Committee, *Jungelin v Sweden* CRPD/C/12/D/5/2011.

52 CRPD Committee, 2014. *General Comment No. 2 on Accessibility* (UN Doc. CRPD/C/GC/2), para 25.

the Convention—like the EU—to enact measures that protect and promote the dignity of persons with disabilities, valuing their diversity, and to pursue policies of redistribution, recognition, participation and accommodation across the whole spectrum of the rights protected by the CRPD.⁵³

2.2 *The 'Human Rights Model of Disability' and the Rights of Asylum Seekers in the CRPD*

The CRPD does not make any explicit references to asylum seekers or refugees within its text. Only women and children are identified as two groups who may, within this overall group, require some degree of further consideration,⁵⁴ and the relevant Articles restate principles of other conventions like the Convention on the Rights of the Child,⁵⁵ and recognised legal norms within the UN system of international law.

An asylum seeker with a disability does not necessarily require their own article within the Convention. At its core, the CRPD is clear that every right set forth within it must be enjoyed by all persons with disabilities (including asylum seekers) on an equal basis with others. It is also evident that asylum seekers must be provided with reasonable accommodation in order to enjoy the rights enshrined in the Convention. Article 14 on the liberty and security of the person is particularly relevant in this respect. It requires that people who are (lawfully) deprived of their liberty are provided with reasonable accommodation. The latter provision would apply to asylum seekers with disabilities in reception centres. Other articles are also equally applicable in an asylum context. For example, as noted by Conte, Article 11 CRPD on situations of risk and humanitarian emergencies, which requires Parties to the Convention to

53 When reviewing various initial reports, the CRPD Committee made reference to the Initial Report of China; in 2012, the CRPD Committee expressed concern in relation to the 'prevalence of the medical model of disability in both the definition of disability and the enduring terminology and language of the discourse on the status of persons with disabilities'. The Committee expressed then various concerns and the overall preoccupation about 'the lack of a coherent and comprehensive disability strategy to implement the human rights model of disability that the Convention establishes to achieve the *de facto* equality of persons with disabilities and implement the rights enshrined in the Convention at all levels'—CRPD Committee, 2012. *Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17–28 September 2012)* (UN Doc. CRPD/C/CHN/CO/1), para 9.

54 CRPD, Articles 6 and 7.

55 UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74. For example, Article 7(2) of the CRPD refers to the 'best interests of the child' which is contained in Articles 3, 9, 18, 20 and 21 of the Convention on the Rights of the Child.

ensure the protection and safety of persons with disabilities in situations of risk and humanitarian emergencies, 'constitutes fertile grounds to include the protection of refugees with disabilities within the CRPD's scope'.⁵⁶ The CRPD Committee's willingness to draw attention to asylum-related matters at both an EU and Member State level highlights how important this issue is and how it does feature in the CRPD, despite the lack of an explicit provision.⁵⁷

Furthermore, the CRPD requires State Parties to mainstream the rights of persons with disabilities in all of their policies and programmes, including asylum policies. This also means that asylum policies as all other policies must be informed by the human rights model of disability. Asylum policies must hence promote the dignity of persons with disabilities and pursue the accommodation of diversity of asylum seekers with disabilities and ensure their participation in society. In its *General Comment No. 7*, the CRPD Committee also makes clear that States Parties to the Convention 'should promote the establishment of organizations of internally displaced persons or refugees with disabilities that are enabled to promote their rights in any situation of risk, including during armed conflicts'.⁵⁸ This support for the establishment of organizations representing asylum seekers and refugees with disabilities helps realize the participatory dimension of inclusive equality. In the same Comment, the Committee also stated that this participatory element of their policies (including asylum policies), 'should ensure the close consultation and active involvement of organizations of persons with disabilities, which represent all persons with disabilities, including but not limited to women, older persons, children, those requiring high levels of support, *victims of landmines, migrants, refugees, asylum seekers, internally displaced persons*, undocumented and stateless persons [...]' (emphasis added).⁵⁹ Thus, despite the lack of an explicit reference to asylum seekers within the text of the Convention, it is clear that its contents

56 Conte, C., 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* (18)(3), pp. 327–349, at p. 332.

57 See CRPD Committee, (2015). *Concluding observations on the initial report of the European Union*, paras 34 and 35 for general criticisms of the EU's policies on asylum and its compliance with the CRPD. For comments on individual Member States in implementing EU law, see CRPD Committee, 2019. *Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties due in 2015 Greece* (UN Doc. CRPD/C/GRC/1).

58 CRPD Committee, 2018. *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*. CRPD/C/GC/7, para 78.

59 *Ibid.*, para. 50.

are applicable to asylum seekers with disabilities wherever their personal circumstances engage one or more of the rights contained within it.

3 The Recast Reception Condition Directive and Disability

After having briefly outlined the human rights model of disability, this section will explore and critically discuss the content of the RRCD, to ground the analysis conducted in section four, which will evaluate how this legislation can best be reconciled with this model. In order to do so, section 3.1 will examine the material scope of the Directive, its aims and objectives, with 3.2 highlighting its application within a disability context.

3.1 *The Recast Reception Conditions Directive: Aims and Core Provisions*

The original Reception Conditions Directive (RCD), passed in 2003, sought to establish minimum standards for the reception of asylum seekers within each Member State to which it applied.⁶⁰ This was meant to ensure a dignified standard of living in each Member State for such persons,⁶¹ and the material reception conditions included within the original Directive were to apply while an asylum seeker awaited the examination of their claim and ensures that applicants have access to housing, food, employment, as well as healthcare. Due to what were considered to be pre-existing failures within the original laws and policies of the Union in this respect, including the RCD, harmonization through higher legislative standards was required.⁶² This led to the adoption, after the entry into force of the Lisbon Treaty and its inclusion of Article 78 TFEU, of the RRCD. Consequently, this second generation Directive attempts to respond to the constitutional imperative purported in Article 78 TFEU, which not only requires that the Union ‘develop a common policy on asylum, subsidiary protection and temporary protection’, but also that any resulting policy and system must include ‘standards concerning the conditions for the reception of applicants for asylum or subsidiary protection’.

The Commission, in underscoring the ‘wide margin of discretion granted to Member States in implementing [the original RCD]’ which ‘could lead to

60 Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers. *OJ L* 31, 6.2.2003, 18–25, Article 1.

61 *Ibid.*, Recital 7.

62 Green Paper on the future Common European Asylum System, COM(2007) 0301 final, 2–3.

policies that might be perceived as not being fully in line with fundamental rights established by the EU Charter of Fundamental Rights as well as the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, and the UN Convention Against Torture,⁶³ not only embraced the idea of a better, but still relatively low, level of harmonization across the EU but also highlighted that such harmonization was *inter alia* necessary to ensure compliance with the Charter and international human rights standards. In that regard, the Commission highlighted the importance of international law foreshadowing the eventual accession of the Union to the CRPD and its importance from an interpretive perspective. In the RRCD text, however, recital 9 of the Preamble does not mention the CRPD. Rather, it states that, in applying the Directive Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union (EU CFR), the 1989 United Nations Convention on the Rights of the Child and the ECHR respectively. The reference to the ECHR pays tribute to the special significance that this Convention displays in the EU legal order, as recalled in the introduction to this article. The explicit inclusion of the Convention on the Rights of the Child (CRC) may be explained as reinforcing the principle of protection of the rights of the child, which is embedded in Article 3(3) TEU, listing the objectives of the EU, and in Article 24 EU CFR. Moreover, the arrival of several children, including unaccompanied children, has presented a significant challenge for the EU, and the reference to the CRC, aims to stimulate national systems and administrations to align their child protection systems to international standards. In 2017, the Council of the European Union and the representatives of the Member States adopted the Conclusions on the protection of children in migration.⁶⁴ In that document they reaffirmed that children in a migration context have the right to be protected, in line with relevant provisions of EU law, including the EU Charter, and with international law on the rights of the child. However, it remains an interesting point of contention that a constitutional reference to a principle within a non-ratified international treaty would warrant a greater level of

63 European Commission, *Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, Impact Assessment*, SEC(2008) 2944, 7.

64 Council of the European Union, 2017. *Council Conclusions on the Promotion and Protection of the Rights of the Child*, 3 April 2017, Doc. 7775/17; Council of the European Union, 2017. *Council Conclusions of the European Union and the representatives of the governments of the Member States on the protection of children in migration*, 8 June 2017, Doc. 10085/17.

inclusion in ordinary legislation and EU-level policy⁶⁵ than a convention to which the EU is party, like the CRPD.

The failure to include an explicit mention of the CRPD at the very least may be considered a missed opportunity. The general allusion, in recital 10 of the Preamble, to the fact that '[w]ith respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party' might somewhat fill the gap and support the interpretation of the RRCD in light of the Convention. The RRCD, within its preamble, also establishes as its central aim that of mandating higher standards than its predecessor,⁶⁶ with the acknowledgment that Member States may still continue to adopt more favorable standards for asylum seekers and persons seeking international protection than those included within it.⁶⁷ The rationale for the RRCD is that harmonization of conditions for the reception of asylum applicants 'should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception'.⁶⁸

For an individual to fall within the material scope of the RRCD, they must have: made or lodged an application for international protection of one form or another; for which they have not yet received a final determination; and which allows them to stay within the territory of the state until such time as a determination has been made.⁶⁹ The RRCD provides for: the recognition of a dignified standard of living;⁷⁰ an extremely qualified set of freedom of movement rights;⁷¹ the right to be provided with some form of shelter;⁷² material reception conditions (which include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three,

65 European Commission, 2006. *Towards an EU Strategy on the Rights of the Child*, COM(2006) 367, 4.7.2006; European Commission, 2009. *Implementation of the European Union's Strategy on the Rights of the Child: State of Play—November 2009*; Council of the European Union, 2008. *Note from the Praesidium, Explanations Relating to the Charter of Fundamental Rights of the European Union*, CHARTER 4473/00, 11 October 2008; European Commission, 2009. *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights*, COM(2009) 205, 29.4.2009; European Commission, 2010. *Commission Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final, 19/10/2010.

66 RRCD, Recital 7.

67 *Ibid.*, Article 4.

68 RRCD Recital 12.

69 *Ibid.*, Article 3.

70 RRCD, Recitals 9 and 10.

71 RRCD, Article 7.

72 RRCD, Article 18.

and a daily expenses allowance);⁷³ a qualified right to education for children under 18 years of age;⁷⁴ provisions for the protection of particularly vulnerable asylum seekers;⁷⁵ and a limited right to work.⁷⁶

With regard to the scope *ratione temporis* of the RRCD, the CJEU has consistently held, since the entry into force of the RCD, that the period during which the material reception conditions must be granted by the Member State to the applicant commences when the asylum seeker applies for asylum.⁷⁷ In *Saciri*, the CJEU made it clear that Article 1 EU CFR, which protects human dignity, preclude the asylum seeker from being deprived, even for a temporary period of time after the making of the application for asylum, of the protection of the minimum standards laid down by the Directive.⁷⁸

Moreover, the RRCD includes provisions on the detention of asylum seekers,⁷⁹ as well as a number of norms on the reduction or withdrawal of material reception conditions in cases of 'serious breaches of the rules of the accommodation centres' or 'seriously violent behaviour'.⁸⁰ However, Article 20(5) of the RRCD states that such a decision for reduction or withdrawal of material reception conditions must 'under all circumstances' ensure a dignified standard of living for all applicants. Recently, Advocate General Campos Sánchez-Bordona made it clear that Member States have some room to ma-

73 RRCD, Article 17 and 18.

74 RRCD, Article 14.

75 RRCD, Article 21–25.

76 Article 11(2) of the RCD provided for a right to work within 1 year of application being made if a determination has not been reached, with the RRCD reducing this to 9 months in its Article 15.

77 Case C-179/11 *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* EU:C:2012:594, para 39.

78 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, EU:C:2014:103. The interpretation of the CJEU tallies well with the interpretation of the reference of the Reception Directive to Article 1 EU CFR advanced by certain scholars, who argued that the reference the full respect for human dignity requires Member States to fulfil broader obligations than the prohibition of torture, inhuman and degrading treatment (Tsourdi, L., 2016. EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers? In: Chetail, V., De Bruycker, P. and Maiani, F. (eds.), *Reforming the Common European Asylum System—The New European Refugee Law*. Leiden: Brill-Martinus Nijhoff, pp. 271–316).

79 RRCD, Articles 8–11. An applicant may be placed in detention in order to verify their identity, nationality or to decide on their right to enter the territory. Detention is justified also where there is a risk of absconding. Bartolini, S. and Bombois, T., 2016. Immigration Detention before the CJEU: The Interrelationship between the Return Directive and the Recast Reception Conditions Directive and their Impact on the Rights of Third Country Nationals. *European Human Rights Law Review* 5, pp. 518–552.

80 RRCD, Article 20.4.

never when deciding over the withdrawal of material conditions considering the nature and the level of seriousness of the act.⁸¹ Moreover, Member States can take account of the factual circumstances in which the act in question was committed. Nonetheless, the decision for reduction or withdrawal of material reception conditions must be objective, motivated and must be adopted impartially. Similarly, 'it must be proportionate and must be adopted following an individual examination, in which the particular situation and the specific needs of vulnerable persons are taken into account'.⁸²

On the whole, despite the RRCD attempting to raise the obligations placed upon Member States in respect of asylum seekers and persons seeking humanitarian protection, the leeway that Member States have is still considerable, leading to large discrepancies in the implementation of the Directive as showed by the European Council on Refugees and Exiles (ECRE) in the Asylum Information Database.⁸³ In that vein, Sliga highlights that is the direct consequence of the RRCD being 'based on two potentially conflicting policy objectives that lie at its basis, namely, the protection of fundamental rights and migration management objectives'.⁸⁴ The limited amount of case law directly related to the RRCD, most of those focusing on detention of applicants and procedural guarantees, also testifies the wide margin that Member States have in fulfilling the Directive's aims.⁸⁵ This scant case law confirms that the RRCD is focused more on ensuring basic procedural rights and providing a minimum threshold,⁸⁶ rather than creating an effective and substantive guarantee of asylum seekers' rights.

3.2 *Disability in the Recast Reception Conditions Directive*

The RRCD includes several, direct and indirect, references to disability. Notably, the RRCD recognizes that asylum seekers with disabilities experience a degree of inherent vulnerability.⁸⁷ In that respect, interestingly, the Directive refers

81 Case C-233/18 *Zubair Haqbin v Federaal agentschap voor de opvang van asielzoekers*, EU:C:2019:468, para 43.

82 *Ibid.*, para 49.

83 The report is available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf (last accessed 09/10/2019).

84 Sliga, J., 2018. The fragmentation of reception conditions for asylum seekers in the European Union: Protecting fundamental rights or preventing long-term integration?. *Freedom, Security & Justice: European Legal Studies* 3, pp. 87–115.

85 See to that end, Case C18/16, *K. v Staatssecretaris van Veiligheid en Justitie* EU:C:2017:680.

86 Case C-704/17 *D. H. v Ministerstvo vnitra*, EU:C:2019:85, para 62: 'as Directive 2013/33 provides for a minimum harmonisation of reception conditions for applicants, (43) it establishes a basic level below which no Member State may go'.

87 While acknowledging the stigmatizing and stereotyping risks associated to the concept of 'vulnerability' (on this aspect see most recently Yeo, R., 2020. The regressive power of

to vulnerability as a condition that gives rise to special (individual) needs.⁸⁸ On the one hand, recital 14 of the Preamble makes reference to 'persons with special reception needs', who 'should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs'. On the other, Article 2 defines 'applicants with special reception needs' as vulnerable persons who are in need 'of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive'.

Chapter IV of the RRCD deals more extensively with 'vulnerable persons'. It includes an open ended list of those who would fall within this category, such as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive'. Member States are under an obligation to assess the needs of vulnerable persons, including those of persons with a disability. By virtue of Article 22 RRCD, 'that assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures'. However, where the Member State in question becomes aware of a potential vulnerability at a later date in the application process, they are also under an obligation to conduct an assessment. Even though this is an innovation compared to the original Directive, which imposed no such direct duty on Member States and consequently left it open for them to avoid this duty entirely, the lack of specificity within the RRCD, which will be discussed in Section 4, remains troubling. Moreover, Member States shall 'ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure'. With regard to material reception conditions, Member

labels of vulnerability affecting disabled asylum seekers in the UK, *Disability & Society*, 35/4, pp. 676–681), this article refers to vulnerability in line with the language used in the current CEAS legislation, and recognizes the usefulness of this concept to address redress system disadvantage and structural inequalities. On the concept of vulnerability see Mustaniemi-Laakso, M., Heikkilä, M., Del Gaudio, E., Konstantis, S., Nagore Casas, M., Morondo, D., G. Hegde, V. and Finlay, G., 2016. *Work Package No. 11, Deliverable No. 3—The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, available at <http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf> (last accessed 09/10/2019).

88 Ferri, D., 2019. La 'vulnerabilità' come condizione giuridica dei migranti con disabilità nell'Unione Europea. In: Bernardini, M.G. (ed.), *Migranti con disabilità e vulnerabilità. Rappresentazioni, politiche, diritti*. Napoli: Jovene.

States must consider 'gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres'. Member States should also ensure that 'dependent adult applicants with special reception needs are accommodated together with close adult relatives'. The Directive engages with somewhat vague terminology, but it would seem to encompass persons with disabilities. Consequently, Conte's suggestion that the scope of the RRCD places an obligation on Member States to 'accommodate the ... needs of applicants with disabilities'⁸⁹ would appear to ring true from a surface level reading of the text, and could be substantially assimilated to a duty to provide reasonable accommodation within the meaning of Article 2 CRPD.

The RRCD also includes several references to medical and psychological care which must be provided to victims of torture, rape or other serious acts of violence, as well as reference to the need of ensuring the physical and psychological integrity of the applicants.⁹⁰ Moreover, when vulnerable applicants are detained, their health, including mental health, 'shall be of primary concern to national authorities',⁹¹ and Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health. Article 19 (on health) stipulates the duty for Member States to 'provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed'.

On the whole, the RRCD acknowledges that persons with disabilities must be accommodated in order for them to be able to enjoy their rights, and places distinct obligations on the Member States, but does not engage with the concept of reasonable accommodation, nor with accessibility or equality as such.

4 Embedding the Human Rights Model of Disability in the Recast Reception Condition Directives

Whilst '[t]he Reception Directive ... represents an important step forward for the international protection of refugees with disabilities',⁹² especially when compared with other legislation forming part of the CEAS, the RRCD is still

89 Conte, C., 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* 18(3), pp. 327–349, at p. 347.

90 See Article 19 RRCD generally, and Article 25 RRCD in particular.

91 Article 11 RRCD.

92 Conte, C., 2016. What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities. *European Journal of Migration and Law* 18(3) 327–349, at p. 347.

quite limited in terms of ensuring the rights of persons with disabilities. This becomes more pronounced when one assesses the RRCD *vis-à-vis* the CRPD, as Conte highlighted.⁹³ If one looks at the human rights model as a theoretical framework, the gaps within the RRCD are even more evident. This section discusses both those gaps and the extent to which the human rights model of disability, if used as an interpretive lens, might support the tightening of some of the protections the RRCD offers to best accommodate the needs of persons with disabilities.

4.1 *Conceptualizing Disability as a Social Construct and a 'Layer of Identity': Opportunities and Challenges*

One of the core tenets of the human rights model of disability is, as discussed above in Section Two, an understanding of disability as a socially-constructed identity which interacts and overlaps with other aspects of personal identity. This understanding should inform the interpretation of the RRCD and, consequently, the way in which disability is identified and assessed.

On the one hand, the RRCD does not contain a definition of disability or persons with disabilities. It is also arguable that some of the groups of people indicated, e.g. persons with serious illnesses, persons with mental disorders, could well be considered as persons with disabilities (in light of the open-ended conceptualization included in the CRPD). This textual ambiguity might be overcome by an interpretation that recognizes that disability is a social construct. Such an interpretation, yet to be adopted, is plausible and desirable. The case law of the CJEU as well as the explicit reference to the wording of Article 1(2) CRPD in most recent legislation⁹⁴ constitute a good indicator that the conceptualization of disability embedded in the Convention must be mainstreamed at the EU level. It is true that CJEU case law has, thus far, been quite limited and concentrated almost exclusively on issues pertaining to employment and equal treatment in the workplace. It is also true that the way in which the Court has addressed disability raised quite a few issues, and it has been claimed that this pays mere lip service to the spirit and intentions of the CRPD.⁹⁵

93 *Ibid.*

94 See e.g. the European Accessibility Act—Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, *OJ L* 151, 7.6.2019, pp. 70–115.

95 O'Brien, C., 2017. Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability. In: Kochenov, D. (ed.), *EU Citizenship and Federalism*. Cambridge: Cambridge University Press, pp. 509–539; Ferri, D., 2019. Daouidi v Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law. *European*

Due, however, to the general obligation to interpret all EU legislation in light of the CRPD, the human rights model envisaged in it should be of general application where disability issues arise. This means that anyone assessed under Articles 21 and 22 RRCD must be considered a person with a disability if their impairment in interaction with external barriers hampers their equal participation in society. On the other hand, the Directive does, however, fail to address an important issue that the human rights model embraces: that of intersectionality or the interconnectedness of socially-constructed identities, which is also inherent to the recognition dimension of the concept of inclusive equality. *General Comment No. 6* has explicitly stated that ‘disability is one of several layers of identity’.⁹⁶ In that vein, Degener, the leading academic proponent of the human rights model, has affirmed that ‘the human rights model offers room for minority and cultural identification’, allowing for action to be taken against intersectional discrimination.⁹⁷ The text of the CRPD explicitly acknowledges that people with disabilities might belong to specific groups on the basis of their gender or age, and in this way, intersectionality is embedded within its text⁹⁸ and should be reflected in any subsequent implementation of it. By contrast, Article 21 RRCD (and more generally the Directive as a whole) ignores those intersections, those more complex forms of identity (e.g. pregnant persons with disabilities, minors with disabilities ...). This reflects the general lack of an intersectional approach in EU anti-discrimination law, as Schiek has argued.⁹⁹ While the concept of vulnerability embraced by the Directive might be interpreted broadly, it seems unlikely that the RRCD can be considered an instrument capable of intersectional analyses where such cases arise.

From a practical standpoint, major issues arise in relation to the technical difficulties in firstly ensuring that a person with a disability is assessed, that this is done within a reasonable period of time, and that the assessment is conducted appropriately. A clear ambiguity exists within the drafting of both Articles 21 and 22 RRCD as to whether they establish the requirement to conduct such assessments as a generalized obligation to be fulfilled for each applicant, or as an obligation that presents itself only where Member States

Labour Law Journal 10(1), pp. 69–84; Waddington, L., 2015. Saying all the right things and still getting it wrong: the Court of Justice’s definition of disability and non-discrimination law. *Maastricht Journal of European and Comparative Law* 4, pp. 576–591.

96 *General Comment No. 6*, para 9.

97 *Ibid.*, p. 49.

98 For example, Articles 6 and 8 CRPD on the rights of women, and Articles 7 and 19 CRPD on children.

99 Schiek, D., 2015. Intersectionality and the Notion of Disability in EU Discrimination Law. *Common Market Law Review*. 53 (1), pp. 35–63.

authorities are put on notice of the potential for such a disability to exist. If the latter is correct, then, many invisible disabilities may go unnoticed. Moreover, a burden is placed on the applicants themselves in such instances, as they would need to inform the State that an assessment should be conducted. This, in turn, presupposes that an asylum seeker is in fact aware or is informed of their right for an assessment to take place, or that they view themselves as having a disability. In practice, as recently as 2016, the European Union Agency for Fundamental Rights highlighted that legally defined procedures to identify people with disabilities in reception and detention centres are lacking, and that many 'people with disabilities are identified on an informal or *ad hoc* basis'.¹⁰⁰ The *ad hoc* nature of this identification suggests that many 'people with disabilities remain unidentified in practice'.¹⁰¹ This ultimately frustrates the need to consider the diversity of people with disability and to protect their dignity. Moreover, without a specific timeframe or definition for what constitutes 'reasonableness' in respect of first-instance assessments, it is difficult to determine at what point a Member State has failed in its duty to do so. This may, however, be read in light of the duty to provide information of all their rights and obligations within 15 days of lodging their application, implying that the assessment *should* be conducted in the same period. This is particularly true when one considers that Article 22 RRCD should solidify this obligation into something concrete for vulnerable persons, but if the Member State is not aware of the existence of a vulnerability, then it is possible that no obligation arise until such time as they are put on notice. The lack of a specific timeframe would also raise questions regarding whether a potential distinction between having made a claim versus having lodged all documentation necessary for the claim to be assessed in full is the point at which the 'clock starts'. These practical issues may eventually be assuaged by the CJEU ruling on a case involving the RRCD and CRPD.

If the Court were to determine that the Directive must be read in light of the CRPD, an outcome that would be supported by their post-accession case law on non-discrimination in the workplace, Member States would be placed on notice that assessments should be more certain in terms of both time frame and the specific requirements. Such a shift would not, however, be sufficient to ensure that Member States themselves carry out an assessment that is compliant

100 European Union Agency for Fundamental Rights, 2016. *Monthly data collection on the current migration situation in the EU Thematic focus: Disability, August 2016 monthly report 1-31 July 2016*, Vienna: FRA, p. 9.

101 *Ibid.*

with the human rights model of disability, and to incorporate it into administrative asylum procedures.¹⁰² Consequently, whilst it would be possible to read the model put forward by the Convention into the RRCD, consistent interpretation would not solve the more substantive issue of Member States being able to escape their duty to carry out assessments in a timely manner, and any new Directive would need to make explicit those practical issues, placing specific procedural constraints upon the Member States to close this gap.

4.2 *Embedding Inclusive Equality: New Perspectives and Quests for Reforms*

While the clear identification of asylum seekers with disabilities will constitute the first step towards ensuring compliance with the human rights model, the greatest potential shift would occur through by embedding the concept of inclusive equality in all its dimensions (a fair redistributive dimension, a recognition dimension, a participative dimension and an accommodating dimension) in the RRCD. The extent to which this is possible is discussed in the subsections below.

4.2.1 Combining a Fair Redistributive Dimension with an Accommodating Dimension

If we look at the first dimension, the Directive has, in its own overall rationale, that of redistribution. The ideals which underpin the RRCD posit that all human beings are equal in terms of their dignity and worth, and that, by virtue of their humanity, they enjoy a range of rights. As outlined above, all applicants must be provided with some form of accommodation or shelter, which meet certain material standards, as well as limited social rights.¹⁰³ Article 17 of the RRCD requires that ‘material reception conditions provide an adequate standard of living for all applicants’, and which is capable of ‘protect[ing] their physical and mental health’. Although the situation is improving in some instances,¹⁰⁴ the implementation of Article 17 is lagging behind and the overall standard in many Member States remains wholly inadequate.¹⁰⁵ In some instances, vulnerable asylum seekers have been provided with as little as €1 a

¹⁰² RRCD, Articles 22.1 and 22.3.

¹⁰³ On minimum condition for reception see Case C-179/11 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, EU:C:2012:594.

¹⁰⁴ UN Human Rights Council, 2013. *Report of the Working Group on the Periodic Review*. 4 December 2013 A/HRC/25/17, Geneva: UNHCR.

¹⁰⁵ Human Rights Watch, 2014. *World Report 2014—European Union*. 21 January 2014; UNHCR, *Refugee Situation Bulgaria—External Update*. 20 January 2014; UNHCR, 2013. *Current*

day to cover their material needs,¹⁰⁶ and this is patently insufficient to cover their basic necessities, let alone begin to redress more embedded structural inequalities. As Thornton has underlined, even where Member States are operating more generous conditions, the rights provided for within the RRCD are not always as substantive as they might otherwise appear,¹⁰⁷ as it is possible for Member States to provide many of these via benefits in kind¹⁰⁸ (albeit within certain limits).¹⁰⁹ These may take the form of paid for accommodation, the provision of food and clothing, prepaid vouchers or public utility cards, or other benefits which either offset a financial cost that an asylum seeker would otherwise encounter, or act in much the same way as a direct financial benefit would e.g. a prepaid voucher to be drawn down at venues which accept these as payment and replenished at regular intervals or when needed, but without directly endowing the individual in question. The Luxembourg Court has rarely entered into a substantive discussion of what constitutes an adequate benefit in kind, payment or system of financial transfers, which would provide for an adequate standard of living—a right that is included in Article 28 of the CRPD. In *Saciri*,¹¹⁰ the CJEU held that a family of asylum seekers, who could not obtain adequate housing through the Belgian asylum reception agency, should not be refused an adequate allowance to obtain it through the private market. The Court nonetheless placed an emphasis on the factual circumstances of the case and on the non-provision of basic amenities,¹¹¹ rather than engaging with the meaning of 'adequate standard' or the effectiveness of rights protection in the context of the Directive more generally.

This is not helped by the lack of clear entitlements for asylum seekers to social security/assistance programs: Article 17(5) of the RRCD specifically allows

Issues of Refugee Protection in Greece July 2013, Hungarian Helsinki Committee, Access to Territory and Asylum Procedure in Hungary. 7 June 2013, Geneva: UNHCR.

106 European Council on Refugees and Exiles, 2013, *Information Note on Syrian Asylum Seekers and Refugees in Europe*, November 2013, Brussels: ECRE.

107 Thornton, L., 2016. A View from Outside the EU Reception Acquis: Reception Rights for Asylum Seekers in Ireland. In: Minderhoud, P. and Zwaan, K. (eds.), *The Recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Tilburg: Wolf Legal Publishers. See also, Peek, M., 2010. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. In: Hailbronner, K. (ed.), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*. Oxford: Hart Publishing, p. 871 and p. 934.

108 RRCD, Articles 2(g) and 17(1).

109 RRCD, Article 18(1).

110 Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, decision of the CJEU, 27 February 2014.

111 *Ibid.*, para 43.

for Member States to treat applicants less favorably than nationals and makes no reference to social assistance or common categorizations. Material living conditions were linked with social welfare entitlements for nationals of a given Member State in a draft of the RRCD¹¹²—a move which was welcomed by the United Nations High Commissioner for Refugees and the European Council on Refugees and Exiles¹¹³—before later being removed due to ongoing concerns from a number of prominent Member States. Slingenbergh has highlighted that access to direct financial transfers and support services, even when possible, have become increasingly limited over time by European States¹¹⁴ as the number of asylum claims being lodged increased.¹¹⁵

The textual limits on the inherent redistributive dimension fulfilled by the Directive and the self-restraint of the CJEU are troubling in general. However, they seem particularly concerning for asylum seekers with disabilities, because they leave Member States with a large liminal space within which they may address the socio-economic disadvantages experienced by asylum seekers with disabilities in divergent ways and to differing degrees. In other words, the possibility for the Directive, as it stands, to ensure that adequate services are provided to people with disabilities, or that, if a monetary allowance is provided, this allowance is adequate to meet the specific costs sustained by individuals for having adequate living conditions or accessing rehabilitation services is uncertain.

Moreover, the redistributive dimension is not explicitly linked to an accommodating dimension, essential in achieving inclusive equality. Recital 14 of the RRCD, which underlines that '[t]he reception of persons with special

112 Article 17(5) of the original proposal included a clause stating that 'points of reference established by Member States either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance'—Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast) 2008/0244 (COD), p. 46.

113 UNHCR, 2009. *Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers*. Geneva: UNHCR: March 2009, p. 10, and European Council on Refugees and Exiles, *Comments on the Re-cast Reception Conditions Directive*. Brussels: ECRE: March 2009, pp. 10–12.

114 Bank, R., 2000. Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany, and the United Kingdom. *Nordic Journal of International Law* 69, pp. 257–88; Minderhoud, P., 1999. Asylum Seekers and Access to Social Security: Recent Developments in The Netherlands, United Kingdom, Germany and Belgium. In: Bloch, A. & Levy, C. (eds.), *Refugees, Citizenship and Social Policy in Europe*. London: MacMillan Press, pp. 132–48; Schuster, L., 2000. A Comparative Analysis of the Asylum Policy of Seven European Governments. *Journal of Refugee Studies* 13, pp. 118–31.

115 Slingenbergh, L., 2016. *The Reception of Asylum Seekers in International Law: Between Sovereignty and Equality*. Oxford: Hart Publishing, pp. 1–2.

reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs,' could support a reading of the Directive as imposing an obligation on Member States to accommodate people with disabilities from the perspective of material reception conditions. Article 21 of the RRCD also alludes to an individualized support for vulnerable asylum seekers, which, in the case of people with disabilities, undoubtedly includes the provision of reasonable accommodation. The CRPD would certainly support a reading of the RRCD as imposing on the Member States a duty towards making reasonable accommodations for asylum seekers with disabilities. Although these accommodations cannot constitute an undue burden, embedding the 'human rights model of disability' in the RRCD arguably necessitates that Member States implementing the RRCD ensure a level of provision capable of addressing individual needs and eradicating the specific barriers that an asylum seeker will encounter. The CRPD Committee was unequivocal in *General Comment No. 6* in saying that 'an accommodation is reasonable [...], if it achieves the purpose (or purposes) for which it is being made and is tailored to meet the requirements of the person with a disability'.¹¹⁶ However, even recognizing that consistent interpretation would be a powerful tool to embed an accommodating dimension into the Directive, the extent to which the RRCD can be effectively read as obliging the adoption of reasonable accommodation in order to ensure a minimum standard of living appropriate to asylum seekers with disabilities is doubtful. By virtue of the Directive facilitating an alternative system between benefit in kinds and individual payment, it is unclear how those benefits may be tailored to such a degree to fully accommodate people with disabilities' personalized needs. The *EASO guidance on reception conditions: operational standards and indicators*,¹¹⁷ whose purpose is to support Member States in the implementation of the RRCD 'while ensuring an adequate standard of living for all applicants for international protection, including those with special reception needs', does not provide any additional clarity in that regard. This document includes scant and often vague references to accommodating the needs of persons with disabilities, and primarily with reference to medical assistive devices. For example, with regard to access to 'essential non-food items', the Guide states that 'a person with physical disabilities or recovering from an injury or medical treatment *can be provided* with crutches, a wheelchair or other medical equipment whenever these cannot be obtained elsewhere (from other

¹¹⁶ *General Comment No. 6*, para 25(a).

¹¹⁷ <https://www.easo.europa.eu/sites/default/files/EASO%20Guidance%20on%20reception%20conditions%20-%20operational%20standards%20and%20indicators%5B3%5D.pdf>.

agents such as the public health system)' (emphasis added).¹¹⁸ With regards to healthcare the guide simply states that persons with disabilities must be provided with necessary arrangements.¹¹⁹ Perhaps the most relevant indication concerns the provision of information on benefits. In the guide, however, it is explicitly mentioned that it is only 'for persons with visual impairments or intellectual disabilities, [that] information is provided in an adapted manner'.¹²⁰

On the whole, taking also into account the guidance provided to Member States by the EASO, it is difficult to see how a more purposive reading of the RRCD in light of the CRPD alone could fill many of the textual lacuna that exist within the Directive. For the RRCD to fully embrace the accommodating dimension of inclusive equality, the text should be redrafted in a manner which explicitly incorporates or directly references the concept of reasonable accommodation.

4.2.2 In Search of a Recognition and Participative Dimension

The recognition and participatory elements of inclusive equality appear to be largely (albeit not totally) absent from the text of the Directive. With regard to the former, the RRCD does not engage with the concepts of stigma, stereotyping, prejudice and violence and, as mentioned above, does not purport any intersectional approach. The interpretive recitals do highlight that 'harmonious relationships between local communities and accommodation centres should ... be promoted',¹²¹ which would infer, when interpreted in light of the human rights model, that Member States should combat stereotyping, stigma and other forms of social exclusion. Nonetheless, there are no specific articles in the remainder of the Directive which would appear to place this duty on a more well established footing. An indirect 'recognition dimension' can be found in the fact that the RRCD underlines the need for 'recognising' the importance and status of the Charter of Fundamental Rights,¹²² which includes a provision of inclusion of people with disabilities in society (namely Article 26 EU CFR). The RRCD also provides that applicants for international protection, whilst in detention, should have access to family and adequate legal representation.¹²³ This might certainly be evocative of a recognition dimension in terms of recognizing dignity and ensuring the effective vindication of rights.

The participatory element (i.e. the reaffirmation of the social nature of people with disabilities as members of social groups) is, by contrast, more evident

118 *Ibid.*, standard 26.3.

119 *Ibid.*, standard 29.8.

120 *Ibid.*, standard 30.5.

121 RRCD, Recital 27.

122 RRCD, Recital 35.

123 RRCD, Article 10.4.

within the text of the RRCD. The right to work,¹²⁴ to engage in schooling¹²⁵ and vocational training¹²⁶ do allow for asylum seekers to integrate into the host society more fully. However, even where these are posited as clear rights, the content of them is heavily deferential to the Member State. These may be brought up based upon a reading of the Directive which is compliant with the Convention, but the lack of clearer processes for vindicating them is troubling, and, again, the lack of an explicit accommodating dimension might make those rights shallow. Reading the more comprehensive definition of disability envisaged within the Convention into the RRCD will provide little comfort for those who continue to have little to no access to work or vocational training in reality.

Finally, from a practical standpoint, beyond the obligation to report on the implementation of the Directive,¹²⁷ there is very little guidance on how persons with disabilities, asylum seekers and their representative organizations can engage with its effects nationally. It is possible, in light of the CRPD, that Member States would include these representative organizations at the reporting stage, as well as whilst they implement the measure in national law, but it is not mandated. Although it may be argued that the gaps in this regard within the RRCD could be somewhat filled by the use of consistent interpretation to the same degree as those relating to the assessment of special needs, or the accommodating dimension, this seems unlikely to say the least. While, for instance, the concept of reasonable accommodation has been clearly defined by both the Committee as well as the CJEU, leaving less room for doubt, to infer from the CRPD and from the human rights model how specific participatory elements within an administrative process should unfold and be delivered in practice is not straightforward. Thus, much like the accommodation element of the CRPD, a redrafting of the RRCD with more robust recognition and participation requirements is needed in order to make a consistent interpretation of the RRCD in light of the CRPD possible.

5 A Pressing Need for Reform

In 2016, the Commission moved forward with a proposal to recast the RRCD as a third-generation Directive.¹²⁸ Now that the new Commission guided by

124 RRCD, Article 15.

125 RRCD, Article 14.

126 RRCD, Article 16.

127 RRCD, Articles 30 and 31.

128 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for international protection (recast) Brussels, 13.7.2016 COM(2016) 465 final 2016/0222 (COD).

Ursula von der Leyen has taken office, the fate of this proposal, and of the whole reform package envisaged for the CEAS, remains uncertain. Thus far, the focus seems more on migration management and border protection, rather than on ensuring the rights of asylum seekers.¹²⁹ However, at present, the proposal to recast the RRCD remains on the table. This proposal, in line with its predecessors, aims at 'lay[ing] down standards for the reception of applicants for international protection'.¹³⁰ It should however be noted that, not only does the proposal seek to achieve a greater level of harmonization amongst the practices adopted by all Member States in this area, but also reduce the incentive for secondary movements.¹³¹ Rather than highlighting movement between Member States, as asylum seekers in a State other than the other who is considered competent to deal with their claim cannot request material reception conditions in that secondary state,¹³² this refers to internal movements, and the degree to which asylum seekers may leave a reception centre to which they are assigned.

On the one hand, the proposal addresses some of the general drawbacks that emerged in the RCD and the subsequent RRCD, but in a potentially insufficient manner. For example, Article 5 of the proposed Directive makes clear that information shall be granted 'as soon as possible and at the latest when they are lodging their application',¹³³ removing the 15 days term which is included in the RRCD. In doing so, the proposal tries to set a timeframe by which to measure if a Member State has fulfilled its duties, but without absolute conceptual clarity. On the other, the proposal pays tribute to securitization instances by introducing provisions on 'absconding' and the 'risk of absconding' respectively, similar to the definitions provided in the Dublin III Regulation,¹³⁴ which may constitute a cause for detention. Yet, the proposal seeks a balance between the protection of asylum seekers and the need to ensure a better control on migrants' movements.¹³⁵

With regards to asylum seekers with disabilities, however, there is little innovation within the proposal and the CRPD is not mentioned nor cited. The proposal currently includes in its preamble that 'with respect to the treatment

129 https://ec.europa.eu/info/priorities/promoting-european-way-life/migration_en.

130 *Ibid.*, Article 1.

131 *Ibid.*, 'Collection and Use of Expertise'.

132 *Ibid.*, Recital 8.

133 *Ibid.*, Article 5.1.

134 *Ibid.*, Article 2(10) of the proposed text states that 'absconding' means the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present in accordance with the Dublin Regulation, or does not remain available to the competent authorities or to the court or tribunal.

135 For example, Article 5 of the proposal would introduce an obligation on the Member States to inform applicants of the consequences of irregular onward movement.

of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party,¹³⁶ however this seems to underscore the individual responsibility of the Member States, rather than that of the Union by virtue of its own accession to the CRPD. References are made to the EU CFR as well as the Convention on the Rights of the Child, but again from the perspective that the individual Member States must ensure compliance with these instruments.¹³⁷ The first notable issue is that the proposal gets a rid of the concept of vulnerability,¹³⁸ and substitutes this for the term 'applicants with special reception needs' (instead of vulnerable applicants), but without the definition of those being dramatically changed. Thus, the elimination of this reference to vulnerability appears more a cosmetic amendment rather than a substantial change. Regrettably, there is no engagement with intersectionality, nor is there an attempt to introduce a definition of disability. Article 2 para 13 of the proposal still mentions among the applicant with special needs *inter alia* disabled people, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, without considering that all those categories could potentially fall within the conceptualization of disability purported by the CRPD. This is, however, the only mention of disability in the proposal as it currently exists, and points to a lack of consideration being given to this group, as well as the Union's obligations under the Convention more generally within the drafting process.

The second significant amendment concerns the new Article 21(1) of the proposal. This provision would, if adopted in its current form, bind Member States to conduct systematic checks of all applicants to ensure that they do not have special needs—the new term for vulnerable persons—and this would include whether or not an individual has a disability, the extent of it and consequently the reasonable accommodations necessary. The same article also necessitates that this assessment take place 'as early as possible' after an application is made, which does not impose a specific timeframe, but does provide a greater degree of clarity and a reasonableness test may be applied to examine if a Member State has failed in their obligation to conduct it in a timely manner. However, whilst these changes likely represent an improvement, insofar as

136 *Ibid.*, Recital 10.

137 *Ibid.*, Recital 32.

138 Only in Recital 32 does the proposal state that 'Member States should in all circumstances ensure access to health care and a dignified standard of living for applicants [...] with due regard to the inherent vulnerabilities of the person as applicant for international protection and that of his or her family or caretaker'.

they have tightened the procedural safeguards somewhat, the issue has always been these provisions do not possess sufficient clarity, and replacing one uncertain clause with another which is uncertain a different way does not remove the potential for discrepancies in implementation between Member States.

Thirdly, and quite disappointingly, while the proposal attempts to tighten the guarantees in terms of rights enjoyed by asylum seekers (especially with regards to employment), it fails to engage in a substantial manner with the concept of reasonable accommodation. As this contribution highlighted throughout, the CJEU has consistently made clear that all secondary legislation should be read in light of the CRPD. This would strongly imply that any legislation on reception conditions would require Member States to provide any necessary accommodations on an individualized basis. However, without a firm textual basis, the obligation of the Member States does not seem readily enforceable. There are a few references to the obligations to take into account individual special needs. For example, Article 16(5) of the proposal establishes that Member States, when assessing the resources of an applicant, must 'take into account the individual circumstances of the applicant and the need to respect his or her dignity or personal integrity, including the applicant's special reception needs'. Moreover they must 'in all circumstances ensure that the applicant is provided with a standard of living which guarantees his or her subsistence and protects his or her physical and mental health'. These references however are unlikely to fulfil the 'human rights model of disability'. This is made even more evident by the provision establishing that, 'in order to restrict the possibility of abuse of the reception system, Member States should be able to provide material reception conditions only to the extent applicants do not have sufficient means to provide for themselves',¹³⁹ and that work is seen as a way to reduce dependency on welfare payments and improve their 'self-reliance'.¹⁴⁰ Interpretive flourishes such as these do not suggest a system which is complimentary to the redistribution element that characterizes the concept of inclusive equality, which is a core tenet of the 'human rights model of disability' purported by the CRPD. The proposal does however, include a new conceptualisation of what constitute material reception needs, which states that those needs now include

not only housing, food and clothing but also essential non-food items such as sanitary items. It is also necessary that Member States determine the level of material reception conditions provided in the form

139 *Ibid.*, Recital 25.

140 *Ibid.*, 'Objectives of the Present Proposal' (3).

of financial allowances or vouchers on the basis of relevant references to ensure adequate standards of living for nationals, such as minimum income benefits, minimum wages, minimum pensions, unemployment benefits and social assistance benefits.¹⁴¹

In doing so, the proposal explicitly makes reference to sanitary items and other non-food necessities for the first time, demonstrating a minor improvement. The failure, however, to alter the modality of providing for these needs remains problematic, particularly when the same recital underlines that the standard of living appropriate for citizens should only be used as a benchmark, and not the minimum standard to be applied for asylum seekers whilst awaiting a determination of their claim. In this way, they would arguably need to find an effective pathway to work to bring asylum seekers up to the standard of living for the ordinary citizen, which may be a difficult proposition for asylum seekers with disabilities, particularly where no reasonable adjustments have been made to facilitate this, or in recognition of their limited ability to engage with the labour market. On the whole, it seems that the new proposal fails to engage at a deep level with the accommodating dimension of inclusive equality.

This proposal would, when (and if) approved, be the third Union-level intervention in this specific field and will arrive approximately a decade after the ratification of the CRPD by the EU. Thus, it is difficult to imagine why almost no attempt has been made to align the text of the proposal with the human rights model. The 'new' language, i.e. the choice to reclassify persons with disabilities as persons with 'special needs' rather than engaging with the language of vulnerability, might be perceived by some as an improvement and step forward towards combating stigma and stereotyping.¹⁴² However, the concept of vulnerability, especially if understood contextually like, as noted by Ferri, the RRCD seems to do,¹⁴³ arguably denotes a stronger obligation on the Member States through the implication that these persons are at risk because of societal barriers, and that there is an inherent need to alleviate this in an individualized

141 *Ibid.*, Recital 24.

142 According to some scholars the concept of vulnerability is at odds with the human rights model. For example Mannan et al. state that: 'From a rights-based perspective, disability does not intrinsically render a person vulnerable, but rather it is the lack of access, information and support, which intensifies vulnerability.' Mannan, H., Maclachlan, M. and Mcveigh, J., 2012. Core concepts of human rights and inclusion of vulnerable groups in the United Nations Convention on the rights of persons with disabilities. *European Journal of Disability Research* 6, pp. 159–177, at p. 161.

143 Ferri, D., 2019. La 'vulnerabilità' come condizione giuridica dei migranti con disabilità nell'Unione Europea. In: Bernardini, M.G. (ed.), *Migranti con disabilità e vulnerabilità. Rappresentazioni, politiche, diritti*. Napoli: Jovene.

manner and with some degree of urgency. Further, the decision to recast this as another Directive, rather than as a Regulation—which would be directly applicable, and would hold Member States to a higher standard through the use of less equivocal language as well as removing the need for national implementation—would appear to be the attempt to avoid the opposition of certain Member States (especially those belonging to the so-called Visegrad Group),¹⁴⁴ rather than one which is focused on the needs of applicants. As the third attempt at adopting a best practice approach, and likely to be the last legislative intervention for some time *if* it passes, the failure to address the issues highlighted above underlines a failure within the Union's commitment to mainstream the human rights model of disability.

6 Concluding Remarks

The need for urgent action and structural reform within the Common European Asylum System to better protect asylum seekers and those seeking humanitarian protection is commonly reflected within scholarly and civil discourse. However, the needs of asylum seekers with disabilities have been overshadowed by systemic failures that affect all applicants. In practice, the extent to which asylum applicants experience disability has been so far very difficult to assess. The Fundamental Rights Agency¹⁴⁵ and scholars have consistently highlighted that disability is a condition that a large proportion of asylum seekers experience, either as a result of pre-existing impairments or as a consequence of displacement.¹⁴⁶ Thus far, the EU and Member States have been unprepared to accommodate their particular needs.¹⁴⁷ In its 'Concluding

144 An alliance between four central European States: the Czech Republic, Hungary, Poland and Slovakia, on matters of common strategic importance. See <http://www.visegradgroup.eu/>.

145 EU Fundamental Rights Agency, *Thematic focus: Migrants with disabilities*, Vienna: FRA, available at <https://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-disability> (last accessed 13/07/2019).

146 Straimer, C., 2011, Between protection and assistance: is there refuge for asylum seekers with disabilities in Europe?, *Disability & Society* 26(5), pp. 537–551; Ferri, D., 2017. The Role of the European Union in Protecting the Rights of Asylum Seekers with Disabilities. In: Baldin, S. and Zago, M. (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*. Trieste: University of Trieste Press.

147 This situation is however widespread beyond Europe. See the recent account of Carlos Rios Espinosa at <https://www.hrw.org/news/2019/02/06/accommodating-asylum-seekers-and-migrants-disabilities>. For a general discussion see Minza, M., 2014. Disability and Forced Migration. In: Fiddian-Qasimiyeh, E., Loescher, G., Long, K. and Sigona, N. (eds.),

observations on the initial report of the European Union,¹⁴⁸ the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) underlined its 'deep concern' regarding the reception conditions extended to asylum seekers within the EU, who are often 'detained ... in conditions which do not provide appropriate support and reasonable accommodation'.¹⁴⁹ In a similar vein, the European Social Network (ESN) in its report on 'The impact of the refugee crisis on local public social services in Europe' highlights that of seventeen countries surveyed, less than half provided access to care for migrants with disabilities.¹⁵⁰ The CRPD Committee's indictment has been underscored by the European Parliament. In its 2016 report on the implementation of the CRPD, the Parliament highlighted its own obligation, as well as that of the Commission and Council, to ensure that all future legislation is fully compliant with the CRPD, and that this includes mainstreaming disability within the Union's asylum and immigration policies.¹⁵¹ Something that is not reflected in the current proposal to replace the RRCD. Concerns have also been expressed towards some Member States such as Italy,¹⁵² and most recently, Spain.¹⁵³ With regard to the latter, the Committee highlighted the need to address 'the precarious situation of refugees and asylum-seeking persons with disabilities' and to 'provide training for professionals and civil servants working in reception centres on the rights of persons with disabilities'.¹⁵⁴

The challenges experienced by asylum seekers with disabilities make the ability to reread specific EU legislation as being compliant with the CRPD and the Union's binding obligations under it, all the more important. However, in order for the EU to avoid paying mere lip service to the CRPD, it is essential that the 'human rights model of disability' is embedded within all EU legislation. Under the RRCD, asylum seekers with disabilities are offered little protection. Put more simply, the textual ambiguities and the lack of procedural certainty

The Oxford Handbook of Refugee and Forced Migration Studies. Oxford: Oxford University Press.

148 CRPD Committee, 2015. *Concluding observations on the initial report of the European Union*. Geneva: CRPD Committee.

149 *Ibid.*, para 34.

150 <https://www.esn-eu.org/news/837/index.html>.

151 European Parliament, 2016. *On the implementation of the UN Convention on the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee*. Report, 09/06/2016 (2015/2258(IN1)), Brussels: European Parliament, paras 7 and 56.

152 CRPD Committee (2015). *Concluding observations on the Initial Report of Italy*.

153 CRPD Committee (2019). *Concluding observations on the combined second and third periodic reports of Spain* 13 May 2019 CRPD/C/ESP/CO/2-3.

154 *Ibid.*, paras 35-36.

in it on when and how assessments of their needs must be conducted will continue to limit the potential for the RRCD to fulfil the human rights model of disability. The clear obligation towards reasonable accommodation already affirmed in the case law of the CJEU in other fields of EU action is of little use, when the text of the RRCD fails to explicitly acknowledge an accommodating dimension.

The recent proposal to recast this Directive illustrates that the Union and its institutions are, in principle, committed to rectifying many of the long standing problems that have plagued this area of law and significantly impacted upon the ability of asylum seekers to have their rights fulfilled. As this article has also endeavored to make clear, however, the current proposal has thus far dramatically failed to embed the human rights model of disability in any meaningful way, and to address the more specific needs of asylum seekers with disabilities as a unique subset of this overall group who bring with them their own considerations and needs. Despite the potential to reread some parts of the RRCD and current proposal as compliant with the Convention, until such time as the EU institutions and Member States fully embrace the spirit of the CRPD, the rights of asylum seekers with disabilities will continue to remain part of a potential, untapped future.

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