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# THE RIGHT TO INCLUSIVE EDUCATION ACCORDING TO ARTICLE 24 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: BACKGROUND, REQUIREMENTS AND (REMAINING) QUESTIONS

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## *Abstract*

*This article deals with the right to inclusive education. Article 24 of the UN Convention on the Rights of Persons with Disabilities (CRPD) provides not only that children with disabilities should not be discriminated against but also that they should be able to participate in the general education system. Children with disabilities should therefore be educated in mainstream schools. The article begins by studying the right to education in international human rights law (Section 2). It continues with a general introduction to the CRPD (Section 3). After discussing its drafting history, the article goes on to analyse Article 24 of the CRPD, examining the concept of inclusive education, the duty to provide reasonable accommodation and the obligation to adopt support measures and asking the question whether special schools should still be available (Section 3).*

**Keywords:** Article 24; children with disabilities; CRPD; inclusive education; mainstream schools; special schools

**Mots-clés:** Article 24; enfants handicapés; CRPD; éducation inclusive; écoles ordinaires; écoles spécialisées

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## 1. INTRODUCTION

Article 24 of the UN Convention on the Rights of Persons with Disabilities (CRPD) protects the right to education of persons with disabilities. It proclaims the right to inclusive education and prescribes the steps that have to be taken to this end. Article 24 of the CRPD provides not only that children with disabilities should not be discriminated against but also that they should be able to participate in the general education system.

The advantages of inclusive education have been largely discussed. Debates have especially been taken place more than 10 years ago when the right to inclusive education was not yet recognised in international human rights law. Although the question is not definitively settled, research demonstrated that educating children with disabilities in regular schools is beneficial for everybody.<sup>1</sup> Children with disabilities who have been to mainstream schools have greater chances to participate in the open labour market. Inclusive education also helps to build more tolerant societies, which will make children (and future adults) more accustomed to living with people who have special needs. The purpose of the paper, however, is not to contribute to this kind of research, since inclusive education has received a legal basis with the adoption of the CRPD. Nor is it to examine how inclusive education can be achieved in practice. Instead, it aims to examine how international human rights law protects the right to education of people with disabilities, considering that codification is the most novel development regarding inclusive education. It departs thus from existing international instruments. Using the CRPD as reference point, the paper studies the different aspects of the right to inclusive education. It provides guidance in the interpretation of Article 24 of the CRPD taking into account the Vienna Convention on the Law of Treaties (VCLT). As will be shown, although the right to inclusive education is to a certain extent self-evident, there are still several grey zones that this article aims to clarify.

This article provides for an in-depth examination of Article 24 of the CRPD. It is divided into four sections. The second section discusses international human rights treaty provisions on the right to education. The third section outlines the main characteristics and introduces the content of the CRPD. The fourth section analyses Article 24 of the CRPD. It starts with retracing its drafting history. It then turns to the definition of inclusive education and examines the duty to provide reasonable accommodation and the obligation to adopt support measures in order to achieve inclusive education. It also addresses the question whether special schools should still be available.

<sup>1</sup> R. Morrison and I. Burgman, 'Friendship Experiences Among Children with Disabilities who Attend Mainstream Schools' (2009) 76 *Canadian journal of occupational therapy* 145; R. Rieser, *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* 2nd edn (Commonwealth 2012) 289–291; A. Kanter, 'The Right to Inclusive Education for Students with Disabilities under International Law' [forthcoming], 33–36, on file with the author.

## 2. RIGHT TO EDUCATION

The right to education is one of the most important rights in international human rights law. Education works as a multiplier since it in turn enables people to exercise other human rights. It enhances both economic, social and cultural rights, such as the right to work and the right to food, and civil and political rights, such as the right to vote and the right to free speech. To be educated improves one's self-esteem and facilitates social mobility. It is therefore essential for every human being.

The right to education is protected by several international instruments. Article 26 (1) of the Universal Declaration on Human Rights provides that '[e]veryone has the right to education' and stipulates that '[e]ducation shall be free, at least in the elementary and fundamental stages' and that '[e]lementary education shall be compulsory'. Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises 'the right of everyone to education' and outlines obligations relating to primary, secondary and tertiary education, covering both the content of education (that is, the social aspect of the right to education) and the right of parents to choose the education of their children according to their religious and moral convictions – which is confirmed in Article 18 (4) of the International Covenant on Civil and Political Rights (ICCPR) – along with the right to establish private schools (that is, the freedom aspect of the right to education). According to Article 13 (2) of the ICESCR, States Parties to the Covenant recognise that

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education [...] shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity [...] and in particular by the progressive introduction of free education;  
[...].

Article 14 of the ICESCR also establishes the obligation to set up a plan of action in case the right to free and compulsory education is not achieved within two years after the ratification of the ICESCR. The Committee on Economic, Social and Cultural Rights furthermore issued two general comments on the right to education: General Comment No. 13 on the right to education (Article 13 of the Covenant)<sup>2</sup> and General Comment No. 11 on plans of action for primary education (Article 14 of the Covenant).<sup>3</sup>

The Convention on the Rights of the Child (CRC) also includes detailed provisions on the right to education which have a wide impact, since it is the most widely ratified

<sup>2</sup> UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The rights to education (art. 13)' (1999) UN Doc E/C.12/1999/10.

<sup>3</sup> UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 11: Plans of action for primary education (art. 14)' (1999) UN Doc E/C.12/1999/4.

international human rights treaty.<sup>4</sup> Articles 28 and 29 of the CRC repeat most of the standards of Article 13 of the ICESCR and even add new standards to the right to education (including the obligation to provide educational and vocational information, to encourage school attendance, to administer school discipline in conformity with the child's dignity and to promote respect for the natural environment). The Committee on the Rights of the Child also issued one general comment on the right to education: General Comment No. 1 on the aims of education (Article 29 (1) of the CRC).<sup>5</sup> Closer reading of the CRC leads, however, to the conclusion that some of the standards provided by this Convention are lower than those provided by the ICESCR.<sup>6</sup> To circumvent this problem, the CRC includes a saving clause in Article 41, which stipulates that if other international human rights treaties have higher standards the latter are applicable.

It should be noted that neither the ICESCR nor the CRC provide for the right to inclusive education, although Article 2 of the CRC mentions disability in the list of prohibited discrimination grounds and Article 23 (3) of the CRC states that children with disabilities must have access to education 'in a manner conducive to the child's achieving the fullest possible social integration and individual development'. Nor do the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child's general comments relating to education examine how this right applies to children with disabilities. The Committee on the Rights of Persons with Disabilities has not yet produced a general comment on the right to inclusive education.<sup>7</sup>

Besides the CRPD which will be discussed in the next section, several international human rights treaties protect the right to education of particular categories of vulnerable people, including racial or ethnic minorities, women, migrant workers, refugees and prisoners of war.<sup>8</sup> The UNESCO Convention against Discrimination also prohibits discrimination in education based on various grounds (but not on disability). Regional human rights treaties further protect the right to

<sup>4</sup> The CRC has been ratified by all but three States: Somalia, South Sudan and the USA.

<sup>5</sup> UN Committee on the Rights of the Child, 'General Comment No. 1: The aims of education (art. 29 (1))' (2001) UN Doc CRC/GC/2001/1.

<sup>6</sup> While Article 13 (2) (b) of the ICESCR stipulates that '[s]econdary education in its different forms ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education', Article 28 (1) (b) of the CRC provides that States Parties shall '[e]ncourage the development of different forms of secondary education ... make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need'.

<sup>7</sup> The Office of the UN High Commissioner for Human Rights (OHCHR, however, issued a thematic study on the topic: OHCHR, 'Thematic study on the right of persons with disabilities to education' (2013) UN Doc A/HRC/25/29.

<sup>8</sup> These include: Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 18 (4) of the ICCPR; Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Article 22 of the Convention relating to the Status of Refugees; Article 38 of the Geneva Convention relative to the Treatment of Prisoners of War.

education.<sup>9</sup> The standards provided for in these treaties reinforce or extend the right to education, but are of course binding only on those States that are parties to them.

The right to education is often divided into the so-called 4-A framework: availability, accessibility, acceptability and adaptability. The 4-A framework was developed by Katarina Tomasevski, the former UN Special Rapporteur on the right to education,<sup>10</sup> and subsequently taken over by the Committee on Economic, Social and Cultural Rights.<sup>11</sup> Availability examines whether education is generally available in terms of schools, infrastructure and teaching materials. Accessibility focuses on the various obstacles to accessing education by vulnerable groups. Acceptability evaluates the various aspects of the content of education. Adaptability concerns the needs of particular categories of children. The 4-A framework thus emphasises both the quantitative and qualitative aspects of the right to education, by measuring not only the right to education but also respect for human rights *in* education and enhancing human rights *through* education. This framework, however, has not yet been applied to children with disabilities in particular.<sup>12</sup>

The right to education is subject to the obligation to progressively realise economic, social and cultural rights within the maximum available resources. According to Article 2 (1) of the ICESCR, a State must 'take steps [...] to the maximum of its available resources [...] with a view to achieving progressively the full realisation of the rights recognised in the [...] Covenant'. As stated by the Committee on Economic, Social and Cultural Rights, progressive realisation recognises that the 'full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.<sup>13</sup> The maximum available resources include financial, natural, human, technological and informational resources as well as potentially available national resources, such as land reform and wealth taxes, and international

<sup>9</sup> These include in Europe: Article 2 of the Protocol No. 1 to the European Convention of Human Rights; Article 17 (2) of the (Revised) European Social Charter; Articles 13 and 14 of the Framework Convention for the Protection of National Minorities; Article 8 of the European Charter for Regional or Minority Languages; Article 14 of the European Convention on the Legal Status of Workers; Article 14 of the EU Charter of Fundamental Rights. These include in the Americas: Article 49 of the Charter of the Organization of American States; Article 26 of the American Convention on Human Rights; Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). These include in Africa: Article 17 (1) of the African Charter on Human and Peoples' Rights; Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Article 11 of the African Charter on the Rights and Welfare of the Child.

<sup>10</sup> UNCHR, 'Preliminary report of the Special Rapporteur on the right to education' (1999) UN Doc E/CN.4/14999/49, 15–25.

<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The right to education (art. 13)' (1999) UN Doc E/C.12/1999/10, para. 6.

<sup>12</sup> Disability concerns especially adaptability and has been examined in relation to it. However, it would be necessary to inquire also into availability, accessibility and acceptability.

<sup>13</sup> UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 3, The Nature of State Parties' Obligations (Art. 2, par. 1)' (1990) UN Doc E/1991/23, para. 9.

resources.<sup>14</sup> States may therefore, to a certain, extent delay in fulfilling some of their obligations relating to economic, social and cultural rights.

The obligation to progressively realise economic, social and cultural rights within the maximum available resources figures as a ‘monster’ in international human rights law, because it is often invoked to argue that resources – which are indeed always limited – are simply not available to implement these rights. Advocates of such rights are, as a result, confronted with the reluctance of policy makers who make use of this argument to ignore this obligation. Progressive realisation, however, does not mean that States have to take no steps whatsoever. As required by the Committee on Economic, Social and Cultural Rights, they must ‘move as expeditiously and effectively as possible towards’ the full realisation of economic, social and cultural rights.<sup>15</sup> States Parties must have a timetable for achieving this as well as mechanisms for monitoring the results. More generally, they have to use their available resources in a way that is compliant with the ICESCR.<sup>16</sup> They should not only consider the consequences of their choices for the realisation of economic, social and cultural rights but also devote a sufficient proportion of their resources to tackling the relevant issues. Progressive realisation of economic, social and cultural rights is thus not an empty obligation.

In addition, the Committee on Economic, Social and Cultural Rights considers that States must at all times fulfil ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ enshrined in the Covenant.<sup>17</sup> A State ‘in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant’.<sup>18</sup> The prohibition of discrimination, which is enshrined in Articles 2 (2) and 3 of the ICESCR, is likewise not subject to the obligation to progressively realise economic, social and cultural rights within the maximum available resources. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect

<sup>14</sup> R.E. Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 Human Rights Quarterly 693, 695–700.

<sup>15</sup> UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3, The Nature of State Parties’ Obligations (Art. 2, par. 1)’ (1990) UN Doc E/1991/23, para. 9.

<sup>16</sup> M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 315.

<sup>17</sup> UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3, The Nature of State Parties’ Obligations (Art. 2, par. 1)’ (1990) UN Doc E/1991/23, para. 9.

<sup>18</sup> *Idem*.

of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.<sup>19</sup>

Non-discrimination is therefore an obligation for which non-achievement automatically violates economic, social and cultural rights. This obligation includes the duty to provide reasonable accommodation, as will be seen in the fourth section.

### 3. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The CRPD, which is the first international human rights treaty of the 21<sup>st</sup> century, fills a considerable gap in international human rights law. Although disability has been on the UN agenda since its foundation, there was no international instrument to protect the rights of persons with disabilities that was legally binding. Moreover, persons with disabilities were largely marginalised in existing international human rights treaties, since these treaties paid little attention to them in particular and since discrimination clauses did not mention disability (except in the CRC). As a result, these persons were almost invisible in the international human rights framework. The CRPD was an attempt to remedy this invisibility. It was adopted on 13 December 2006 and entered into force on 3 May 2008 after its 20<sup>th</sup> ratification. On 16 June 2014, there were 158 signatories and 147 ratifications.

The CRPD brings a human rights dimension to disability issues. It replaces the medical model by the social model of disability.<sup>20</sup> The latter defines disability as the interaction between the impairments of persons with disabilities and the physical and social barriers to their participation in society. The social model considers persons with disabilities no longer as objects of charity but as subjects of rights. Rather than focusing on deficiencies, it revolves around society itself and its relationship with persons with disabilities.<sup>21</sup> Disability is considered as a social construct and society should be capable of correcting its own failure to be more inclusive. It is therefore the environment which is disabled if it fails to provide for equal treatment for persons with disabilities. The social model of disability is reflected in Article 1 of the CRPD, which provides that 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'. The CRPD aims therefore not only to preserve the dignity of

<sup>19</sup> 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 691, para. 11.

<sup>20</sup> R. Kayess and P. French, 'Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1, 5-7.

<sup>21</sup> M. Oliver, *Understanding Disability. From Theory to Practice* 2<sup>nd</sup> edn (Palgrave Macmillan 2009) 42-48.

persons with disabilities by providing them with optimal prospects for autonomy but also to abolish the various mechanisms that exclude them.

The drafters of the CRPD were especially concerned with the widespread violations of the rights of persons with disabilities. The purpose was therefore not to elaborate new human rights standards but rather to increase compliance with existing ones. As a result, the CRPD was considered mainly as an implementation convention. However, it also reaffirmed, clarified and even expanded the rights of persons with disabilities.<sup>22</sup> This is more the case with certain rights than with others. In some instances, the CRPD merely repeats previously existing provisions, while adding certain aspects that were already emphasised by international bodies. In other instances, it takes a clearer stand on particular issues for which some doubts still remained, as is the case with the right to inclusive education. It also protects those rights that are specific to persons with disabilities, such as legal capacity and equal recognition before the law. Both for those provisions that are built on existing ones and for those that introduce novel aspects, the CRPD constantly seeks inspiration in the previously mentioned social model of disability, which can be seen as the cornerstone of the entire set of rights.

The CRPD itself is divided into three parts.<sup>23</sup>

The first part consists of the transversal provisions (Articles 1–9). This part includes the general principles of the Convention (Article 3), the general obligations of the States Parties (Article 4), the right to equality and non-discrimination (Article 5) as well as stand-alone provisions for women with disabilities (Article 6) and children with disabilities (Article 7) in addition to awareness-raising (Article 8) and accessibility (Article 9). Worth stressing here is that States Parties have to ‘adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention’ according to Article 4 (1) and that ‘[i]n the development and implementation of legislation and policies’ they have to ‘closely consult with and actively involve persons with disabilities’ according to Article 4 (3). Article 5 (3) also provides that they must ‘take all appropriate steps to ensure that reasonable accommodation is provided’. As far as economic, social and cultural rights are concerned, it should also be noted that, like Article 2 (1) of the ICESCR, Article 4 (2) of the CRPD provides that ‘[w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources [...] with a view to achieving progressively the full realization of these rights’. The principles that were previously outlined regarding economic, social and cultural rights apply therefore likewise to the CRPD.

<sup>22</sup> F. Megret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights’ (2008) 30 *Human Rights Quarterly* 494.

<sup>23</sup> For an introduction to the CRPD, see G. Quinn, ‘Disability and Human Rights: A New Field in the United Nations’ in K. Krause and M. Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University-Institute for Human Rights 2009) 247.

The second part sets out an exhaustive catalogue of civil, political, economic, social and cultural rights, taking account of the special needs of persons with disabilities (Article 10–30). This part includes the right to life (Article 10), legal capacity and equal recognition before the law (Article 12), the right to access to justice (Article 13), the right to liberty and security of the person (Article 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15), freedom from exploitation, violence and abuse (Article 16), the right to living independently and being included in the community (Article 19), freedom of expression and opinion and access to information (Article 21), the right to privacy (Article 22), respect for home and the family (Article 23), the right to education (Article 24), the right to health (Article 25), the right to habilitation and rehabilitation (Article 26), the right to work (Article 27), the right to social protection (Article 28) and participation in cultural life, recreation, leisure and sport (Article 30). Although all of these are equally important for persons with disabilities, one of the essential rights for the enjoyment of all rights enshrined in the Convention is the right protected by Article 12 (2), which recognises that ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. Without autonomy, these persons cannot make choices for their life, which applies to the right to education as well. This relationship does not mean that other provisions are not interrelated. On the contrary, the rights of persons with disabilities cannot be isolated from each other and should be read together, as is the case with the right to education and the right to independent living as well as participation in cultural life, recreation, leisure and sport.

The third part deals with implementation and monitoring (Article 31–40). After data collection (Article 31) and international cooperation (Article 32), this part provides for the creation of national mechanisms for implementation and monitoring (Article 33), the establishment of the Committee on the Rights of Persons with Disabilities (Article 34), State reporting (Article 35) and report consideration (Article 36) as well as meetings of the Conference of States Parties (Article 40). It is particularly interesting that the CRPD provides for monitoring mechanisms not only at the international but also at the national level. Article 33 (2) stipulates that States Parties should designate or establish ‘a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention’ taking into account the Paris Principles (which regulate NHRIs).<sup>24</sup> While there were some innovative proposals, such as the Conference of States Parties, during the negotiations, the international mechanisms are to a large extent copied from other international human rights treaties.<sup>25</sup>

<sup>24</sup> On this issue, see G. de Beco, ‘Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities. Another Role for National Human Rights Institutions?’ (2011) 29 *Netherlands Quarterly of Human Rights* 84.

<sup>25</sup> On this issue, see M. Stein and J. Lord, ‘Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential’ (2010) 32 *Human Rights Quarterly* 689.

## 4. ARTICLE 24 OF THE CRPD

The right to education is one of the most important rights for persons with disabilities. It enhances their autonomy and facilitates their participation in society. It has an impact on the enjoyment of all the other rights protected by the CRPD. To maximise the chances of children with disabilities to enjoy equal treatment, Article 24 of the CRPD proclaims the right to inclusive education. In practice, many children with disabilities nonetheless do not attend school or are enrolled in special schools. The latter, as a rule, provide for lower education and decreases their chances to find employment.

This section is divided into two parts. The first part examines the drafting history, including evolving consensus on inclusive education. The second part studies Article 24, examining the concept of inclusive education, the nature and content of the duty to provide reasonable accommodation, the scope and purpose of the obligation to adopt support measures and the potential availability of special schools.

### 4.1. DRAFTING HISTORY

While the CRPD is the first international legally binding instrument to protect the right to inclusive education, the idea was already expressed in previously adopted international instruments. Following the World Conference on Education in 1990, the World Declaration on Education For All: Meeting Basic Learning Needs (Jomtien Declaration)<sup>26</sup> declared that '[s]teps need to be taken to provide equal access to education to every category of disabled persons as an integral part of the education system'.<sup>27</sup> The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) adopted in 1993 subsequently provided that '[e]ducation for persons with disabilities should form an integral part of national educational planning, curriculum development and school organisation'<sup>28</sup> and that '[e]ducation in mainstream schools presupposes the provision of interpreter and other appropriate support services' and '[a]dequate accessibility and support services, designed to meet the needs of persons with different disabilities'.<sup>29</sup> However, it also recognised that '[i]n situations where the general school system does not yet adequately meet the needs of all persons with disabilities, special education may be considered' but 'should be aimed at preparing students for education in the general school system'.<sup>30</sup>

The next significant step was the UNESCO World Conference on Special Needs Education: Access and Equality in 1994. For the first time, specific attention was paid

<sup>26</sup> UNESCO, *World Declaration on Education For All: Meeting Basic Learning Needs* (1990) <[www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm](http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm)> accessed 16 June 2014.

<sup>27</sup> Jomtien Declaration, Article 3 (5).

<sup>28</sup> Standard Rules, Rule 6 (1).

<sup>29</sup> Standard Rules, Rule 6 (2).

<sup>30</sup> Standard Rules, Rule 6 (3).

to the right to inclusive education in particular. The resulting Salamanca Statement<sup>31</sup> provided that ‘those with special educational needs must have access to regular schools which should accommodate them within a child-centred pedagogy capable of meeting these needs’ and that ‘regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all’.<sup>32</sup> This was the first time an international instrument proclaimed the right to inclusive education. States were asked ‘to adopt as a matter of law or policy the principle of inclusive education, enrolling all children in regular schools, unless there are compelling reasons for doing otherwise’.<sup>33</sup> However, this appeal was not incorporated into further international instruments adopted before the CRPD, such as the Dakar Framework for Education for All and the Millennium Development Goals. Neither was monitoring of the implementation of the Salamanca Statement provided for.

The drafters of the CRPD did not immediately agree on the right to inclusive education. There was a lot of discussion in this regard, where among others the question arose whether or not special education still had to be made available.<sup>34</sup> The Ad Hoc Committee initially left persons with disabilities the right to choose between inclusive and special education. Draft Article 17 (3) of the CRPD provided that ‘where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available’. Any such forms should:

- a) reflect the same standards and objectives provided in the general education system;
- b) be provided in such a manner to allow children with disabilities to participate in the general education system to the maximum extent possible;
- c) allow a free and informed choice between general and special systems;
- d) in no way limit the duty of States Parties to continue to strive to meet the needs of students with disabilities in the general education system.<sup>35</sup>

This provision indeed reflects the different opinions among the drafters regarding the right to education of persons with disabilities.

The ambiguity subsequently lessened when, following proposals by Australia and the European Union, a new draft Article 17 (1) stipulated that States Parties commit

<sup>31</sup> World Conference on Special Needs Education: Access and Equality, *Salamanca Statement and Framework for Action on Special Needs Education*, Salamanca, 7–10 June 1994 <<http://unesdoc.unesco.org/images/0009/000984/098427eo.pdf>> accessed 16 June 2014.

<sup>32</sup> Salamanca Statement, para. 2.

<sup>33</sup> Salamanca Statement, para. 3.

<sup>34</sup> B. Byrne, ‘Hidden Contradictions and Conditionality: Conceptualisations of Inclusive Education in International Human Rights Law’ (2013) *Disability & Society* 232, 239.

<sup>35</sup> Report of the Working Group to the Ad Hoc Committee (2004) UN Doc A/AC.265/2004/WG/1, Annex I <[www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm](http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm)> accessed 16 June 2014.

themselves to ‘the goal of inclusiveness of their general education systems’.<sup>36</sup> In the meanwhile, the Committee on the Rights of the Child had adopted General Comment No. 9 on the rights of children with disabilities, which likewise provided that inclusive education must be the objective of education for children with disabilities. However, it also recognised that ‘the measure in which the inclusion occurs, may vary’ and that ‘[a] continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future’.<sup>37</sup> There were still doubts, therefore, about whether inclusive education should be the preferable option in all circumstances. However, the drafters eventually limited special education to children who are blind, deaf or deaf-blind in – what became then – Article 24 (3),<sup>38</sup> while – what became final – Article 24 (1) provided that inclusive education had to be guaranteed for all persons with disabilities, following Panama’s proposal.<sup>39</sup> The CRPD thus clearly lays down the principle of inclusive education, with an exception made for persons with sensory or communication impairments. Article 24 of the CRPD provides even in the most straightforward way for inclusion in the entire Convention. The proposal made by the Centre for Studies on Inclusive Education (CSIE) to prohibit providing special education for children with disabilities was nonetheless rejected.<sup>40</sup> The question whether special schools should continue to exist – which is arguably the most difficult and sensitive one regarding the right to education of persons with disabilities – will be further discussed in the second part of this section.

## 4.2. ANALYSIS

### 4.2.1. *Inclusive Education*

Article 24 (1) of the CRPD provides that ‘States Parties shall ensure an inclusive education system at all levels and lifelong learning’. The Convention thus makes inclusive education the principle and special education the exception. Article 24 (2) (a) and (b) of the CRPD further stipulates that the States Parties shall ensure that ‘children with disabilities are not excluded from free and compulsory primary education on the basis of disability’ and that ‘persons with disabilities can access an inclusive, quality

<sup>36</sup> Australia, ‘Draft Article 17 EDUCATION’ <[www.un.org/esa/socdev/enable/rights/ahc6australia.htm](http://www.un.org/esa/socdev/enable/rights/ahc6australia.htm)> accessed 16 June 2014; EU, ‘European Union Proposal for Article 17’ <[www.un.org/esa/socdev/enable/rights/ahc6eu.htm](http://www.un.org/esa/socdev/enable/rights/ahc6eu.htm)> accessed 16 June 2014.

<sup>37</sup> UN Committee on the Rights of the Child, ‘General Comment No. 9: The rights of children with disabilities’ (2006) UN Doc CRC/C/GC/9, para. 66.

<sup>38</sup> See O. Arnardóttir, ‘The Right To Inclusive Education For Children With Disabilities – Innovations In The CRPD’ in A. Eide, J. Möller, and I. Ziemele (eds), *Making Peoples Heard. Essays on Human Rights in Honour of Gudmundur Alfredsson* (Martinus Nijhoff Publishers 2011) 197, 219–221.

<sup>39</sup> Panama, ‘Suggested Modifications to Art. 24’, <[www.un.org/esa/socdev/enable/rights/ahc7panama.htm](http://www.un.org/esa/socdev/enable/rights/ahc7panama.htm)> accessed 16 June 2014.

<sup>40</sup> B. Shaw, ‘Inclusion or Choice? Securing the Right to Inclusive Education for All’ in M. Sabatello and M. Schulze (eds), *Human Rights & Disability Advocacy* (University of Pennsylvania Press 2013) 58, 63.

and free primary education and secondary education on an equal basis with others in the communities in which they live'. Consequently, children with disabilities may not be denied education because of their impairment and must, together with their parents, be able to opt for regular schools in their neighbourhood. This interpretation follows the spirit of the CRPD, which follows the social model of disability.

From a legal point of view, there is no consensus on the definition of the concept of 'inclusive education'. Contrary to other concepts such as 'reasonable accommodation', this concept is not defined in Article 2 of the CRPD. What is clear, however, is what it is not. Inclusive education is obviously not equal to education in special schools, which would lead to a segregated education system. But neither is inclusive education equal to integration, which would simply provide access to regular schools for children with disabilities without allowing them to be educated there in a way that takes account of their special needs.<sup>41</sup> This interpretation was confirmed in the Committee on the Rights of Persons with Disabilities' Concluding Observations to Austria's initial report, in which it noted 'that there is some confusion between "inclusive" education and "integrated" education' in the State.<sup>42</sup>

Inclusive education recognises that all children are different and acknowledges that children with disabilities should be able to participate in the general education system.<sup>43</sup> According to the Office of the UN High Commissioner for Human Rights (OHCHR), inclusion is 'a process that recognizes: (a) the obligation to eliminate barriers that restrict or ban participation, and (b) the need to change culture, policy and practice of the mainstream schools to accommodate the needs of all students, including those with impairments'.<sup>44</sup> It requires 'accommodating both different styles and rates of learning and ensuring quality education to all through appropriate curricula, organizational arrangements, teaching strategies, resource use and partnerships with their communities'.<sup>45</sup>

The right to education of persons with disabilities may be achieved over a certain period of time. As mentioned in the previous section, Article 4 (2) of the CRPD – which is copied from Article 2 (1) of the ICESCR – provides that economic, social and cultural rights have to be progressively realised within the maximum available resources. States Parties have therefore to put in place their resources with a view to fully realising the right to inclusive education and immediately take steps to this end, even though the objective does not have to be reached right away. States Parties have also to provide a timetable for achieving it and monitor the result. The progressive

<sup>41</sup> UN Committee on the Rights of the Child, 'General Comment No. 9: The rights of children with disabilities' (2006) UN Doc CRC/C/GC/9, para. 67.

<sup>42</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Austria' (2013) UN Doc CRPD/C/AUT/CO/1, para. 40.

<sup>43</sup> UNCHR, 'The right to education of persons with disabilities. Report of the Special Rapporteur on the Right to Education' (2007) UN Doc A/HRC/4/29, 9.

<sup>44</sup> OHCHR (n 7) 5.

<sup>45</sup> Salamanca Statement, para. 9.

realisation of the right to education of persons with disabilities does not mean, therefore, that inclusive education can just be postponed. States Parties must show that they have a strategy for the achievement of inclusive education.

Contrary to what is sometimes asserted, an inclusive education system is not more expensive than a segregated education system. There is even unanimity about the fact that the former is more economical than the latter. For example, Inclusion International considers that it could be seven to nine times cheaper.<sup>46</sup> That inclusive education is cheaper than segregated education is also confirmed in the Salamanca Statement, which declares that inclusive education ‘would improve the efficiency and ultimately the cost-effectiveness of the entire education system’.<sup>47</sup> According to UNICEF, ‘countries are now increasingly realizing the inefficiency of multiple systems of administration, organizational structures and services, and that it is the option of special schools which is financially unrealistic’.<sup>48</sup> The Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol (Handbook for Parliamentarians) also considers that ‘inclusive educational settings are generally less expensive than segregated systems’.<sup>49</sup> Money can be saved not only on the buildings but also on administration, materials and transport. Inclusive education is therefore economically feasible and even more beneficial. The progressive realisation of the right to inclusive education within the available resources could therefore rapidly be achieved.

We are, however, in a transitional phase. Inclusive education could bring additional costs in the short term and only become profitable in the long term. The building of inclusive education can be compared to the construction of a ‘passive house’, which will be cheaper in the long run than the heavy installation costs which would have to be carried out afterwards in a badly insulated house. In order to move from a segregated school system to an inclusive one, States Parties have therefore to promote ‘universal design’ by ensuring that from the very beginning, goods, services, equipment and facilities can be used by everybody, as provided for in Article 4 (f) of the CRPD. A practical problem, however, is that placing more children with disabilities in mainstream schools does not automatically lead to fewer children with disabilities in special schools in the short term.<sup>50</sup> It is therefore not possible to recover resources

<sup>46</sup> Inclusion International, *Better Education for all when we are included too. A Global Report. People with an Intellectual Disability and their Families Speak out on Education for All, Disability and Inclusive Education* (INICO 2009) 41 <[http://ii.gmalik.com/pdfs/Better\\_Education\\_for\\_All\\_Global\\_Report\\_October\\_2009.pdf](http://ii.gmalik.com/pdfs/Better_Education_for_All_Global_Report_October_2009.pdf)> accessed 16 June 2014.

<sup>47</sup> Salamanca Statement, para. 2.

<sup>48</sup> UNICEF, *The Right of Children with Disabilities to Education: A Rights-based Approach to Inclusive Education. Position Paper* (UNICEF 2012) 39 <[www.unicef.org/ceecis/IEPositionPaper\\_ENGLISH.pdf](http://www.unicef.org/ceecis/IEPositionPaper_ENGLISH.pdf)> accessed 16 June 2014.

<sup>49</sup> OHCHR, *From Exclusion to Equality. Realizing the rights of persons with disabilities. Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (OHCHR 2007) 84 <[www.un.org/disabilities/documents/toolaction/ipuhb.pdf](http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf)> accessed 16 June 2014.

<sup>50</sup> EASPD, *Barometer of Inclusive Education in Selected European Countries* (EASPD 2011) 38 <[www.investt.eu/sites/default/files/barometerreport.pdf](http://www.investt.eu/sites/default/files/barometerreport.pdf)> accessed 16 June 2014.

used for the purpose of inclusive education immediately. This situation indicates not only that support measures for children with disabilities can be beneficial to all children but also that a greater number seem actually to need such measures. After a while the backlog should be cleared, thereby resolving the problem.

In practice, resources remain nonetheless, by and large, an obstacle to achieving inclusive education. While States have usually adopted national legislation allowing children with disabilities to enrol in regular schools, there are no or only limited resources available to make it work. The lack of resources has been pointed out on many occasions by the Committee on the Rights of Persons with Disabilities. While reacting positively to legal frameworks, it has expressed its concern about practical implementation. To Spain the Committee requested 'allocating sufficient financial and human resources to implement the right to inclusive education'.<sup>51</sup> To Peru it likewise recommended that the State 'allocate sufficient budget resources to achieve advances in the progress for an inclusive education system for children and adolescents with disabilities',<sup>52</sup> while to Argentina it recommended that the State 'allocates sufficient budgetary resources to ensure progress towards the establishment of an education system that includes students with disabilities'.<sup>53</sup> To Hungary it called upon the State 'to allocate sufficient resources for the development of an inclusive education system for children with disabilities'.<sup>54</sup> States have therefore to invest in inclusive education by providing reasonable accommodation and adopting support measures. They should make greater efforts to comply with the obligation to progressively realise the right to inclusive education within the maximum available resources.

Many States allocate substantial resources to special education. The resources are therefore available but are not allocated in the way that has to be according to international human rights law. The Committee on the Rights of Persons with Disabilities has requested that States use these resources for the purpose of inclusive education. To China it recommended that the State 'reallocate resources from the special education system to promote the inclusive education in mainstream schools, so as to ensure that more children with disabilities can attend mainstream education'.<sup>55</sup> The right to inclusive education involves, thus, that States transfer budgets for special schools to building inclusive education systems.

The main problem, however, lies perhaps somewhere else. According to the UNICEF Innocenti Research Centre, 'some of the most significant barriers result

<sup>51</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Spain' (2014) UN Doc CRPD/C/ESP/CO/1, para. 44 a).

<sup>52</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Peru' (2012) UN Doc CRPD/C/PER/CO/1, para. 37.

<sup>53</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Argentina' (2012) UN Doc CRPD/C/ARG/CO/1, para. 38.

<sup>54</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Hungary' (2012) UN Doc CRPD/C/HUN/CO/1, para. 41.

<sup>55</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of China' (2012) UN Doc CRPD/C/CHN/CO/1, para. 36.

from the legacy of policies and structures that have influenced attitudes and mindsets and so created resistance to change'.<sup>56</sup> The problem concerns particularly those States that previously invested a lot in special schools, which are often well equipped and sometimes even appreciated by persons with disabilities. Regarding countries that have established specialised education systems, a gradual approach is therefore required to ensuring transition towards an inclusive education system.<sup>57</sup> This involves reviewing the entire education system, something which can create resistance by those that are afraid of change, including (alleged) increased workload and job redundancy. More significantly, there are stereotypes and prejudices surrounding children with disabilities, who are considered not to fit in the general education system. There is sometimes a fear that children with disabilities would push the level of education downward.<sup>58</sup> This fear is fed by the fact that the standard tests which are used to determine this level are inappropriate for inclusive education and the fact that schools are usually not willing to adapt their curricula in order to make them accessible to children with intellectual disabilities in particular. The real obstacles are thus not the practical but the social barriers to inclusive education, which are difficult to remove considering the historically segregated structures.

#### 4.2.2. Reasonable Accommodation

Article 24 (2) (c) of the CRPD provides that States shall ensure that '[r]easonable accommodation of the individual's requirements is provided'. While this obligation is already provided for in Article 5 (3), it is repeated in relation to education, which shows its importance for inclusive education. Article 2 of the CRPD defines the concept of 'reasonable accommodation' as follows: 'necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. It furthermore provides that 'denial of reasonable accommodation' is a form of discrimination. Consequently, the provision of reasonable accommodation is an obligation which has to be fulfilled immediately.

Reasonable accommodations are individualised measures meeting the special needs of children with disabilities. They aim to move beyond formal equality and achieve substantive equality, and ensure that persons with disabilities can reach the same level of opportunities as other persons. As far as inclusive education is concerned, the purpose is that children with disabilities are able to attend regular schools that are close where they live. The duty to provide reasonable accommodation

<sup>56</sup> UNICEF Innocenti Research Centre, *Promoting the Rights of Children with Disabilities* (UNICEF 2007) 17 <[www.un.org/esa/socdev/unyin/documents/children\\_disability\\_rights.pdf](http://www.un.org/esa/socdev/unyin/documents/children_disability_rights.pdf)> accessed 16 June 2014.

<sup>57</sup> Inclusion International (n 46) 38–39.

<sup>58</sup> UNICEF Innocenti Research Centre (n 56) 17.

means, for example, that buildings and classrooms must be accessible, transportation to schools is available and communication technology is used, as also provided for in Article 9 (1) of the CRPD. This obligation also applies to higher education, as well as to pre-school and adult education, since Article 24 (1) guarantees 'an inclusive education system at all levels and lifelong learning' and since reasonable accommodation have to be provided to all persons with disabilities.

Since education has to be free, reasonable accommodation should likewise be provided for by the State. In its Concluding Observations to the initial report of Spain the Committee on the Rights of Persons with Disabilities asked the State to 'ensure that the parents of children with disabilities are not obliged to pay [...] for the measures of reasonable accommodation in mainstream schools'.<sup>59</sup> As demonstrated by a survey carried out in the EU, the number of accommodations that are granted to satisfy individual requirements is still relatively low in reality.<sup>60</sup> Regular schools are, thus, required further to examine possibilities for allowing children with disabilities to participate in the general education system. Reasonable accommodation should be provided by both public and private schools. The latter are also prohibited to discriminate, especially since they provide a public service. It is the role of the State to guarantee that they do so.

The question is of course when accommodation is considered 'reasonable'.<sup>61</sup> This question will never have a definite answer and has to be examined on a case-by-case basis.<sup>62</sup> The notion of reasonable accommodation comes from the field of religious discrimination but was legally anchored for the first time in the Americans with Disabilities Act (ADA). While examining this notion in greater depth would require more space than that available in the present paper, it can be considered that accommodations are reasonable if they do not create an undue burden.<sup>63</sup> There may be a burden, which means that efforts are required, but this burden may not be undue. This involves a comparison between costs, which should be calculated taking into account compensations that can be obtained, and benefits, which includes advantages for parties other than those for whom the measures are taken.<sup>64</sup> If a ramp is useful for children with disabilities, for instance, it will likewise be beneficial to pregnant mothers, small children and older people. While the OHCHR defines 'reasonableness' as 'the result of an objective test that involves an analysis of the availability of resources, as well as the relevance of the accommodation, and the expected goal of countering

<sup>59</sup> UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Spain' (2011) UN Doc CRPD/C/ESP/CO/1, para. 44.

<sup>60</sup> EASPD (n 50) 23–24.

<sup>61</sup> N. Bamforth, M. Malik and C. O'Conneide, *Discrimination Law: Theory and Context* (Sweet and Maxwell 2008) 1077–1078.

<sup>62</sup> This can be compared with the 'reasonable person' or *bonus paterfamilias*.

<sup>63</sup> L. de Campos Velho Martel, 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective' (2011) 8 *International Journal on Human Rights* 85, 103.

<sup>64</sup> *Ibid.* 104.

discrimination', it acknowledges that 'testing standards are yet to be developed in jurisprudence by the Committee on the Rights of Persons with Disabilities'.<sup>65</sup>

The way in which the reasonable accommodations are determined must be decided in consultation with all involved parties, including the applicant(s). Whatever the outcome, the decision must be the result of an objective and fair procedure creating a dialogue in which the parties can debate on all available options. Following the Habermasian deliberation model, such a procedure is needed in order to achieve consensus based on rational arguments. For consensus to be valid, participants must be on an equal footing during discussions, since this will guarantee that only the better argument counts.<sup>66</sup> The purpose, in the words of Joshua Cohen, is to establish the conditions for a 'free reasoning among equals'.<sup>67</sup> To achieve such a 'free reasoning among equals', it is necessary that people are informed about the issues at stake and made fully aware of their rights, and being given the opportunity to express their point of view. The procedure must also meet certain formal guarantees, including publicity and transparency. The process is therefore as much, if not more, important than the outcome. It is possible for certain accommodations to be deemed unreasonable, as long as all parties have had the chance to put forward their arguments and decisions are made taking those arguments into account. A negative answer will then be more easily accepted by those concerned.

Even though the reasonable character of an accommodation for the purpose of inclusive education is difficult to determine, several sources point out that their cost is often over-estimated and that most of the time they are available. The Handbook for Parliamentarians considers that this should be possible for approximately 80 to 90 percent of the children with disabilities, including children with intellectual disabilities.<sup>68</sup> According to the UNICEF Innocenti Research Centre, '[i]nclusive policies and practices required to promote the enjoyment of the rights of [children with disabilities] are both feasible and practical'.<sup>69</sup> Most of the barriers to inclusive education can therefore be removed.

#### 4.2.3. Support Measures

In addition, the CRPD prescribes a number of support measures so that children with disabilities can participate in the general education system. The support measures supplement the reasonable accommodations and add a human rights dimension to the right to education of persons with disabilities. They are likewise

<sup>65</sup> OHCHR (n 7) 12.

<sup>66</sup> J. Habermas, *Morale et Communication* (translation C. Bouchindhomme) (Les Editions du Cerf 1986) 111.

<sup>67</sup> J. Cohen, 'Democracy and Liberty' in J. Elster (ed.), *Deliberative Democracy* (Cambridge University Press 1998) 185, 193.

<sup>68</sup> OHCHR (n 49) 85.

<sup>69</sup> UNICEF Innocenti Research Centre (n 56) 1.

at the expense of the State, which is responsible for the achievement of inclusive education. Since children do not have to pay for their education, there is no reason why it should be any different for children with disabilities, who have to be included in mainstream schools. The reading of Article 24 of the CRPD, in combination with that of Article 13 (2) of the ICESCR,<sup>70</sup> confirms this interpretation. Article 24 (2) (a) and (b) of the CRPD stipulates that 'children with disabilities are not excluded from free and compulsory primary education on the basis of disability' and that 'persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live'. There seems, however, to be a serious difference between theory and practice in this regard. While national legislation generally provides for free inclusive education, this has in reality only partially been achieved in many EU Member States.<sup>71</sup>

The support measures are subject to the obligation to progressively realise the right to inclusive education within the maximum available resources (contrary to the duty to provide reasonable accommodation). Consequently, these measures do not have to be adopted all at once, provided that the available resources are used to achieve inclusive education and that there is a timetable and monitoring. As was made clear in the first part of this section, the progressive realisation of the right to inclusive education within the available resources does entail immediate action. States have therefore the obligation to start building inclusive education systems right away. Inclusive education has to be given a priority over special education.<sup>72</sup>

According to Article 24 (2) (d) of the CRPD, States Parties guarantee that 'persons with disabilities receive the support required, within the general education system, to facilitate their effective education'. Its drafting history is worth mentioning in order to understand its particular meaning. The original proposal additionally provided that '[i]n exceptional circumstances where the general school system cannot adequately meet the needs of all persons with disabilities, States Parties shall ensure that effective alternative support measures are provided, consistent with the goal of full inclusion'.<sup>73</sup> '[E]ffective alternative support measures' was to be understood as special education or a mixed form of education.<sup>74</sup> The obligation to 'ensure that effective alternative

<sup>70</sup> As stated earlier, Article 13 (2) of the ICESCR provides that 'a. primary education must be compulsory and free for everybody; b. secondary education ... in particular through the gradual introduction of free education, must be made generally available and accessible for everybody; [and] c. higher education ... in particular through the gradual introduction of free education, must be made equally accessible based on each person's competence'.

<sup>71</sup> EASPD (n 50) 13 and 21–22.

<sup>72</sup> As noted earlier, however, there is the practical problem that an increase in the number of children with disabilities in mainstream schools often does not result immediately in a decrease in those attending special schools.

<sup>73</sup> Ad Hoc Committee, 'Seventh Session, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (2003) UN Doc A/AC.265/2006/2, Annex II Article 24 (4) <[www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7report-e.pdf](http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7report-e.pdf)> accessed 16 June 2014.

<sup>74</sup> Arnardóttir (n 38) 217.

support measures are provided’ was subsequently replaced by the obligation to ‘ensure that effective individualized support measures are provided in environments that maximize academic and social development’, which eventually became Article 24 (2) (e). The terms ‘environments that maximize academic and social development’ can likewise be interpreted as special schools, especially since these terms are also to be found in Article 24 (3) (c), which provides an exception for blind, deaf or deaf-blind children.<sup>75</sup> While there remains ambiguity, Article 24 (2) (e) should however be read more narrowly than Article 24 (3) (c), because Article 24 (2) (e) provides that the support measures have to be provided ‘consistent with the goal of full inclusion’ – terms which were taken over from draft Article 24 (2) (d) – and because Article 24 (2) (e) was previously a part of Article 24 (2) (d). It could therefore refer more to a mixed form of education than special education.<sup>76</sup>

Support measures are general measures which must gradually achieve inclusive education. They do not aim to provide for particular adjustments but to adapt the general education system in order to include all children. Although they are general in nature, they have still to be tailored to the special needs of the child. The general measures include providing personal assistance, including medical assistance, as well as the necessary equipment and material, including Braille and sign language, as provided in Article 24 (3) of the CRPD. According to the Special Rapporteur on the Right to Education, both internal and external factors should be addressed in order to create inclusive education systems. The former include ‘altering the physical environment, such as the design of hallways and classrooms, desks, widening entrances, building ramps, installation of elevators, altering or reconsidering geographical locations, adapting rules and admission standards’, whereas the latter include ‘the provision of supplementary classes, alternative/additional forms of communication, special tutors or support staff, and nutritious meals’.<sup>77</sup> Furthermore, inclusive education requires States Parties to adapt not only teaching methods and curricula but also evaluation tools for children with intellectual disabilities.<sup>78</sup>

Article 30 (5) (d) of the CRPD provides that States Parties should ‘ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school’. Support measures should thus also be taken in the broader school life. They must facilitate interaction with fellow classmates and are therefore not only for children with disabilities. To this end, it is necessary that schools promote respect for diversity with a view to combating stereotypes and prejudices against children with

<sup>75</sup> Ibid. 219–220 and 225. Contra: OHCHR (n 7) 13.

<sup>76</sup> Arnardóttir (n 38) 225.

<sup>77</sup> UNCHR (n 43) 8.

<sup>78</sup> Save the Children, *See Me, Hear Me. A Guide to Using the UN Convention on the Rights of Persons with Disabilities to Promote the Rights of Children* (Save the Children 2009) 112 <[www.crin.org/docs/See\\_me\\_hear\\_final.pdf](http://www.crin.org/docs/See_me_hear_final.pdf)> accessed 16 June 2014; UNICEF (n 48) 71; UNICEF Innocenti Research Centre (n 56) 27; UNCHR (n 43) 7.

disabilities. They should give a positive image of children with disabilities and ensure that these children are valued among their peers. Awareness-raising in the context of education is also safeguarded by Article 8 (2) (b) of the CRPD, which provides that States Parties must undertake measures among which ‘fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities’.

In order to achieve inclusive education, a crucial aspect is support given to teaching staff. Teachers and supervisors need advice and assistance to be able, and be encouraged, to work on inclusion. They should get help from colleagues so that they can address particular problems and change their approaches.<sup>79</sup> Furthermore, Article 24 (4) of the CRPD requires that ‘students are trained in how to deal with persons with disabilities and the use of supporting communication and other methods [...] to support persons with disabilities’. Training in disability rights should not only be included in specialisation courses but also in general courses which must pay attention to diversity. Often there are special teaching curricula for those that are interested in working with children with disabilities (in special schools), but rarely are those courses integrated into the mainstream teaching curricula. In its concluding observations to the initial report of Azerbaijan the Committee on the Rights of Persons with Disabilities recommended the State to ‘[s]tep up efforts to provide quality training for teachers [...] in the use of braille and sign language with a view of enhancing the education of all categories of children with disabilities [...] and ensure that inclusive education is an integral part of core teacher training in universities’.<sup>80</sup> It is also important that teachers continue to be supported and trained during their teaching career. As far as the available resources are concerned, in its concluding observations to El Salvador’s initial report the Committee asked the State to ‘allocate the requisite budget for the compulsory training of teachers in inclusive education techniques in respect of persons with disabilities’.<sup>81</sup>

A final question is how support measures relate to reasonable accommodation. This question has not been examined so far, although it has considerable repercussions. On the one hand, support measures aim at adapting the general education system with a view to making it accessible to children with disabilities. On the other hand, reasonable accommodation will enable these children to be educated in regular schools. The former targets schools, the latter the individuals. While the two overlap to a certain extent, the more support measures are taken, the more reasonable accommodations will be available. Accommodation will more

<sup>79</sup> UNICEF, *The State of the World’s Children 2013. Children with disabilities* (UNICEF 2013) 33 <[www.unicef.org/sowc2013/files/SWCR2013\\_ENG\\_Lo\\_res\\_24\\_Apr\\_2013.pdf](http://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf)> accessed 16 June 2014.

<sup>80</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Azerbaijan’ (2013) UN Doc CRPD/C/AZE/CO/1, para. 46.

<sup>81</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of El Salvador’ (2013) UN Doc CRPD/C/SLV/CO/1, para. 50 b).

often be deemed reasonable, if changes within the school context can be made easily. The cost would be much reduced, since the general education system would take account of their special needs from the outset. In any case, fewer reasonable accommodations would be needed, as they would largely be covered by the support measures. In view of this, schools have to be made inclusive from scratch as much as possible. The best way of achieving this is thus providing ‘universal design’, in the sense of Article 4 (f) of the CRPD, when building general education systems, as this will make the reasonable accommodations redundant. So doing will, moreover, be beneficial to all children.<sup>82</sup> ‘Universal design’ requires not only providing supporting communication, including Braille and sign language, and making buildings accessible through the use of ramps, elevators and wider entrances but also adapting the purpose of education by focusing on the learning capacities of every child and establishing targets that suit the needs of all children. While it is therefore essential to provide reasonable accommodation for children with disabilities, as this can indeed be requested immediately, it is therefore even more important to adopt support measures in order to achieve inclusive education. Too great a focus on reasonable accommodations can have the opposite effect, since it may detract attention from the imperative to change the general education system, something that will further contribute to their limited availability.

#### 4.2.4. *Special Schools*

The question is what must be done about special schools. This question is one of the most difficult and debated questions regarding the right to education of persons with disabilities. As indicated earlier, it was a constant preoccupation of the drafters of the Convention, who were divided into two groups. While some of them considered that both mainstream and special schools should exist in parallel, others thought that inclusive education should be the norm and special education the exception.<sup>83</sup> Draft Article 17 (3) of the CRPD provided that ‘where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available’. This part was, however, subsequently deleted, whereas Article 24 (3) made an exception for blind, deaf or deaf-blind children. As indicated earlier, there also is still ambiguity as to whether Article 24 (2) (e) of the CRPD makes room for special education. The question therefore remains to what extent such schools are allowed under Article 24 of the CRPD.

This question is of course irrelevant for those States in which there is only one general education system. The question is then the extent to which children with

<sup>82</sup> N. Minow, ‘Universal Design in Education. Remaking All the Difference’ in A. Kanter and B. Ferri (eds), *Righting Education Wrongs* (Syracuse University Press 2013) 38, 56.

<sup>83</sup> Arnardóttir (n 38) 210.

disabilities have access to regular schools or are not able to attend schools at all. As still happens in many of parts of the world, many children with disabilities simply cannot go to school,<sup>84</sup> and States Parties are therefore responsible for making these schools inclusive for them.

In those States that have strongly segregated education systems, special schools cannot be suddenly closed, because to do so would lead to discrimination against children with disabilities, if these children could no longer receive education. They must instead start immediately with building an inclusive education system, while at the same time the special schools must continue to function. There should be a gradual move from segregated to inclusive education systems. Such a transition can be achieved by establishing a mixed form of education. One of the solutions is to bring the two systems to the same campus so that the knowledge and materials from special schools can be used in regular schools. Special schools will then be transformed as learning resource centres.<sup>85</sup> It must of course remain a temporary solution, considering that bringing these two systems together can still mean a segregated education system in reality. After a while, the learning resource centres should be incorporated into mainstream schools. Resources have likewise to be transferred from the special schools to the mainstream schools.

The question remains, however, whether all children have to participate in the general education system. It cannot be ruled out that for a limited number of children reasonable accommodations are not possible or support measures not desired. Consequently, it could be that inclusive education is not achievable for some children, particularly children with serious and multiple limitations. Article 24 does not prevent States from establishing special schools for these children.<sup>86</sup> Nor, however, does it compel them to be equipped with special schools, as was confirmed during the negotiations.<sup>87</sup> In other words, while such schools can be established for some children with disabilities, there is no requirement to have them. Providing special education to them is however permissible as long as this is not done on the basis of their impairments but on the basis of the barriers to their participation in society. States, thus, have a certain leeway, although they should provide a strong CRPD-based justification if they keep a – partially – segregated education system. Special education may also not be of lesser quality than normal education, because this would again lead to discrimination. The risk is nonetheless that only children with less severe disabilities have the chance to be educated in mainstream schools, whereas the others will remain in special schools.

A related and no less sensitive question is whether persons with disabilities have the right to opt for special schools. This question was raised during the negotiations,

<sup>84</sup> UNICEF (n 80) 27–28.

<sup>85</sup> OHCHR (n 7) 13.

<sup>86</sup> Kanter (n 1) 24.

<sup>87</sup> Arnardóttir (n 38) 214–215.

where some advocated that children with disabilities must be able to choose between inclusive and special education.<sup>88</sup> This view was eventually rejected, as the final version of Article 24 of the CRPD clearly indicates. It should be noted in this regard that the UNESCO Convention against Discrimination makes specific exceptions to inclusive education systems, but not for persons with disabilities. One argument that could nonetheless be made is that parents have the right to choose the education of their children according to their religious and moral convictions, as guaranteed by both Article 13 (3) of the ICESCR and Article 18 (4) of the ICCPR. This right, however, allows them to send their children to schools other than those provided by the State but does not require the State to give them a choice within public schools.<sup>89</sup> In addition, the right in question concerns freedom of thought, whereas inclusive education relates to participation in society, which persons with disabilities should likewise contribute to. The UN World Programme of Action on Disability adopted in 1981 proclaims indeed that '[a]s disabled persons have equal rights, they also have equal obligations. It is their duty to take part in the building of society'. Otherwise would be like giving people a right to opt for schools (solely) for girls and children from racial or ethnic minorities, while the general education system were already accessible to them.

As already mentioned, the CRPD provides for a special status for children who are blind, deaf and deaf-blind. According to Article 24 (3) (c) of the CRPD, States Parties guarantee that the education of these children is 'delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development'. The terms 'in environments which maximize academic and social development' are generally understood as an authorisation to educate blind, deaf and blind-deaf children in special schools.<sup>90</sup> The exception was defended during the negotiations by their representative organisations, which feared that inclusive education would neglect the identity of these children and would in practice mean exclusion. This is still the opinion of the World Blind Union (WBU) and also of the World Federation of the Deaf (WFD), for whom 'inclusion as a simple placement in a regular school without meaningful interaction with classmates and professionals at all times is tantamount to exclusion'.<sup>91</sup> The consequence is that persons with sensory or communication impairments should be allowed to be educated in special schools, although this option should not prevent them from asking to be able to participate in the general education system.

<sup>88</sup> Ibid. 209–211; Kanter (n 1) 17.

<sup>89</sup> Shaw (n 40) 65.

<sup>90</sup> Arnardóttir (n 38) 219–220.

<sup>91</sup> Ad Hoc Committee, 'Seventh Session: article 24' <[www.un.org/esa/socdev/enable/rights/ahcstata24sevscomments.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata24sevscomments.htm)> accessed 16 June 2014.

## 5. CONCLUSION

While debates in favour of inclusive education have been going on, the right to inclusive education has for the first time been recognised in international human rights law. There is no doubt that this principle is a far-reaching one. While the purpose of inclusive education seems clear in theory, there are many problems in practice. It is however something essential for children with disabilities, since segregated education systems contribute to their marginalisation and jeopardize their participation in society. As proclaimed by the US Supreme Court in relation to racial minorities in the *Brown v. Board of Education* judgment 60 years ago, '[s]eparate educational facilities are inherently unequal'.<sup>92</sup> The same can be said of persons with disabilities.

Article 24 of the CRPD not only prohibits discrimination against children with disabilities in education but also proclaims the right to inclusive education. Article 24 is one of the provisions that most closely follows the social model of disability, since it aims especially to remove barriers to participation in society. It requires that States Parties take steps to ensure that children with disabilities can participate in the general education system. While there was originally no consensus during the negotiations as to whether inclusive education should be a principle, this is what the drafters eventually decided for the right to education of persons with disabilities.

Practice shows that it was necessary to have the right to inclusive education enshrined in the CRPD. While national legislation generally guarantees that children with disabilities can enrol in regular schools, there are still many obstacles to achieving inclusive education. The main one is probably related to attitudes. Inclusive education requires re-thinking the purpose of education and re-building education systems taking account of the special needs of persons with disabilities. Education should no longer aim at transferring knowledge but enhancing learning capacities. Diversity should also be valued as such, which means no longer focusing only on deficiencies. In view of this, inclusive education would be more advantageous for every single child.

What does Article 24 of the CRPD require for getting there? There are two kinds of steps that should be taken in order to achieve inclusive education. As is the case with the entire Convention, there is a duty to provide reasonable accommodation for children with disabilities so that these children can be educated in regular schools. States Parties must also adopt support measures in order to allow children with disabilities to participate in the general education system. This obligation involves building inclusive education systems through adapting both the environment and the content of education, while supporting all those involved in school life, including teaching staff and schoolmates. While it may not be possible to accomplish this overnight, this is indeed the final goal of Article 24 of the CRPD.

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<sup>92</sup> *Oliver M. Brown et. Al. v. the Board of Education of Topeka (KS)* [1954] 347 US 483.