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# THE DETENTION OF PERSONS WITH PSYCHOSOCIAL AND INTELLECTUAL DISABILITIES

THE BELGIAN SYSTEM AND ITS COMPLIANCE WITH THE UN  
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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## *Abstract*

This thesis provides an analysis of the States Parties' obligations under the UN Convention on the Rights of Persons with Disabilities with regard to the detention of persons with psychosocial and intellectual disabilities with the purpose of psychiatric treatment, with emphasis on Articles 12 and 14, on the right to equal recognition before the law and the right to liberty and security, respectively. Furthermore, the thesis below provides an overview of the Belgian system of detention of persons with psychosocial and intellectual disabilities for psychiatric treatment and its compliance with the obligations and standards established in the CRPD.

## Table of Contents

<i>List of Abbreviations</i> .....	iv
<b>Chapter 1.</b>	
<b>Introductory Chapter</b>	
1.1 Introduction.....	1
1.2 Research Questions.....	3
1.3 Methodology.....	4
1.4 Structure.....	6
<b>Chapter 2.</b>	
<b>A brief socio-historical contextualisation</b>	
2.1 Introduction.....	8
2.2 An overview of the Institutionalisation of Persons with Disabilities.....	10
2.3 Theoretical Models of Disabilities.....	12
2.3.1 The Medical Model of Disability.....	12
2.3.2 The Social and Minority Models of Disability.....	13
2.3.3 The Human Rights Model of Disability.....	14
2.4 The CRPD as an Achievement of the Disability Rights Movement.....	15
<b>Chapter 3.</b>	
<b>Interpretation of State Parties' obligations under the CRPD</b>	
3.1 Introduction.....	16
3.2 Legal interpretation of Article 12.....	17
3.2.1 Article 12, paragraphs 1 and 2.....	18
3.2.2 Article 12, paragraph 3.....	24
3.2.3 Article 12, paragraphs 4 and 5.....	25
3.3 Legal interpretation of Article 14.....	25
3.3.1 Article 14, paragraph 1.....	26
3.3.2 Article 14, paragraph 2.....	30
3.4 Committee's considerations concerning individuals communications.....	30
<b>Chapter 4.</b>	
<b>Belgian legislation</b>	
4.1 Introduction.....	33
4.2 The Act on Confinement.....	34
4.3 The Mental Health Act.....	39
4.4 Reform 107.....	42
<b>Chapter 5.</b>	
<b>Comparison and Recommendations</b>	
5.1 Chapter's Summary.....	45

5.2 States Parties' obligations under the CRPD and the Act on Confinement.....	45
5.2.1 Article 12 and related provisions.....	46
5.2.2 Article 14 and 25.....	48
5.2.3 Practices and breaches of the CRPD.....	50
5.3 States Parties' obligations under the CRPD and the Act on Mental Health.....	52
5.3.1 Article 12 and related provisions.....	53
5.3.2 Article 14.....	54
5.3.3 Practices and breaches of the CRPD.....	54
5.4 Recommendations on the Belgian system.....	55
5.4.1 Recommendations on the Belgian security measures system.....	55
5.4.2 Recommendations on the Belgian protection measures system.....	60
5.5 Final Considerations.....	63

## **Chapter 6.**

### **Concluding Remarks**

6.1 Summary of the main findings.....	64
6.1.1 States Parties' obligations under Articles 12 and 14.....	64
6.1.2 The Relation of Articles 12 and 14 With Other Provisions of the CRPD.....	66
6.1.3 The Belgian System and its Compliance with the CRPD's Standards.....	67
6.2 A Consideration of Current Challenges.....	68
6.3 Conclusion.....	70

<i>Bibliography</i> .....	v
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### *List of Abbreviations*

Disabled Persons Organisations (DPOs)  
European Committee for the Prevention of Torture (CPT)  
European Convention on Human Rights (ECHR)  
European Court of Human Rights (ECtHR)  
International Covenant on Civil and Political Rights (ICCPR)  
International Covenant on Economic, Social and Cultural Rights (ICESCR)  
Non Governmental Organisations (NGOs)  
Persons with Disabilities (PWD)  
United Nations (UN)  
World Health Organisation (WHO)  
International Committee of the Red Cross (ICRC)  
United Nations Children's Fund (UNICEF)  
United Nations Committee against Torture (UN CAT)  
United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee)  
United Nations Convention on the Rights of Persons with Disabilities (CRPD)  
Vienna Convention on the Law of Treaties (VCLT)

# Chapter 1

## Introductory Chapter

### 1.1 Introduction

The United Nations Convention on the Rights of Persons with Disabilities (the ‘CRPD’ or the ‘Convention’), adopted in 2006 and with entry into force in May 2008,<sup>1</sup> with its Optional Protocol,<sup>2</sup> is essentially a ‘non-discrimination instrument’<sup>3</sup> with the purpose and objective to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’, as stated in Article 1 of the CRPD. As pointed out by Gerard Quinn, the majority of rights recognised by the Convention are those that were already enshrined in United Nations (‘UN’) human rights treaties, such as the International Covenant on Civil and Political Rights (‘ICCPR’) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’). However, these treaties did not in fact benefit persons with disabilities, due to their invisibility both in society and in the treaties monitoring bodies.<sup>4</sup>

One of the ‘classical’ human rights recognised by the international community is the right to liberty and security.<sup>5</sup> Nonetheless, in several countries worldwide, persons with mental impairments or illnesses (hereafter ‘psychosocial disabilities’) and those with intellectual disabilities are treated in a discriminatory manner and are detained against their will in institutions, in the name of treatment. Article 14 (1) (b) of the CRPD provides that ‘the existence of a disability shall in no case justify a deprivation of liberty,’ which must be considered an unlawful or arbitrary detention.

The cases of involuntary detention of persons with psychosocial and intellectual disabilities for their treatment is directly linked to the denial of legal capacity, another inherent right traditionally

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<sup>1</sup>Information taken from the UN Treaty Collection website, ‘Status of the CRPD’, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) last accessed 7 July 2018.

<sup>2</sup>As explained by G Quinn, the States that ratified the Optional Protocol ‘agree to accept a complaints mechanism that will enable a new United Nations Committee on the Rights of Persons with Disabilities to entertain both group and individual complaints’. See G Quinn, ‘The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability’ (Jacobus tenBroek Disability Law Symposium, April 2009), at page 34, available at [http://heinonline.org/HOL/Page?handle=hein.journals/tfcl15&div=5&g\\_sent=1&casa\\_token=&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/tfcl15&div=5&g_sent=1&casa_token=&collection=journals) last access 5 July 2018.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, at page 38.

<sup>5</sup> Article 9: 1. International Covenant on Civil and Political Rights states that: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. Treaty available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> last access on 24 June 2018.

denied to persons with psychosocial and intellectual disabilities in legal systems worldwide. As stated by the Committee on the Rights of Persons with Disabilities (CRPD Committee)<sup>6</sup> in its General Comment no. 1,<sup>7</sup> involuntary treatment and the denial of legal capacity are strictly related, due to the fact that many persons are institutionalised without their consent or with the consent of a substitute decision-maker. Globally, persons with psychosocial and intellectual disabilities are still not recognised as holders of rights and duties.

Following the paternalistic tradition of treating people with disabilities as ‘incapable,’ many criminal laws do not recognise the responsibility of offenders with a psychosocial or intellectual disability when the impairment is deemed to affect their capacity of discernment or control over their acts. The negation of criminal responsibility is used to justify forced institutionalisation of psychosocial or intellectually disabled offenders in a secured mental hospital or in the psychiatric annex of a prison, sometimes with no limit of time. A similar approach is taken to people with psychosocial or intellectual disability who are considered to be a threat to themselves or to others, even though no crime was committed.

On the surface, the Belgian legal system is committed to the obligations and values enshrined in the CRPD<sup>8</sup> regarding the treatment of psychosocially and intellectually disabled persons, since the country has even established reforms in the health system to treat better this specific group. Despite the commitment of sectors of mental health professionals to changing practices, the European Court of Human Rights (‘EctHR’) has ruled, twenty-three times,<sup>9</sup> that Belgium has violated the right to liberty and security, contained in Article 5, paragraph 1 of the European Convention on Human Rights (‘ECHR’), as a result of its internment policy. This demonstrates that institutionalisation policies and practices related are sensitive issues in Belgium, which has measures of control, such as security and protection measures, provided by its national law.

This thesis will deal with compulsory measures of institutionalisation in the Belgian system, in the light of the provisions of the CRPD, a treaty which ‘forces an acknowledgment of the contradiction

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<sup>6</sup> The CRPD Committee performs the traditional role assigned to a treaty-monitoring body, such as interpretation, formation of conclusions, and recommendations based on periodic state reports, etc, as described by G Quinn (n 2), at page 34 and 35.

<sup>7</sup> UN CRPD Committee, General Comment no. 1 on Article 12: Equal recognition before the law, eleventh session (31 March-11 April 2014), U.N. Doc. CRPD/C/GC/1 (2014), at para. 40.

<sup>8</sup> The CRPD was ratified by Belgium on 2 July 2009.

<sup>9</sup> Information taken from E Schipaanboord’s article published in Strasbourg Observers website, ‘Too little, too late? The EctHR’s pilot judgment on the Belgian internment policy’ (2016), available at <https://strasbourgobservers.com/2016/10/20/too-little-too-late-the-ecthrs-pilot-judgment-on-the-belgian-internment-policy/> last access 2 July 2018.

between our universal values and our practice on disability throughout the world.’<sup>10</sup> This contradiction is entrenched in our society, resulting in a deep marginalisation and exclusion of persons with disabilities. The fact that the CRPD is a very recent human rights treaty, the first of the twentieth-first century, indicates that we have only begun to recognise and to face disability issues, which means that there is still a long way to go to effectively transpose the CRPD provisions into practice.

The objective of this thesis is to analyse whether measures of involuntary institutionalisation, in the Belgian context, are in line with the provisions of the CRPD and contribute to the current discussion about the rights of persons with disabilities.

## **1.2 Research Questions**

The main research question addressed by this thesis is as follows: are Belgium law, policy and practices with regard to the institutionalisation of persons with psychosocial and intellectual disabilities in compliance with the CRPD?

To answer the core question above, it is required to consider the measures of involuntary treatment provided by Belgian legislation and its practices in relation to the obligation enshrined by Article 14, paragraph 1(b) CRPD which considers unlawful or arbitrary the detention on the ground of a disability as unlawful. As briefly mentioned in the introduction to this chapter, the measures in the Belgian system are applied if a person with a psychosocial or intellectual disability has committed a crime or if the person is considered to be a threat to him or herself or to others, which raises the doubts of whether these criteria create lawful grounds for detention.

It is also required to assess the right of equal recognition before the law (legal capacity), provided for in Article 12 of the Convention, since, as stated in the introduction above, it is strictly related to the detention of persons on the ground of a disability. In Belgium, the right to legal capacity is not recognised with regard to offenders with a psychosocial or intellectual disabilities, which can justify their forced institutionalisation.

Considering the non-discriminatory purpose of the Convention, it is also necessary to consider what extent the denial of legal capacity and detention on the ground of psychosocial or intellectual disability affect other important rights provided by the CRPD, namely the right of access to justice, enshrined in Article 13, paragraph 1; the right to freedom from cruel, inhuman or degrading treatment,

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<sup>10</sup> G. Quinn (n. 2), at page 39.

given in Article 15, paragraph 1; freedom from violence and abuse, provided by Article 16, paragraph 1; the right to personal integrity, enshrined in Article 17; and the right to free and informed consent to medical treatment, provided in Article 25, (d).

In order to consider these issues, the sub-research questions of this thesis are as follows:

- 1) What are States Parties' obligations under the CRPD with regard to Articles 12 and 14 of the Convention?
- 2) Is the denial of criminal responsibility on the ground of disability a breach of the right of equal recognition before the law?
- 3) What is the relation between the States Parties' obligation under Articles 12 and 14 with other inherent rights provided by the CRPD?
- 4) Do the criteria set out under Belgian law create lawful grounds for detention under the CRPD's standards?

### **1.3 Methodology**

To investigate the research questions of this thesis, various methods will be used.

In setting out the background to the thesis, it is necessary to elaborate on the sociohistorical background of the disability and the disability rights movements and what were the contributions of this movement to the CRPD drafting history and intellectual basis, relying on historical, sociological readings, as well as legal scholar academic articles.

A large part of the research will be based on an analysis of Belgian legislation concerning the detention of persons on the ground of disability and its compliance with States Parties' obligations under the CRPD. For that, the interpretation of the Convention's provisions will take into account the widely accepted interpretative tools contained in Article 31 of the Vienna Convention on the Law of Treaties<sup>11</sup> ('the VCLT'), which embodies the general rules on this matter, and Article 32, which enshrines supplementary means of interpretation. Together, Articles 31 and 32 of the VCLT combine the following methods of interpretations: the literal or textual interpretation, the systematic or contextual interpretation, the teleological or functional interpretation and historical interpretation.

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<sup>11</sup> Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969. Available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> last access 1 July 2018.

The literal interpretation is the starting point of the process of interpretation - as the name suggests, the treaty's words and phrases should be the primary source of interpretation, given their 'ordinary meaning'. As Andrea Broderick states, the meaning of the provisions of the CRPD should not be determined in abstract, but determined in the context of the treaty as a whole and in light of its objective and purpose, which are given by the systematic and teleological interpretation approaches.<sup>12</sup>

The systematic approach is the method of interpretation employed to determine the context of the treaty as a whole. As outlined by Broderick, the contextual method 'mandates that the researcher locates the interpretation of any phrases within their broader meaning.'<sup>13</sup> The broader meaning must consider the whole of the CRPD text, which are contained in the Preamble and Annexes<sup>14</sup> of the CRPD, as well as the 'general principles and general obligations,'<sup>15</sup> contained in Articles 3 and 4 of the Convention. Moreover, Broderick considers general comments and concluding observations of CRPD Committee as a subsidiary source of interpretation under the contextual approach – these are not legally binding *per se*, however, they 'carry authoritative weight.'<sup>16</sup> The research will also take into consideration articles by legal scholar, in order to examine the broader meaning of the provisions of the CRPD, as well as UN documents, such as Special Rapporteurs and High Commissioner Reports.

The teleological approach is the method required to determine the objective and purpose of the Convention since they play a major role in interpretation in the context of human rights. The interpreter must make human rights treaty provisions effective for individuals, what is called as 'principle of effectiveness,'<sup>17</sup> which Hollis considers to be an 'overarching approach to human rights treaty interpretation.'<sup>18</sup> To make human rights provisions effective, the interpretation should place emphasis on the object and purpose of the treaty as a whole or of a particular provision, since it encompasses the other two methods of interpretation.

The last approach method provided by Article 32 of VCLT is the historical approach, that addresses the *travaux préparatoires* or the drafting history of the treaty. In the specific context of the CRPD, 'the drafting history plays an important role in its interpretation, in light of the fact that the Convention has been adopted so recently' and 'it provides vital background information to the CRPD's

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<sup>12</sup> A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities – The United Nations Convention on the Rights of Persons with Disabilities* (Intersetia Publisher, 2015), at page 10.

<sup>13</sup> *Ibid.*

<sup>14</sup> B. Çali, 'Specialized Rules of Interpretation: Human Rights', In D B Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press, 2012), at page 481.

<sup>15</sup> A. Broderick (n. 12), at page 10.

<sup>16</sup> *Ibid.*, p. 11.

<sup>17</sup> B. Çali (n. 14), at page 538.

<sup>18</sup> *Ibid.*

provisions.’<sup>19</sup> In this thesis, the relevant historical documents that will be included in the interpretation process are the daily summaries of drafting sessions related to the CRPD articles to be interpreted. Since the preparatory work is considered by the heading of Article 32 as a ‘supplementary means’ of interpretation, the drafting history will only be used in situations in which the interpretations in accordance with Article 31 leave an ambiguous or obscure meaning or manifest absurdity or unreasonableness.

Legal doctrinal methodology will be used to analyse the law, policy and practice at the national level. In that regard, ‘normative’ and ‘authoritative sources’<sup>20</sup> will be taken into consideration. The normative sources are Belgian national law; and authoritative sources will be scholarly legal writing on Belgian legislation, policy and practice. In addition, NGOs and research institutions reports will be taken into consideration.

## 1.4 Structure

This thesis will be composed of six chapters.

Following this introductory chapter 1, chapter 2 briefly outlines the overall condition of persons with disabilities, an overview of the institutionalisation of persons with psychosocial and intellectual disabilities, the contributions of the disability rights and deinstitutionalisation movements to critique and change the way society sees disability and the shift of paradigm provided in the CRPD.

Chapter 3 interprets States Parties’ obligations under Article 12 of the CRPD, on the right of equal recognition before the law, and Article 14 of the CRPD, on the right to liberty and security with regard to the detention of persons with psychosocial and intellectual disabilities. Other provisions of the Convention related to Articles 12 and 14 and to the topic under discussion will also be analysed.

Chapter 4 outlines the law and policy in the Belgian system with regard to the measures of involuntary institutionalisation of persons with psychosocial and intellectual disabilities to treatment. The purpose of this chapter is not to analyse relevant Belgian law and policy, but to provide an overview. Two different Belgian laws and one national policy on mental health will be analysed.

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<sup>19</sup> A. Broderick (n 12), at page 13.

<sup>20</sup> M van Hoecke, ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in M van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oxford, 2011), at page 11.

In turn, chapter 5 examines the compliance of the Belgian system with the obligations set out in the CRPD, involving a comparison between the legislations exposed in chapter 4 and States Parties' obligations interpreted in chapter 3. Within this discussion, reports about Belgian practices in the field under discussion will be briefly addressed. In addition, this chapter sets out recommendations on law, policy and practices on the matter of detention and treatment of persons with psychosocial and intellectual disabilities.

Chapter 6, in turn, sets out the concluding commentaries of this thesis, referring back to the research questions established in the this introductory chapter and providing a summary of the main findings. Chapter 6 also includes brief consideration on the current challenges faced by persons with disabilities with regard to the respect for their right to liberty and finishes with a synthetic conclusion about this thesis as whole.

## Chapter 2

### A brief socio-historical contextualisation

#### 2.1 Introduction

As mentioned in chapter 1, the situation of marginalisation and invisibility of persons with disabilities did not improve after the adoption of international human rights treaties, and they were not recognised specifically as a protected group under binding human rights law until the creation of the CRPD, in 2006.<sup>21</sup> According to Arlene Kanter, the lack of specific binding instruments for people with disabilities can be explained by the fact that the development of different treaties for specialised groups of people, such as women, refugees or children, is recent in the history of human rights and by the invisibility of persons with disabilities itself – ‘in law and in life.’<sup>22</sup>

The invisibility of persons with disabilities is, nonetheless, surprising, considering that it is estimated that at least fifteen per cent of the world’s population, or an estimated one billion people, have disabilities.<sup>23</sup> Moreover, eighty per cent of these persons live in developing countries, according to the UN Development Programme<sup>24</sup> and twenty per cent of the world’s poorest people have some kind of disability, and tend to be regarded in the own communities as the most disadvantaged, according to the World Bank’s data.<sup>25</sup> This indicates a connection between disability and socioeconomic exclusion, and this connection is also indicated by UN and the United Nations Children’s Fund (‘UNICEF’) data,<sup>26</sup> which states that women report higher incidents of disability than men and thirty percent of street youths have some kind of disability.

The link between poverty, powerlessness and disability is pointed out by Gerard Quinn, who states that the causes of disability include, among other factors, ‘social and economic deprivation,

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<sup>21</sup> According to A. Kanter, there is one exception: Articles 2 and 23 of the Convention of the Rights of the Child, adopted in 1989. See A. S. Kanter, *The Development of Disability Rights Under International Law: from Charity to Human Rights*, Routledge, New York, 2015, at page 24. The mentioned provisions of the CRC refers to non-discrimination and assistance for children and parents with disabilities.

<sup>22</sup> *Ibid.*, at pages 26 and 27.

<sup>23</sup> World Health Organization, Disability and Health, Fact sheet on Persons with Disabilities. Available at <http://www.who.int/mediacentre/factsheets/fs352/en/> last accessed on 11 April 2018.

<sup>24</sup> United Nations, Division for Social Policy and Development Disability, Factsheet on Persons with Disabilities. Available at <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> last accessed on 11 April 2018.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

malnutrition, violence and warfare.<sup>27</sup> This cycle of human rights violations leading to disability and disability leading to further human rights violations, as summarised by Quinn,<sup>28</sup> is explained by political-economic and sociocultural reasons.

According to James Charlton, the situation of persons with disabilities is primarily a question of class, since ‘class positions groups of people in relation to economic production and exchange, political power and privilege’ and the group of disabled people have been left outside the economy and political process.<sup>29</sup> That is, the symptoms of marginalisation of person with disabilities are directly related to their place in the hierarchy of classes in society, and the *locus* of a specific society in the international market, which explains the higher incidence of disabilities in developing economies.<sup>30</sup>

Our society is build upon a general belief that disability is abnormal and persons with disabilities are less capable than others.<sup>31</sup> Charlton sets out that social attitudes about disability are usually pejorative and paternalistic, which starts with a notion of inferiority of persons with disabilities, in the sense that they are deemed as subjects incapable of taking responsibility for their lives and that needs to be controlled, even against their individual will.<sup>32</sup>

The involuntary institutionalisation of persons with psychosocial and intellectual disabilities is a manifestation of the cultural belief that these groups need to be controlled and cared for, against their will. For the sake of consistency, from now on, I will use the term ‘institutionalisation’ meaning any kind of placement of persons in institutional facilities, such as defined by Goffman,<sup>33</sup> be it in psychiatric hospitals, psychiatric annexes of prisons or secured facilities of care. I will provide an outline of the institutional model of care and the deinstitutionalisation movement.

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<sup>27</sup> G. Quinn, ‘*The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability*’ (Jacobus tenBroek, 2009), at page 34, available at [http://heinonline.org/HOL/Page?handle=hein.journals/tfcl15&div=5&g\\_sent=1&casa\\_token=&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/tfcl15&div=5&g_sent=1&casa_token=&collection=journals) (last access on April 25 2018), at page 35.

<sup>28</sup> Ibid.

<sup>29</sup> J. I. Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment*, University of California Pres, Berkeley, 1998, at page 24.

<sup>30</sup> As stated by Charlton (ibid), at page 43, in the ‘peripheral economies’ there are less governmental policies on health, higher occurrences of diseases, higher unemployment, as well as hunger, and misery, among other things, that have tremendous impact on people with disabilities, who ‘are the poorest, most isolated group in the poorest, most isolated places’.

<sup>31</sup> Ibid, at page 27.

<sup>32</sup> Ibid, at page 53.

<sup>33</sup> The sociologist E Goffman developed the concept of ‘total institution’, which can be summarised as follows: ‘A total institution may be defined as a place of residence and work where a large number of like-situated individuals cut off from the wider society for an appreciable period of time together lead an enclosed formally administered round of life’. Concept cited In C. Davies, ‘Goffman’s concept of the total institutiton: Criticism and revisions’, *Human Studies*, Vol. 12, No. 1/2, Erving Goffman’s Sociology, Springer Publisher, 1989, at pages 77-95.

## 2.2 An Overview of the Institutionalisation of Persons with Disabilities

During the medieval period in Europe, many impairments were believed to have supernatural or demonological causes.<sup>34</sup> Impairments such as epilepsy, intellectual disability, psychotic episodes and deafness were deemed to be a demonic possession that could be cured with magic and religious elements.<sup>35</sup> Given to this understanding of impairments, it is likely that many women persecuted, imprisoned and tortured in the Middle Ages for the practice of witchcraft had psychosocial disabilities.<sup>36</sup> On the other hand, there is also historic evidence that there were networks of supports for persons with impairments situated in the poor segments of society, which shows that etiological beliefs about disability were complex and not entirely negative.<sup>37</sup>

Concurrently, institutions of confinement such as the *leprosariums* were expanding, with the aims to isolate the lepers and ‘to address the issues presented by people with disabilities’.<sup>38</sup> In the sixteenth century, leprosy was controlled and such facilities became ‘privately operated madhouses for people with mental illness and, in some cases, for persons with intellectual disabilities’ and for the poor people deemed suspect.<sup>39</sup> In the seventeenth century, the Enlightenment period gave rise to the idea that ‘experience and reason [...] were the sources of all knowledge and that social and environmental modification could thus improve humans and society by manipulating society and the environment’, which includes intervention on the issue of poverty and disability.<sup>40</sup>

As explained by David Braddock and Susan Parish, the confinement of the ‘furiously mad’ were already regulated by law in England in the eighteenth century, usually in facilities that were combined with criminal prisons, as well as institutions which received people with disabilities considered not violent, in countries such as France, Spain, New Spain (Mexico), England, Germany and Holland.<sup>41</sup> In the beginning of the nineteenth century, in turn, mental hospitals and mental asylums were widespread in the United States, Europe and Latin American countries.<sup>42</sup>

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<sup>34</sup> D. L. Braddock and S. Parish, An Institutional History of Disability, *In Disability at the Dawn of the 21<sup>st</sup> Century and the State of the States*, American Association on Mental Retardation, 2002, ed. David Braddock, pp. 11-68, available at <https://www.researchgate.net/publication/288853348> (last access 4 July 2018), at page 17.

<sup>35</sup> *Ibid.*, at page 18.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at page 19.

<sup>38</sup> *Ibid.*, at page 20.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, at page 24.

<sup>41</sup> *Ibid.*, at page 25.

<sup>42</sup> *Ibid.*, at page 28.

Kanter explains that mental institutions were established to confine ‘people whom society blamed for all of its woes from poverty and illness to crime and urbanisation’,<sup>43</sup> which is an idea closely related to the rise of eugenicists policies in the late nineteenth century and beginning of the twentieth century.<sup>44</sup> Several studies based on eugenic theories linked disability to deviance, criminality, immoral behaviour and pauperism, and the institutionalisation and forced sterilisation of persons with disabilities were supposed to protect society from such menaces.<sup>45</sup>

At this time, psychiatry was being established as an autonomous science, together with the idea of medicine as a public hygiene and the doctor as a technician of the social body.<sup>46</sup> Based on theories of degeneration, the concept of an intrinsically ‘dangerous individual’<sup>47</sup> is constructed, within the confused realm where ‘crime and insanity mix,’ and psychiatry conquers a modality of power used to justify interventions also in the penal system ‘to the dangers inherent in the social body.’<sup>48</sup>

Accompanied with numerous reports of abuse and questioning of the eugenicists and degeneration theories, persons with disabilities were vulnerable to all kinds of medical experimentation, including shock therapies and lobotomy.<sup>49</sup> The numbers of institutional facilities continued to grow, as well as the population living in degrading conditions inside these institutions.<sup>50</sup> However, the public awareness about the living conditions, the high costs of maintenance, the emergence of psychotropic drugs and ideas of disability as a result not of the impairment itself, but of the reaction of society towards it, gave rise to discussion over alternatives to institutionalisation in the beginning of the 1950’s.<sup>51</sup>

The deinstitutionalisation movement disfavored the ‘custodial care of the poor and the insane’ and ‘changed the location of treatment to the community as well as certain clinical aspects of treatment’, as noted by Kanter.<sup>52</sup> However, the author explains that institutions continue to exist and

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<sup>43</sup> A. Kanter (n. 21), at page 66.

<sup>44</sup> D. L. Braddock and S. Parish (n. 34), at page 38.

<sup>45</sup> Ibid. See also J Luty, *Psychiatry and the dark side: eugenics, Nazi and Soviet psychiatry*, Advances in psychiatric treatment (2014), vol. 20, p. 52-60. Available at 10.1192/apt.bp.112.010330 (last access 5 July 2018). According to the author, ‘(e)ugenics and forced sterilisation programmes tend to be associated with Nazi Germany. However, other countries had active forced sterilisation programmes and eugenics laws, among them the USA, Denmark, Norway, Sweden and Switzerland.

<sup>46</sup> M Foucault, *About the Concept of the “Dangerous Individual” in the 19<sup>th</sup> Century Legal Psychiatry* (translated by Alain Baudot and Jane Couchman), International Journal of Law and Psychiatry, Vol. 1, pp. 1-18, 1978, Pergamon Press, at page 7.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., at pages 6 and 7.

<sup>49</sup> D. L. Braddock and S. Parish (n. 34), at page 41.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, at pages 44 and 45.

<sup>52</sup> A. Kanter (n. 21), at page 67.

they are the ‘main *locus* of treatment’ of persons with disabilities with psychosocial and intellectual disabilities, despite research findings of long-term consequences of institutional settings on the lives of persons with disabilities, high mortality rates, abuse and violence.<sup>53</sup> Nonetheless, some countries have adopted deinstitutionalisation policies and developed community living arrangements and the population in institutions have declined.<sup>54</sup>

As stated above, the notion of disability as a result not of the impairment itself, but of the societal attitudes towards it was fundamental to the rise of the deinstitutionalisation movement, as well as to the disability rights movement as a whole. As a result of these movements, Disability Studies has emerged as a new field of academic research, which identified theoretical models of disability that will be presented below.

## **2.3 The Theoretical Models of Disability and Models of Equality**

There are several models of disability in the field of Disability Studies and their boundaries are the object of discussion and disagreement between scholars.<sup>55</sup> In any case, the majority of Disability Studies scholars ‘agree that viewing disability solely through the medical model is no longer acceptable’.<sup>56</sup> In this section, I will address three different models of disability: the medical model, the social model and the human rights model.

### **2.3.1 The Medical Model of Disability and the Formal Equality Approach**

This model of disability views disability as a sickness that needs treatment, rehabilitation, cure or charity and locates this ‘problem’ as well as the responsibility for this ‘problem’ in the individual and not in society.<sup>57</sup> In other words, the barriers experienced by persons with disabilities are perceived to be

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<sup>53</sup> Ibid, at page 66.

<sup>54</sup> Ibid, at page 67.

<sup>55</sup> A. S. Kanter, ‘The Law: What’s Disability Studies Got To Do With It *Or* An Introduction To Disability Legal Studies’, *Columbia Human Rights Law Review*, Vol. 42, No. 2, Winter 2011, at page 419.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, at page 420.

a direct result of their impairment and the treatment has the aim to conform them to the ‘to the non-disabled norm’.<sup>58</sup>

The medical model personalises disability, in the sense that it is perceived as an inadequacy located in the individual, and does not question the obstacles created by society itself. As a result of this view on disability, institutions were created in order to segregate and protect people with disabilities from society and vice-versa, as noted by Kanter.<sup>59</sup> Many international instruments from the period before the mid-1970’s reflected the medical model of disability and adopted a formal equality approach, which focuses only on equal and neutral treatment of the law and prohibition of direct discrimination.<sup>60</sup> Andrea Broderick explains that such international instruments contained non-discrimination provisions, which prohibited any ‘distinctions made on the basis of personal attributes, rather than to tackle structural discrimination’ and to take into account the ‘individual and contextual differences between marginalised and socially privileged groups.’<sup>61</sup>

As the critiques to the medical model and to formal equality became more solid, the medical model was considered outdated and formal equality were substituted to a substantive equality approach, explained in the sub-section below. The notion that it is society that systematically excludes persons with disabilities from mainstream structures, as a result of ‘legal, attitudinal and physical barriers,’<sup>62</sup> gave way to the social model of disability, predominant in the 1970s, and adopted as the main discourse of the disability rights movement.<sup>63</sup>

### **2.3.2 The Social Model of Disability and the Substantive Equality Approach**

For the social model, there is a difference between the impairment itself and the disability, which is seen as a social construct and a result of a systematically discriminatory and oppressive society that equates difference with inferiority, as noted by Rosemary Kayess and Phillip French.<sup>64</sup> According to the social model, national governments and society as a whole have the responsibility ‘to remedy the

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<sup>58</sup> A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities – The United Nations Convention on the Rights of Persons with Disabilities* (2015). (School of Human Rights Research, Vol. 74. Intersecta Publisher), at page 22.

<sup>59</sup> A. S. Kanter (n. 21), at page 46.

<sup>60</sup> A. Broderick (n. 58), at page 33.

<sup>61</sup> *Ibid.*, at pages 31 and 33.

<sup>62</sup> A. S. Kanter (n. 55), at page 420.

<sup>63</sup> *Ibid.*

<sup>64</sup> R. Kayess and P. French, *Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, *Human Rights Law Review* 8:1, 2008, Oxford University Press, at page 8.

disadvantage and inequalities faced by persons with disabilities.’<sup>65</sup> In addition, the shortcomings of the formal equality approach were incorporated to the substantive equality approach, which ‘seeks to address structural and indirect discrimination and take into account power relations.’<sup>66</sup>

Nevertheless, the social model of disability was criticised for ‘focusing too much on external factors and ignoring the impact of impairment.’<sup>67</sup> The CRPD incorporated such critiques and adopted a more advanced model of disability, the human rights model of disability, and extended the substantive equality approach, which will be articulated below.

### **2.3.3 The Human Rights Model of Disability and the Inclusive Equality Approach**

The social model has had a great influence in the development of the CRPD, mainly on recognising disability as a social construct and placing the responsibility on the state to compensate the disadvantaged situation faced by persons with disabilities. However, the CRPD goes further by adopting the human rights model of disability, which recognises that ‘impairments must not be taken as a legitimate ground for the denial or restriction of human rights’ and that ‘disability laws and policies must take the diversity of persons with disabilities into account.’<sup>68</sup>

The human rights model is based on a ‘inclusive equality approach,’<sup>69</sup> as defined by the CRPD Committee. This equality framework ‘extends and elaborates on the content of equality’ by recognising that persons with disabilities are marginalised by ‘socioeconomic disadvantages,’ ‘stigma, stereotyping, prejudice and violence,’ and providing tools to ‘a fair redistributive dimension’ and to combat such discriminations.<sup>70</sup> The inclusive equality approach is centered on the ideas of ‘equali[s]ation of opportunities’ and full and effective participation and inclusion in society, two of the general principles of the CRPD, reaffirming the ‘social nature of people as member of social groups’ and the right to the accommodation of difference.<sup>71</sup>

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<sup>65</sup> A. Broderick (n. 58), at page 23.

<sup>66</sup> CRPD Committee, General Comment No. 6 (2018) on equality and non-discrimination (adopted by the Committee at its nineteenth session (14 February – 9 March 2018), U.N. Doc. CRPD/C/GC/6, April 2018, at para. 10.

<sup>67</sup> A. Broderick (n. 58), at pages 24 and 36.

<sup>68</sup> CRPD Committee, General Comment No. 6 (n. 66).

<sup>69</sup> *Ibid.*, at para. 11.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

## 2.4 The CRPD as an Achievement of the Disability Rights Movement

Despite the development of models of disability that defies the belief of disability as ‘a personal tragedy,’ the medical model still often determines our vision over disability, which is reflected by the persistent social and economical marginalisation of persons with disabilities – as demonstrated in the data presented at the beginning of this chapter – and by the maintenance of the institutional response as the primary source of ‘treatment’ to persons with psychosocial and intellectual disabilities.

Nonetheless, as stated by Quinn, the link between disability, poverty and powerlessness ‘is not inevitable and can be broken’ through the employment of appropriate policy responses and the move to the human rights model.<sup>72</sup> The CRPD appears to be an important step towards the ultimate goal of full inclusion of persons with disabilities in society. Firstly, because it is the first international treaty to recognise persons with disabilities as a group ‘worthy of human rights protections’<sup>73</sup> and secondly, because it places people with disabilities as ‘equal rights holders’ and rejects the ‘long-standing medical model of disability,’<sup>74</sup> both political goals of the disability rights movement.

Furthermore, the participation of more than four hundred different NGOs and DPOs in the drafting process of the CRPD was unprecedented in the history of UN treaties.<sup>75</sup> As stated by Kanter, the CRPD offers a new model or example to future human rights treaties where the persons directly affected by it are largely included in the its discussions and writings processes.<sup>76</sup> This participation of persons with disabilities in the drafting process is also felt reflected in the ‘scope and breadth’ of the CRPD, in the sense that it includes ‘new rights,’ which were not contained in previous human rights treaties.<sup>77</sup>

After these preliminary contextual considerations, I will interpret the relevant provisions of the CRPD in relation to the topic of this thesis in the next chapter.

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<sup>72</sup> G. Quinn (n. 27) , at page 36.

<sup>73</sup> A. S. Kanter (n. 21), at page 8.

<sup>74</sup> Ibid, at page 7.

<sup>75</sup> Ibid, at page 9.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

## Chapter 3

### Interpretation of States Parties' obligations under the CRPD

#### 3.1 Introduction

In this chapter, the CRPD's relevant provisions related to involuntary institutionalisation of persons on the ground of disability will be analysed. As explained in chapter 1, it is necessary to interpret States Parties' obligations under Article 12, on the right to equal recognition before the law, and Article 14, on the right to liberty and security. These two provisions are considered by scholars<sup>78</sup> to be at the centre of the CRPD system and they are strictly related to the main topic of discussion in this thesis, the involuntary detention of persons with psychosocial and intellectual disability in Belgium.

Articles 12 and 14 of the CRPD will be interpreted using the VCLT methodology outlined in chapter 1 of this thesis, with the purpose of defining States Parties' obligations under these provisions and how they relate to each other and to other relevant provisions of the Convention which are relevant to the thesis' topic. The interpretation will begin with the CRPD's text. To establish the broader meaning of the CRPD's provisions, besides the general principles and values and the objectives and purposes of the Convention, the 'General Comment no. 1'<sup>79</sup> and the 'Guidelines on Article 14'<sup>80</sup> of the CRPD Committee will be substantial sources of interpretation.

The General Comment no. 1 has the aim to explore the 'normative content' and general obligations of States Parties deriving from the various components of Article 12, and the Guidelines on Article 14 provides clarifications on the obligations of States Parties on the right to liberty and security. The concluding observations of the Committee and the drafting history of the CRPD will also be analysed, the former to confirm or make clearer the interpretation given by the practice of the

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<sup>78</sup> See G Quinn, 'Personhood & legal capacity perspectives on the paradigm shift of Article 12 of the CRPD', Concept Paper presented at the HPOD Conference (Harvard Law School, February 2010), at page 3, where he observes that: '[i]t is frequently said that Article 12 of the CRPD is emblematic of the paradigm shift of the Convention. I agree'. About Article 14 of the CRPD, See A S Kanter, *The Development of Disability Rights Under International Law – From Charity to Human Rights* (Routledge, New York, 2015), at page 125, where she states that: 'The right to liberty and security goes to the very core and purpose of the CRPD'.

<sup>79</sup> Committee on the Rights of Persons with Disabilities, General Comment no. 1 on Article 12: Equal recognition before the law, eleventh session (31 March-11 April 2014), U.N. Doc. CRPD/C/GC/1 (2014).

<sup>80</sup> Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities – The right to liberty and security of persons with disabilities, adopted during the Committee's 14<sup>th</sup> session, 2015.

Committee<sup>81</sup> and the latter to clarify a text obscurity, by searching the intention of the drafters. Elucidative and critical legal scholars articles discussing the provision under discussion will be another important secondary source.

Below, I will interpret the States Parties' obligations contained in Articles 12 and 14 of the CRPD, respectively.

### 3.2 Legal interpretation of Article 12

Article 12 of the CRPD affirms the right of persons with disabilities to legal recognition before the law on an equal basis with others and constitutes a 'paradigm shift' provision, since it challenges laws and practices worldwide that traditionally deprive people with disabilities of their legal capacity. As stated by Gerard Quinn, 'the issue of legal capacity reform is probably the most important issue facing the international legal community at the moment.'<sup>82</sup>

Before starting to analyse Article 12, it is important to make a brief consideration on the controversial term 'disability' in the CRPD. As discussed in chapter 2, the CRPD adopts the human rights model of disability, which complements the social model, recognising both the 'interactional nature' of the process leading to disability and the 'disadvantages that result directly from the impairment'.<sup>83</sup>

This perspective is reflected in the Preamble (e) of the CRPD, which recognises disability as 'an evolving concept' and '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'<sup>84</sup>. The Preamble must be read in conjunction with Article 1, para. 2 of the CRPD, which provides the 'scope *ratione personae* of the Convention'.<sup>85</sup> It provides as follows:

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<sup>81</sup> Under the Additional Protocol.

<sup>82</sup> G. Quinn (n. 78), at page 3.

<sup>83</sup> A Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities – The United Nations Convention on the Rights of Persons with Disabilities* (2015). School of Human Rights Research, Volume 74. Intersentia Publisher, at page 27.

<sup>84</sup> UN CRPD, Preamble (e).

<sup>85</sup> R. Cera, 'Article 2 [Definition]' In R. Cera, V. Della Fina, R. Cera and G Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary* (Springer Publisher, Switzerland, 2017), at page 109.

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.<sup>86</sup>

As we can infer from the text of both provisions, the term ‘disability’ is not formally defined. The ‘non-definition of disability’<sup>87</sup> is considered by Valentina Della Fina to ‘allow adjustments over time and in different sociocultural contexts’ and prevent ‘very restrictive interpretations’.<sup>88</sup> Having settled a key term of the Convention – disability – I will proceed to the interpretation of Article 12 of CRPD.

### 3.2.1 Article 12, paragraphs 1 and 2

The right to equal recognition before the law is affirmed in the wording of paragraph 1 of Article 2, which provides that ‘States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.’<sup>89</sup>

As mentioned in chapter 1, the CRPD is essentially a non-discrimination treaty, with the purpose of ensuring the full and equal enjoyment of human rights by persons with disabilities, since this category did not benefit from the rights recognised by the international community, due to their marginalisation and invisibility. According to the CRPD Committee, in the General Comment no. 1, ‘States Parties have the obligation to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law’, refraining ‘from any action that deprives persons with disabilities of the right to equal recognition before the law’,<sup>90</sup> which, as observed by Arlene Kanter, includes law and policies that make distinctions based on disability.<sup>91</sup>

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<sup>86</sup> UN CRPD, Article 1, para. 2.

<sup>87</sup> M Schulze, ‘Understanding the UN Convention on the Rights of Persons with Disabilities - A handbook on the human rights of persons with disabilities’ (edited by Handicap International, september 2009), at page 22, available at [https://iddcconsortium.net/sites/default/files/resources-tools/files/hi\\_crpd\\_manual\\_sept2009\\_final.pdf](https://iddcconsortium.net/sites/default/files/resources-tools/files/hi_crpd_manual_sept2009_final.pdf) last accessed 18 June 2018.

<sup>88</sup> V Della Fina, ‘Article 1 [Purpose]’, In R. Cera, V. Della Fina, R. Cera and G Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary* (n. 85), at page 97.

<sup>89</sup> UN CRPD, Article 12, at para. 1.

<sup>90</sup> CRPD Committee, General Comment no. 1 (2014) – Article 12: Equal recognition before the law (eleventh session, 31 March-11 April 2014), CRPD/C/GC/1, at para. 24.

<sup>91</sup> A S Kanter, *The Development of Disability Rights Under International Law: from Charity to Human Rights*, Routledge, New York, 2015, at page 237.

Moreover, the Committee, in the General Comment no. 1, affirms that the right to be recognised as a person before the law guarantees that every human being is respected as a person possessing legal personality, which is a prerequisite for the recognition of person's legal capacity.<sup>92</sup> The right to enjoy legal capacity on an equal basis with others is enshrined in Article 12, paragraph 2 of the CRPD, which provides that 'States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others *in all aspects of life*'.<sup>93</sup>

The Committee explains that legal capacity includes the capacity to be both a holder of rights and duties (legal standing), which entitles the person to full protection of his or her rights by the legal system. The Committee also explains that legal capacity includes the capacity to be an actor under the law (legal agency), which recognises the person as an agent with the power to engage in transactions and create, modify or end legal relationships,<sup>94</sup> such as applying for a passport, getting married, owing or inheriting property or controlling their own financial affairs.<sup>95</sup>

Legal capacity is an instrument for personhood, with which we exercise and express our personal freedom and interact in society.<sup>96</sup> However, as stated by Quinn, this 'concept of personhood is not entirely deontological', but 'always relative to the kind of society we value.'<sup>97</sup> The author explains that rationality, since the Enlightenment, is deemed to be one of the most 'important features of human of human essentialism – of personhood.'<sup>98</sup> Furthermore, individuals are deemed to be free from 'all cultural and social bonds' by employing the rational process of apprehending consequences of their choices and pondering these consequences to reach to a rational outcome.<sup>99</sup>

Our personal processes of reasoning and making choices do not occur in a purely rational process, since, as pointed out by Quinn, we are not 'decimated cyborgs' and our choices are 'a mix of raw preferences with rationality.'<sup>100</sup> Nonetheless, our society has systematically denied the right to legal capacity to persons with disabilities, on assumptions that they lack mental capacity to make their own decisions.

The concept of mental capacity, as explained by the Committee, is controversial and it is not an objective, scientific and naturally occurring phenomenon as we think; it is contingent to social and

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<sup>92</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 11.

<sup>93</sup> UN CRPD, Article 12, at para. 2 [emphasis added].

<sup>94</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 12.

<sup>95</sup> Examples of legal relationships given in UN CRPD, Article 12, para. 5.

<sup>96</sup> G Quinn (n. 78), at page 10.

<sup>97</sup> *Ibid.*, at page 11.

<sup>98</sup> *Ibid.*, at page 7.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

political contexts, just as the disciplines, professions and practices that play a role in assessing mental capacity.<sup>101</sup> Therefore, mental capacity is a concept that can change over time and through space, as our moral values.

The conflation between mental capacity and legal capacity is the reason why persons with psychosocial or intellectual disabilities are denied capacity, since this group of persons is considered to have impaired decision-making skills, ‘on the basis of a diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person’s decision-making skills are considered to be deficit (functional approach).’<sup>102</sup> According to the Committee, all these approaches are discriminatorily applied to persons with disabilities since their ‘disability and/or decision-making skills are taken as legitimate ground for denying his or her legal capacity.’<sup>103</sup> The denial of legal capacity on the ground of ‘perceived or actual deficit in mental capacity’<sup>104</sup> is considered as discrimination on the basis of disability, as defined in Article 2, paragraph 3 of the CRPD.<sup>105</sup>

The right of persons with disabilities to hold and exercise legal capacity is aligned with the principle of inherent dignity, individual autonomy and independence to make one’s own choices, provided in Article 3(a) of the CRPD.<sup>106</sup> The right to individual autonomy includes the right to take risks and make mistakes.<sup>107</sup> Making mistakes is tied to our human condition, it is a way of learning and exercising our freedom.

However, as observed by Jill Peay, these independent decision-making can also be ‘either harmful to others’, or extremely harmful ‘to that individual and that individual’s core decisions making capacities are in doubt,’<sup>108</sup> which raises questions about how to deal with these kind of decisions. The cases of harmful decision-making leads us to situations where people with disabilities are considered dangerous for themselves or for others or when they perpetrate acts defined by law as a crime.

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<sup>101</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 14.

<sup>102</sup> Ibid, para. 15.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid, para. 13.

<sup>105</sup> The term ‘discrimination on the basis of disability’ is defined as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms’ in all fields, including ‘all forms of discrimination’, which concerns any type of discrimination on the ground of disability.

<sup>106</sup> UN CRPD, Article 3 – The principles of the present Convention shall be: (a) respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.

<sup>107</sup> CRPD Committee, General Comment no. 1 (n 30), at para. 22.

<sup>108</sup> J Peay, ‘Mental Incapacity and criminal liability: redrawing the fault lines?’, *International Journal of Law and Psychiatry*, 40, p. 25-35, 2015, at page 17, available at <http://eprints.lse.ac.uk/61854/> (last access 23 June 2018).

To elucidate how the issue of harmful independent decision-making is dealt with by the CRPD, it is required to consider that Article 12, paragraph 2, recognises ‘universal legal capacity,’<sup>109</sup> which must be respected at all times, even in crisis situations.<sup>110</sup> From the text of the provision in discussion, it is clear that persons with disabilities should enjoy legal capacity in *all aspects of life*, on an equal basis with others, which suggests that persons with disabilities should enjoy legal capacity even in cases where the decision-making is considered harmful, including when the consequent conduct is considered a crime.

The obligation enshrined in Article 12, paragraph 2, demands that States Parties abolish discriminatory denials of legal capacity. As explained by Anna Arnstein-Kerslake and Eilionóir Flynn, it does not mean that any state intervention is prohibited under Article 12, but that the denial of legal capacity must be imposed equally on persons with and without disabilities.<sup>111</sup> According to the authors, those situations in which legal capacity is denied and the will and preferences of the individual are not be respected should be permitted only in the rarest situations and the level of harm that the State will tolerate ‘must also be carefully constructed’.<sup>112</sup>

As mentioned in chapter 1, the negation of criminal responsibility of those with ‘mental impairment’ or ‘mental illness’ (psychosocial disabilities) and intellectual disabilities is used to justify their detention in mental health institutions or psychiatric annexes of prisons. Despite the silence over this specific topic in General Comment no. 1, the Committee provides hints on the matter in its articulations on the relation of Articles 5 and 13 with the right to legal capacity, and more elucidative statements in the Guidelines on Article 14 and its concluding observations.

Article 5 of the CRPD, in sum, recognises the equality of all persons ‘before and under the law’ and the right to equal protection and benefit of the law,<sup>113</sup> without any discrimination on the basis of disability and the provision of reasonable accommodation, as defined in Article 2.<sup>114</sup> According to the Committee, the denial of legal capacity with ‘the purpose or effect of interfering with the right of

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<sup>109</sup> CRPD Committee, General Comment no. 1 (n 90), at para. 25.

<sup>110</sup> Ibid, para. 42.

<sup>111</sup> A. Arnstein-Kerslake & E. Flynn, ‘The General Comment on Article 12 of the Convention on the Right of Persons with Disabilities: a roadmap for equality before the law’, *The International Journal of Human Rights*, 20:4, pp. 471-490, 2016, at page 483. Available at <https://doi.org/10.1080/13642987.2015.1107052> (last access 23 June 2018)

<sup>112</sup> Ibid.

<sup>113</sup> UN CRPD, Article 5, para. 1.

<sup>114</sup> Besides the definition of the term ‘discrimination on the basis of disability’, Article 2 of the CRPD also defines the term ‘reasonable accommodations’, which is outlined as follows: ‘‘Reasonable accommodation’ means the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

persons with disabilities to equal recognition before the law is a violation of Articles 5 and 12 of the Convention'.<sup>115</sup> It further explains that States can restrict legal capacity 'based on certain circumstances, such as bankruptcy or criminal conviction', however, this restriction 'must be on the same basis for all persons' and never 'on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently'.<sup>116</sup>

Thus, the Committee admits that the denial of legal capacity of persons with disabilities may be allowed, but it must be based on non-discriminatory criteria. As stated above, a personal trait, such as disability, is not an adequate justification for suspending the capacity of holding and exercising rights. However, many criminal laws worldwide declare that persons with psychosocial or intellectual disabilities do not hold criminal liability when their impairment is deemed to affect the subjective elements of the crime, *mens rea*.<sup>117</sup>

The UN High Commissioner for Human Rights Report states that, in the area of criminal law, the recognition of legal capacity requires States Parties to abolish a 'a defence based on the negation of criminal responsibility because of the existence of a mental [psychosocial] or intellectual disability'<sup>118</sup> and instead apply 'disability-neutral'<sup>119</sup> doctrines on the subjective element of the crime, which take into consideration the situation of the individual defendant.'<sup>120</sup> In addition, the report clarifies that '[p]rocedural accommodations both during the pretrial and trial phase of the proceedings might be required', in order to fulfil Article 13 of the CRPD.

The High Commissioner explains that the objective of article 12 is not to change the subjective element of crime, but that 'disability-neutral doctrines' should be applied, not based on the personal attribute of disability. In the opinion of Christopher Slobogin, the CRPD is not 'aimed at preventing legal recognition that some people have difficulty making decisions or adhering to criminal prohibitions. Rather, it commands that any such laws remove mental disability as a determining

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<sup>115</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 32.

<sup>116</sup> Ibid.

<sup>117</sup> Brief explanations about the elements of formation of criminal intent will be addressed in Chapter 5.

<sup>118</sup> Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, adopted in Tenth Session, U.N. Doc. A/HRC/10/48, 2009, at para. 47.

<sup>119</sup> Although the term 'disability-neutral' is not used in the text of the CRPD nor in the Committee's documents or practices, it has been frequently used by scholars, such as Minkowitz and Slobogin, as a way of complying with the obligation of non-discrimination on the basis of disability and equal treatment on the same basis with others. However, the term is criticised by other legal scholars, such as A. S. Kanter and P. Bartlett. It will be discussed in Chapter 5.

<sup>120</sup> Ibid.

factor,<sup>121</sup> since it undermines the right of equal recognition before the law, individual autonomy and freedom to make one's choices.

The positions presented above find support in the drafting history of the CRPD, from which we can infer that the drafters did not intend to change the required elements to form criminal intent. As noted by the Chair of the Ad Hoc Committee of the CRPD during the negotiations there was 'no intention to change the criminal law of any country as it relates to the capacity of any individual to form criminal intent.'<sup>122</sup> The intention was to change the denial of culpability on the basis of a psychosocial or intellectual disability, which is explicitly prohibited by Articles 5 and 12 of the CRPD.

From this perspective, Article 12 also prohibits the declaration of persons with psychosocial or intellectual disabilities as incapable to stand trial. Traditionally, criminal laws declare that these groups of disabled people lack 'the ability to engage with various crucial aspects of the trial process.'<sup>123</sup> It is important to comment that, as explained by Peay, the findings of incapability to stand trial and the acquittals based on psychosocial or intellectual disabilities are considered a protection of 'vulnerable individuals from the risk of unfair convictions' and 'provide a way out of the criminal system' where justice cannot establish the subjective elements of crime and would probably provide 'inappropriate criminal convictions.'<sup>124</sup>

Nonetheless, as already discussed, Article 12 does not allow denial of criminal responsibility nor incapability to stand trial based on a diagnosis of impairment (status approach) or on findings that a person's decision-making skills are deficit (functional approach). In addition, according to Peay, both the negation of criminal liability and capability to stand trial are also considered to expose the person to a 'highly stigmatic finding' and can be interpreted as having the potential to place the 'accused person in a limbo with respect to the potential non-resolution of their criminal culpability whilst exposing them to compulsory treatment for mental disorder,'<sup>125</sup> which usually has no time limit stipulated by law.

The declarations of incompetency to stand trial on the basis of a psychosocial or intellectual disability, besides the violation of Article 12, paragraphs 1 and 2, run counter Article 13 of the CRPD,

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<sup>121</sup> C. Slobogin, 'Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defense, civil commitment, and competency law', *International Journal of Law and Psychiatry* 40 (2015), 36-42, at page 36, available at <https://www.sciencedirect.com/science/article/pii/S0160252715000758> last access 7 July 2018.

<sup>122</sup> Ad Hoc Committee of the CRPD, Daily Summaries of discussion on Article 12 on Equal Recognition before the law, 3<sup>rd</sup> session, May 26, 2004.

<sup>123</sup> J. Peay (n. 108), at page 10.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

which creates the obligation of States Parties to ‘ensure effective access to justice for persons with disabilities on an equal basis with others,’<sup>126</sup> which includes their recognition as persons before the law with equal standing in courts and tribunals.<sup>127</sup> Instead, as referred to by the High Commissioner, procedural accommodations should be afforded to provide assistance for persons with disabilities in the justice system.

### 3.2.2 Article 12, paragraph 3

Article 12, paragraph 3, reads as follows: ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’<sup>128</sup> This provision is related to the essence of the Convention, which is supporting people with disabilities to make their own decisions, rather than making those decisions for them through some scheme of ‘substituted decision-making,’<sup>129</sup> such as guardianship or trusteeship laws.

As explained by Kanter, such laws are based on the principle of *parens patriae*, which authorise the State to act as a ‘parent’ and to intervene on behalf of those whom it deems are unable to care for themselves.<sup>130</sup> This principle is also closely related to the paternalism exercised over persons with disabilities, responsible for the overall perception of them as an object of charity, as discussed in chapter 2. The CRPD represents a rupture with the paternalistic paradigm, considering persons with disabilities subjects of rights. If the person needs and wants support, States Parties have the obligation to provide it.

The system of supported decision-making applies in a context of defence in the court where people with disabilities need support, since they have the right to access to justice on an equal basis with others, with equal standing in trials, a right enshrined in Article 13, as discussed previously. According to the Committee, in the Guidelines on Article 14, both declarations of unfitness to stand trial or incapacity to be found criminally responsible in the criminal justice system deprives the persons of the right to due process and safeguards applicable to every defendant, since they are submitted to a ‘separate track of law,’ which ‘have a lower standard when it comes to human rights protections,

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<sup>126</sup> UN CRPD, Article 13, at para. 1.

<sup>127</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 38.

<sup>128</sup> UN CRPD, Article 12, at para. 3.

<sup>129</sup> J Peay (n. 108), at page 16.

<sup>130</sup> A. S. Kanter (n. 91), at page 239.

particularly the right to due process and fair trial.’<sup>131</sup> States Parties must remove these type of declarations from the criminal justice system and provide ‘support and accommodation to facilitate their effective participation,’<sup>132</sup> in the criminal justice system, in line with Articles 12 and 13.

The Committee’s practice also endorses this interpretation of Articles 12 and 13 in the concluding observations of Paraguay and Australia. In the case of Paraguay, the Committee recommends the State Party ‘to amend its criminal legislation in order to make penalties applicable to persons with psychosocial or intellectual disabilities subject to the same guarantees and conditions as those applicable to any other and to provide the procedural accommodations and safeguards.’<sup>133</sup> For Australia, in turn, the Committee recommended the State Party to ensure that persons with disabilities who have been accused of crimes without trial are allowed to defend themselves and provided with required support and accommodation.<sup>134</sup>

### **3.2.3 Article 12, paragraphs 4 and 5**

Article 12, paragraph 4 of the CRPD recognises that people with disabilities who need support to exercise their legal capacity need protection from ‘abuse’ and ‘undue influence.’ With this intent, this provision establishes safeguards that must be present in a system of support, in order to preserve the person’s ‘rights, will and preferences.’ Article 12, paragraph 5, in turn, requires States Parties to protect persons with disabilities ‘in the context of financial and property transactions.’ These provisions of Article 12 will not be specifically addressed since they run out of the scope of discussion in this thesis.

## **3.3 Legal interpretation of Article 14 of the CRPD**

The right to liberty and security enshrined in Article 14 of the CRPD is one of those rights already included in prior human rights treaties since the beginning of international human rights

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<sup>131</sup> CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, adopted during the Committee’s 14<sup>th</sup> session, held in September 2015, at para. 14.

<sup>132</sup> *Ibid*, para. 16.

<sup>133</sup> CRPD Committee, Concluding Observations on the initial report of Paraguay (adopted by the Committee at its ninth session, 15-19 April 2013), U.N. Doc. CRPD/C/PRY/CO/1, para. 32.

<sup>134</sup> CRPD Committee, Concluding Observations on the initial report of Australia (adopted by the Committee at its tenth session, 2-13 September 2013), U.N. Doc. CRPD/C/AUS/CO/1, at para. 30.

jurisprudence.<sup>135</sup> The Committee already affirmed that ‘liberty and security of the person is one of the most precious rights to which everyone is entitled’,<sup>136</sup> and it is directly related to the purpose of the CRPD. It is particularly relevant in the context of involuntary detention of persons with psychosocial and intellectual disabilities since, as observed by Kanter, they ‘have been subjected to restriction on their lives in ways that people with other disabilities, or without disabilities, have not,’<sup>137</sup> mostly in the name of treatment.

As already mentioned, many countries allow involuntary placement of people with psychosocial or intellectual disabilities for their treatment, without the consideration of their individual autonomy, freedom to make their choices, the right to be recognised as equal persons before the law and the right to liberty and security.

### **3.3.1 Article 14, paragraph 1**

Article 14, paragraph 1 of the CRPD requires States Parties to ‘ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security’ and ‘are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’<sup>138</sup>

In the context of the involuntary detention of persons with disabilities, the provision ‘does not ban involuntary treatment and detention outright’<sup>139</sup> and it does not mean that persons with disabilities cannot be lawfully subject to care or preventative detention. As explained by the High Commissioner, and as clearly implied by the literal interpretation of Article 14, the provision bans a deprivation of liberty on the ground of the existence of a disability, therefore, it should ‘de-linked from the disability and neutrally defined so as to apply to persons on an equal basis.’<sup>140</sup>

Nonetheless, as observed by Kanter, disability alone ‘has never been a legal justification for loss of liberty,’ usually countries require the person to ‘pose a danger to self or others’ or to ‘be unable to care for oneself.’<sup>141</sup> On this matter, the Committee clarifies ‘that Article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment,’

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<sup>135</sup> For instance, in Article 3 of the Universal Declaration of Human Rights and in Article 9 of the International Covenant on Civil and Political Rights.

<sup>136</sup> CRPD Committee, Guidelines on Article 14 (n. 131), at paras. 3 and 4.

<sup>137</sup> A. S. Kanter (n. 91), at page 125.

<sup>138</sup> UN CRPD, Article 14, para. 1.

<sup>139</sup> A. S. Kanter (n. 91), at page 133.

<sup>140</sup> UN Human Rights Council (n 58) , para. 49.

<sup>141</sup> A. S. Kanter (n. 91), at page 134.

even if it is combined with other reason, ‘including that they are deemed dangerous to themselves or others.’<sup>142</sup>

The statement of the Committee is reflected in the drafting history of the CRPD. During the preparatory works, there were extensive discussions on the prohibition of deprivation of liberty on the basis of disability. Canada proposed adding the qualifier ‘solely,’ so that the provision would prohibit the deprivation of liberty based solely or exclusively on disability.<sup>143</sup> Civil society and the majority of States opposed it, arguing that it could lead to misinterpretation and allow deprivation of liberty on the basis of their actual or perceived impairment in conjunction with other conditions, like danger to self or others.<sup>144</sup>

Following that rationale, the Committee understands that allowing the detention of persons with disabilities on the ground of ‘perceived dangerousness’ or ‘alleged need for treatment’ is contrary to Article 14 and corresponds to arbitrary detention.<sup>145</sup> It explains that perceptions of dangerousness affects mainly people with intellectual or psychosocial disabilities, which, like all other persons, ‘have a duty to do no harm’ and in case of breach of this obligation, applicable law should be employed, such as criminal law, on an equal basis with others.<sup>146</sup>

The same consideration can be found during the preparatory works of the CRPD, in which the Chair of the Ad Hoc Committee closed the discussions on Article 14 saying that the ‘debate has focused on the treatment of [people with disabilities] on the same basis with others. [People with disabilities] who represent a legitimate threat to someone else should be treated as any other persons would be,’<sup>147</sup> what excludes considerations of dangerousness, an obscure criteria that may lead to ‘open abuse and misuse’ if applied to the general population and, consequently, if applied to people with psychosocial and intellectual disabilities.<sup>148</sup>

The Committee has also addressed security measures – the so called measures of control – imposed on persons found not responsible due to ‘insanity’ and incapacity to be held criminally

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<sup>142</sup> CRPD Committee, Guidelines of Article 14 (n. 131), at para. 6.

<sup>143</sup> Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (New York), Daily Summaries of the discussions on Article 14 – Liberty and Security of the Person, 3<sup>rd</sup> session, May 26, 2004 and 5<sup>th</sup> session, January 26, 2005.

<sup>144</sup> Ibid.

<sup>145</sup> CRPD Committee, Guidelines on Article 14 (n. 131), at para. 13.

<sup>146</sup> Ibid, at para. 14.

<sup>147</sup> Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (New York), Daily Summaries of the discussion on Article 14 – Liberty and Security of the Person, Volume 8, #4, January 19, 2006.

<sup>148</sup> P Barlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (*The Modern Law Review*, Vol. 75, no. 5, September 2012, pp. 752-778). Available at <http://www.jstor.org/stable/41682870> last access 8 July 2018.

responsible. In line with my considerations on Article 12, the Committee recommended eliminating these type of measures, ‘including those which involve forced medical and psychiatric treatment in institutions,’ since it entails involuntary detention for treatment based on disability, which is prohibited by Article 14, even if combined with other reasons.

Article 14’s absolute prohibition on involuntary detention on the basis of disability is linked to the right to enjoy ‘the highest attainable standard of health’ on ‘the basis of free and informed consent,’ as provided in Article 25, (d) of the CRPD. As stated by the Committee, people with disabilities have the right ‘to decide about care, treatment, and admission to a hospital or institution’, as it characterises their exercise of legal capacity. Therefore, States Parties have the obligation to abolish policies and law that allow involuntary detention for treatment on the basis of disability, even ‘with the consent of a substitute decision-maker,’<sup>149</sup> a regime prohibited by Article 12, paragraph 3.

The obligation of States Parties in relation to Articles 14 and 25 of the CRPD is well summarised in the Concluding Observations to New Zealand, where it recommends that the State Party must take measures ‘to ensure that no one is detained against their will in any medical facility on the basis of actual or perceived disability’ and ‘that all mental health services are provided on the basis of free and informed consent of the person concerned,’<sup>150</sup> as indicated by Articles 14 and 25 of the CRPD.

The articulation between the rights to refuse or accept medical treatment and liberty and security are also essentially related to Article 17 of the CRPD, on the right to respect for ‘physical and mental integrity’ of persons with disabilities on an equal basis with others.<sup>151</sup> The Committee provides that ‘people using mental health systems’ experienced ‘deep pain and trauma’ in the context of forced treatment and that there is ‘empirical evidence indicating its lack of effectiveness.’<sup>152</sup>

The Committee, in the General Comment no. 1, states that ‘forced treatment by psychiatric and involuntary placement in institutions and other health and medical professionals is a violation of the right to equal recognition before the law,’ since it ‘denies the legal capacity of the person to choose medical treatment’ and is ‘an infringement of the rights to personal integrity,’<sup>153</sup> enshrined in Article 17 of the CPRD, which must be read in conjunction with Articles 15, 16 and 19.

Special Rapporteurs on Torture have manifested concern about the situation of people with disabilities deprived of liberty due to their higher vulnerability to physical, mental and sexual abuses

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<sup>149</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 40.

<sup>150</sup> CRPD Committee, Concluding Observations on the initial report of New Zealand (adopted by the Committee at its twelfth session, 15 September – 3 October 2014), U.N. Doc. CRPD/C/NZL/CO/1, para. 30.

<sup>151</sup> UN CRPD, Article 17.

<sup>152</sup> CRPD Committee, General Comment no. 1 (n 90), para. 42.

<sup>153</sup> Ibid.

and exposure to non-consensual medical practices, including ‘electroshock treatment and mind-altering drugs,’ ‘solitary confinement’ and ‘forced sterilisation of girls and women.’<sup>154</sup> These type of interventions were recognised by the UN Rapporteur Juan E. Mendéz as always amounting ‘at least to inhuman and degrading treatment’ and often they ‘meet the criteria for torture,’<sup>155</sup> which are explicitly prohibited in Article 15 of the CRPD. As explained by Mendéz, the prohibition of torture ‘is of the few absolute and non-derogable human rights, a matter of *jus cogens*’.<sup>156</sup> Additionally, according to the UN Rapporteur Manfred Nowak, ‘serious violations and discrimination against persons with disabilities may be masked of “good intentions” on the part of health professionals.’<sup>157</sup>

According to the Committee, in the General Comment no. 1, the practices described above are also prohibited by Article 16 of the CRPD, which creates the obligation of State Parties to protect people with disabilities from all forms of exploitation, violence and abuse. In turn, Article 19 of the CPRD creates the obligation of States Parties ‘to respect and facilitate full enjoyment [...] of persons with disabilities to live independently and be included in the life of the community.’<sup>158</sup> As contended by Palmisano, the provision of Article 19(a) clearly prohibits forced institutionalisation, which is an implication of States Parties’ obligation to secure that persons with disabilities are not obliged to live in a particular living arrangement.<sup>159</sup>

Following Giuseppe Palmisano’s rationale, the prohibition of forced institutionalisation is strengthened by the obligation of States Parties to ensure that the existence of an actual or perceived disability shall not justify a deprivation of liberty, as provided in Article 14, paragraph 1(b) of the CRPD.<sup>160</sup> Palmisano states that ‘[t]here is a strong presumption that presumes that the practice of isolating and segregating people with disabilities in long-stay institutions is in itself not in conformity with Article 19’ and could only be admissible in cases where the person freely chooses to live in an institution.<sup>161</sup>

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<sup>154</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendéz (adopted in the twenty-second session), U.N. Doc. A/HRC/22/53, 2013, at paras. 63 and 80.

<sup>155</sup> Ibid, at para. 81.

<sup>156</sup> Ibid, at para. 82.

<sup>157</sup> UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment (adopted in the sixty third session), U.N. Doc. A/63/175, 2008, at para. 49.

<sup>158</sup> G. Palmisano, ‘Article 19 [Living Independently and Being Included in the Community]’, In R. Cera, V. Della Fina, R. Cera and G Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary* (n. 85) (n. 25), at page 354.

<sup>159</sup> Ibid, at page 365.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid, at page 366.

The presumption of Palmisano is in line with the Committee's Concluding Observations to Argentina, in which involuntary long-term committal is noted with concern and effective deinstitutionalisation strategies are urged to be implemented.<sup>162</sup> The Committee also states that deinstitutionalisation must be realised and legal capacity must be granted for people with disabilities, so that they can be able to choose where and with whom to live, as provided in Article 19.<sup>163</sup> Thus, States Parties have the 'obligation to start and carry a deinstitutionalisation process, by making living arrangements alternatives actually available.'<sup>164</sup>

### **3.3.2 Article 14, paragraph 2**

Article 14, paragraph 2 of the CRPD reaffirms the human rights rules and standards to be applied in cases of deprivation of liberty, mentioning specifically person with disabilities and it also 'adds new language that did not appear' in previous human rights treaties.<sup>165</sup> The provision creates the obligation for States Parties to 'ensure that if persons with disabilities are deprived of their liberty through any process', they are entitled to guarantees 'in accordance with human rights international laws' and they 'shall be treated in compliance with the objectives and principles' of the CRPD, 'including the right to reasonable accommodation.'<sup>166</sup>

As explained by Francesco Seatzu, Article 14, paragraph 2 of the CRPD demands that, in cases that persons with disabilities have their right to personal liberty circumvented or denied, human rights rules and standards should be followed and they shall be treated in conformity with general principles of the CRPD.<sup>167</sup> The author also contends that the exact meaning of this provision opaque and it seems to only refer to the treaty's systematic and teleological interpretation and introduce the related subsequent articles, namely articles 15, 16 and 17, already mentioned above.<sup>168</sup>

## **3.4 The CRPD Committee's considerations concerning individual communications**

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<sup>162</sup> CRPD Committee, Concluding Observations on the initial report of Argentina as approved by the Committee at its eighth session (17-28 September 2012), U.N. Doc. CRPD/C/ARG/CO/1, at para. 24.

<sup>163</sup> CRPD Committee, General Comment no. 1 (n. 90), at para. 46.

<sup>164</sup> G. Palmisano (n. 158), at page 366.

<sup>165</sup> A. S. Kanter (n. 91), p. 134.

<sup>166</sup> UN CRPD, Article 14, para. 2.

<sup>167</sup> F. Seatzu, 'Article 14 [Liberty and Security of Person]', In R. Cera, V. Della Fina, R. Cera and G Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary* (n. 85), at page 304.

<sup>168</sup> Ibid.

The considerations of this chapter focused on the obligations of States Parties under Articles 12 and 14 of the CRPD and demonstrated their interdependence with each other and other relevant articles of the CRPD in the context of the detention of persons with disabilities. After interpreting each provision separately, I will now present an overview of States Parties' obligations on the matter of the detention of persons with disabilities. For this, I will briefly analyse the CRPD Committee's considerations on the aforementioned articles, in the decision concerning communication No. 7/2012, received under the procedure regulated in the CRPD Optional Protocol, of Marlon James Noble, an Aboriginal national of Australia with psychosocial and intellectual disabilities.<sup>169</sup>

In sum, the author of the communication spent thirteen years in detention, without any criminal conviction and any indication of the duration of his detention, as a result of the application of the Australian Mentally Impaired Defendants Act.<sup>170</sup> According to the Committee, Australia had failed to fulfil its obligations under Articles 5(1) and (2) of the Convention, namely to ensure equal protection and equal benefit of the law, without discrimination on the basis of disability. The Act was found to be discriminatory applied to persons with disabilities, because 'it applies only to persons with cognitive impairment' and allows 'their indefinite detention without any finding of guilt,' a treatment not provided to persons without this type of impairment, who benefit from the rules of due process and fair trial.<sup>171</sup>

The Committee explains that the finding of Noble's unfitness to plead was a result of the denial of his legal capacity, based on his disability, to plead not guilty and to test evidence against him and no adequate form of support was provided to enable him to stand trial and plead not guilty. Therefore, the Noble's rights under Articles 12, paragraphs 2 and 3 and 13, paragraph 1 of the CRPD were breached, since Australia failed to fulfil the obligation to recognise legal capacity of persons with disabilities on an equal basis with others, to provide support in the exercise of legal capacity and to ensure effective access to justice.

Moreover, Noble's detention was decided on the basis of the assessment of 'potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby, converting his disability into the core cause of his detention.'<sup>172</sup> This situation resulted in the violation

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<sup>169</sup> CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication no. 7/2012, U.N. Doc. CRPD/C/16/D/7/2012, 10 October 2016.

<sup>170</sup> *Ibid.*, at para. 8.7

<sup>171</sup> *Ibid.*, at para. 8.2.

<sup>172</sup> *Ibid.*

of Article 14(1)(b) of the CRPD, which provides that ‘the existence of a disability shall in no case justify a deprivation of liberty’.<sup>173</sup>

Finally, the Committee also considered that the indefinite character of Noble’s detention and the repeated acts of violence to which he was subjected during his detention amount to the violation of Article 15, on the prohibition of torture, inhuman and degrading treatment. As stated in the communication, indefinite detention causes ‘irreparable psychological effects’ and results in his submission to inhuman and degrading treatment.<sup>174</sup> In relation to the acts of violence committed against Noble, the Committee noted that the absence of action from State Party’s authorities to prevent any form of treatment contrary to Article 15 is also a violation of States Parties’ obligations under this provision, taking into account that States Parties must ‘safeguard the rights of persons deprived of their liberty owing to the extent of control that they exercise over those persons.’<sup>175</sup>

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<sup>173</sup> Ibid, at para. 8.8

<sup>174</sup> Ibid, at para. 8.9

<sup>175</sup> Ibid.

## Chapter 4

### Belgian Legislation on the Detention of Persons with Psychosocial and Intellectual Disabilities

#### 4.1 Introduction

In this chapter, I will focus on the Belgian legislation related to involuntary institutionalisation of persons with psychosocial and intellectual disabilities. The French titles of all laws will be used in the first instance, with a translation being given in English also.<sup>176</sup> It is important to make clear that Belgian law uses medical model terms, that will be translated to CRPD-compliant terms. For instance, the term ‘*trouble psychique*’ or ‘*trouble mental*’ will be translated to ‘psychosocial and intellectual impairment.’<sup>177</sup>

The *Loi relative à l'internement* (Act on Confinement),<sup>178</sup> adopted in 2014, and the *Loi relative à la protection de la personne des malades mentaux* (Act on Mental Health),<sup>179</sup> adopted in 1990, will be examined in this chapter in order to investigate in which circumstances, under the Belgian legal system, people with psychosocial or intellectual disabilities can be submitted to detention. Moreover, the chapter will very briefly address the *Réforme 107* (Reform 107),<sup>180</sup> a practice adopted in Belgium since 2011, with the objective to provide ‘community-based’ treatment as a primary form of mental health care.

Contrary to the chronological order, the Act on Confinement will be the first topic of discussion, since it demands a swift contextualisation of its underpinning rationale. As outlined in chapter one of

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<sup>176</sup> Note that all translations of both titles and content of laws in this chapter are the authors own and are not official translations.

<sup>177</sup> It is important to stress that the translation of such terms are problematic. However, further clarifications will be provided in the discussion of the terms used in each specific legislation discussed.

<sup>178</sup> ‘5 Mai 2014. - *Loi relative à l'internement [...]*’, published on July 2014 and entered into force on October 2016. Legislation available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=2014050511](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2014050511) last access 26 June 2018.

<sup>179</sup> ‘26 Juin 1990. - *Loi relative à la protection de la personne des malades mentaux*’, published on July 1990 and entered into force on July 1991. Legislation available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=1990062632&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1990062632&table_name=loi) last access 28 June 2018.

<sup>180</sup> Official website disponible both in french and in dutch, available at <http://www.psy107.be/> last access 8 July 2018.

this thesis, the methodology used in this chapter is legal doctrinal analysis. The law and practice presented below will also be addressed with the support of academic articles and explanatory documents provided by relevant Belgian civil associations, as well as governmental organisations.

#### 4.2 The Act on Confinement (*Loi relative à l'internement*)

To understand better the provisions of the Act on Confinement, adopted in 2014 and with entry into force in October of 2016,<sup>181</sup> which has the purpose to protect society and to provide the appropriate treatment for the person under internment measure regarding his or her reintegration in the community,<sup>182</sup> it is required to understand its rationale, which begins before the adoption of the *Loi de défense sociale à l'égard des anormaux, des délinquants d'habitude et des auteurs de certains délits sexuels* (Act on Social Defence), adopted in 1930,<sup>183</sup> which was abrogated by the Act under discussion.<sup>184</sup> As explained by Yves Cartuyvels and Gaetan Cliquennois, the 1930 Act was an answer to a problem faced by European society at the end of nineteenth century, the problem of 'abnormal' delinquents.<sup>185</sup>

In the period in question, the issue of recidivism was largely associated with degeneration and madness, and those so-called 'abnormals' ('*anormaux*') caused fear, just as regular delinquents, wanderers and alcoholics ('*délinquants habituels, vagabonds ou alcooliques*').<sup>186</sup> In order to give a scientific response to this issue, the 1930 Act was influenced by penal positivism, already addressed in chapter 2, with a strategy to protect society from these individuals who were deemed to be dangerous.<sup>187</sup> The logic behind the law is based on a duality between the culpability of 'normal' persons and dangerousness of so-called 'abnormal' and 'degenerated' persons, with the conventional punitive response to the former and security measures being taken with regard to the latter.<sup>188</sup> The security measures are perceived not as punishment, since 'abnormal' individuals were considered

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<sup>181</sup> Ibid.

<sup>182</sup> Act on Confinement, Article 2.

<sup>183</sup> 9 Avril 1930.- *Loi de défense sociale à l'égard des anormaux, des délinquants d'habitude et des auteurs des certains délits sexuels*, published in May 1930 and entered into force in January 1931. Legislation available in french at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=1930040930](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1930040930) (last access 6 June 2018).

<sup>184</sup> Act on Confinement, Article 132.

<sup>185</sup> Y. Cartuyvels and G Cliquennois, 'The Punishment of Mentally Ill Offenders in Belgium: Care as Legitimacy for Control'. (*Champ Pénal/ Penal Field*, Vol. XII, 2015), at paras. 1 and 2. Available at <https://journals.openedition.org/champpenal/9204#quotation> last access 23 June 2018.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid, paras. 13-14 and 19-22.

irresponsible under criminal law, but as a measure justified both by the protection of society and by the need for psychiatric surveillance.<sup>189</sup>

The 1930 Act on Social Defence was reformed in 1964, with the introduction of the possibility of internment for an indeterminate period, and the obligation on the State to provide the best treatment available,<sup>190</sup> including in a private setting.<sup>191</sup> The Act on Confinement of 2014, reformed in 2016,<sup>192</sup> is based on the same logic – it does not include regular delinquents, wanderers and alcoholics, but only those deemed by the law as persons with a ‘mental disorder’, ‘mental illness’ or ‘mental impairment’ (*‘trouble mental’*)<sup>193</sup> – in other words, persons with psychosocial and intellectual disabilities.<sup>194</sup>

According to Article 71 of the Belgian Criminal Code, there is no offence established when the accused (defendant) was affected, at the time of the act, by a psychosocial or intellectual impairment that abolished his or her capacity of discernment or self-control or when he or she was constrained by a force that he or she could not resist’.<sup>195</sup> In the same provision, the Criminal Code refers to the Act on Confinement, which regulates the security measures applied to persons with psychosocial and intellectual disabilities when it is considered that no offence was established.

The objective of the security measure, as aforementioned and provided in Article 2 of the Act on Confinement, is twofold: to protect society and to ensure that the required treatment will be provided to the person concerned, regarding his or her condition and reintegration in the community.<sup>196</sup> The conditions for a decision of internment are outlined in Article 9 of the Act on Confinement:

- i) the committal of an offence that attacks or threatens the bodily or psychological integrity of another person;

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<sup>189</sup> Ibid, paras. 13-14 and 19-22.

<sup>190</sup> Y. Verbist, ‘Paroles en défense sociale Paroles de défense social – Ce qui fait soin dans um parcours em défense sociale? Le point de vue des personnes sous statut interné’ (ASBL Psytoyens – 2015), at page 24.

<sup>191</sup> Y Cartuyvels and G Cliquennois (n. 6), at para. 24.

<sup>192</sup> The Act on Confinement discussed in this thesis is the latest version of the legislation, after the reform of 2016.

<sup>193</sup> Act on Confinement, Article 9.

<sup>194</sup> According to the Mental Health Platform of Luxembourg Website (*Plate-forme de Concertation en Santé Mentale de la Province de Luxembourg*), the recognition of criminal irresponsibility and the application of security measures are designed to persons with psychosocial and intellectual disabilities, in the sense that the legislation applies to persons with a ‘dementia’, a ‘serious mental imbalance’ or a ‘mental debility’ (*‘La notion de «défense sociale» désigne un ensemble de mesures prises à l’égard de personnes inculpées ou condamnées pour un délit ou un crime, qui souffrent de démence, de grave déséquilibre mental ou de débilité mentale. Elle se fonde sur l’irresponsabilité pénale des personnes atteintes de trouble ou de handicap mental’*). Available at <http://www.platfomepsylux.be/ou-sadresser/vos-droits-et-la-legislation/defense-sociale/> last access 8 July 2018

<sup>195</sup> Not an official translation: translation by the author. Article 71 of Belgian Criminal Code is available in french at [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi) last access 23 June 2018.

<sup>196</sup> Act on Confinement, Article 2.

- ii) the presence, at the moment of the judicial decision, of a psychosocial or intellectual impairment that abolishes or severely modifies his or her capacity of discernment or self-control; and
- iii) the danger that the person may commit other facts such as those mentioned in the first paragraph due to his or her impairment, contingently combined with other risk factors.<sup>197</sup>

According to Article 5, the judge will only make a decision after receiving a report of a psychiatric forensic expert (*‘expertise psychiatrique médico-légale’*), which must establish, at least, if:

- i) in the moment of the act, the person was affected by a psychological or intellectual impairment that abolished or severely modified his or her capacity of discernment or self-control;
- ii) there is a possibility of causal relation between the impairment and the act;
- iii) considering the impairment and other risk factors, there is a possibility of the person concerned committing another offence,
- iv) where appropriate, the person can be treated, monitored and cared for and in which way that can be done, having in perspective his or her reintegration into the community.<sup>198</sup>

It is important to stress that the person concerned can, at any moment, be assisted by an expert of his or her choice and by his or her lawyer.<sup>199</sup>

The Act on Confinement creates a completely different apparatus to judge the applicability of security measures, if compared to the conventional system that applies to people without disabilities. Under the Act, there is a specific chamber (*‘la chambre de protection sociale’*), headed by a specialised judge (*‘le juge de protection sociale’*) and special facilities where the person concerned will be sent, namely, the psychiatric annex of a prison,<sup>200</sup> the social defence institute or section – high security facilities and the forensic centre (*‘centre de psychiatrie légale’*) or any facility recognised by the

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<sup>197</sup> Ibid, Article 9.

<sup>198</sup> Ibid, Article 5, paras 1-4.

<sup>199</sup> Ibid, Article 7.

<sup>200</sup> According to National Superior Council of Persons with Disabilities (*‘Conseil Supérieur National des Personnes Handicapées’*), the psychiatric annex of prisons are not a place of detention under the Act on Confinement. Their function is to receive the defendants during the period of observation. Information available at <http://ph.belgium.be/resource/static/files/2016-04-note-de-position-internement-fr.pdf> last access 23 June 2018, at page 5. However, the psychiatric annex of prison are still defined in Article 3, para. 4, (a) as one of the different modalities of detention facilities.

competent authority<sup>201</sup> - intermediate or low security facilities.<sup>202</sup> However, the appeals from decisions taken by the Social Protection Chamber are addressed to the common appeal court on criminal matters – the appeal court of correctional chamber<sup>203</sup> (*‘la chambre correctionnelle de la cour d’appel’*).<sup>204</sup>

It is important to stress that when there is enough reason to believe that a person detained on the basis of preventive detention<sup>205</sup> satisfies the conditions defined in Article 9 of the Act on Confinement (outlined above) and there is an expert report indicating the need for an observation period to establish his or her condition, the person can be submitted to observation in a secured facility, without the possibility of appeal from this decision.<sup>206</sup> During the period of observation, which cannot exceed two months in total, the same rules are applied to people with disabilities as are applied in general cases of preventive detention (for people without disabilities).<sup>207</sup> On the same issue, the equivalent to preventative detention in the Act on Confinement (*l’arrestation provisoire*) can last until seven days, without a judicial intervention.<sup>208</sup>

During the application of security measures related to persons with disabilities, the person interned can be allowed to leave the facility for a determined period of time. These permissions are called ‘release permissions’ (*‘permission de sortie’*), which allow the person to leave the facility for a determinate period that cannot exceed sixteen hours,<sup>209</sup> and the ‘*congé*’, which permits the person to leave the setting for a period of one day at a minimum and fourteen days at a maximum per month.<sup>210</sup> Both permissions have, among other things, the objective to maintain the familiar, affective, social bonds of the person submitted to internment and prepare his or her reintegration into the community or community-based therapeutic programmes.<sup>211</sup> However, the person with a disability will only benefit from these permissions if there are no contraindications, such as the risk that the person will evade the

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<sup>201</sup> Ibid, Article 3, para. 4 (a), (b), (c) and (d).

<sup>202</sup> Ibid, Article 3, para. 4 (a), (b), (c) and (d).

<sup>203</sup> The correctional chambers examine the appeals from decisions of the first instance of the criminal jurisdiction. See Service Public Fédéral, *La justice en Belgique* (2009), available at [https://justitie.belgium.be/sites/default/files/downloads/La%20justice%20en%20Belgique%20\(version%202009\).pdf](https://justitie.belgium.be/sites/default/files/downloads/La%20justice%20en%20Belgique%20(version%202009).pdf) (last access 24 May 2018).

<sup>204</sup> Ibid, Article 77/6.

<sup>205</sup> The preventive detention is regulated by the ‘20 Juillet 1990 - *Loi du 20 juillet 1990 relative à la détention préventive*’ (Preventive Detention Act), published in August 1990 and entered into force in December 1990, available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&table\\_name=loi&cn=1990072035](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1990072035) last access 26 June 2018.

<sup>206</sup> Act on Confinement, Article 6, para. 1.

<sup>207</sup> Ibid.

<sup>208</sup> Act on Confinement, Article 65.

<sup>209</sup> Ibid, Article 20.

<sup>210</sup> Ibid, Article 21.

<sup>211</sup> Ibid, Articles 20, paras 1 and 3; Article 21, paras. 1 and 3.

execution of the security measure, the risk of committing new offences during the leave or the risk of bothering or harassing the victims.<sup>212</sup>

Moreover, there are different types of execution of the security measures: the limited detention (*'la détention limitée'*), the electronic monitoring (*'la surveillance électronique'*) and release on a sort of probation (*'la libération à l'essai'*). The limited detention permits the person submitted to internment to exit the facility on a regular basis for the period of sixteen hours per day.<sup>213</sup> The electronic monitoring is a type of execution of the security measure outside the facility, according to a determined plan, controlled by electronic means.<sup>214</sup> The release on probation is a modality where the person can serve the security measure within a residential or an ambulatory (outpatient) treatment centre, with the condition of respecting predetermined terms.<sup>215</sup>

Similarly to the temporary exit permissions, the person concerned will only benefit from the different types of execution of security measures if there are no contraindications, such as (a) the absence of perspectives of social reintegration of the person interned, taking into account his or her psychosocial or intellectual impairment; (b) the risk of committing other offences; (c) the risk of annoying or harassing the victims; (d) the considerations of the person's attitude towards the victims and (e) his or her efforts to compensate the civilian aspect, considering his or her family situation, after the perpetrations of the acts that caused his or her internement.<sup>216</sup>

Both the permissions to exit and the different types of execution of security measures applied to persons with disabilities are comparable to their 'conventional' forms, applied to persons without disabilities, implemented in the penitentiary system.<sup>217</sup> Generally, the conditions to receive benefits are the same in the social defense system or penitentiary system,<sup>218</sup> however, it is required the fulfilment of time conditions in the case of the penitentiary system, directly related to the length of the sentence applied to each particular case. This type of condition is not present in the Act on Confinement, since there is no time limit to the application of a security measure.

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<sup>212</sup> Ibid, Article 22.

<sup>213</sup> Ibid, Article 23.

<sup>214</sup> Ibid, Article 24.

<sup>215</sup> Ibid, Article 25.

<sup>216</sup> Ibid, Article 26.

<sup>217</sup> These measures are regulated by the Act on the Juridic Status of Persons Condemned to Custodial Sentences (*'Loi relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d'exécution de la peine du 17 Mai 2006'*). Available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2006051735&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006051735&table_name=loi) last access 23 May 2018.

<sup>218</sup> Act on the Juridic Status of Persons Condemned to Custodial Sentences, Articles 4-9 and 21-25.

A person under security measure can only obtain a definitive release once, among other things,<sup>219</sup> his or her psychosocial or intellectual impairment is sufficiently stabilised and when there is no risk of recidivism, taking into consideration the person's condition and other risk factors,<sup>220</sup> while persons without disabilities serving sentences will obtain a definitive release, generally, after a predetermined period of time defined in the prison sentence.<sup>221</sup>

There is the possibility of a condemned person<sup>222</sup> be submitted to security measure if he or she committed an offence provided for in Article 9(1) of the Act on Confinement, and the psychiatrist in service in the respective prison facility states that, during the his or her detention, a psychosocial or intellectual impairment with the same characteristics described to cases where security measures are applicable and that there the risk of this person committing an offence, as provided in the aforementioned Article 9, can be interned, following the procedures described above.<sup>223</sup> In other words, the execution of a sentence can be substituted for the execution of a security measure, if the required conditions are present.

Those are the summarised conditions of internment of persons with psychosocial and intellectual disabilities who committed crimes, but are considered incapable of being held criminally responsible for their acts. Below, I will analyse the procedure about the hospitalisation of persons with psychosocial and intellectual disabilities who are deemed to be dangerous to themselves or to other persons.

#### **4.3 The Mental Health Act (*Loi relative à la protection de la personne des malades mentaux*)**

The Mental Health Act sets forth the principle of individual liberty in the treatment of persons with psychiatric and intellectual impairment ('*trouble psychiques*' and '*maladie mentale*')<sup>224</sup> and that every person voluntarily admitted in a psychiatric service can leave at any moment.<sup>225</sup> Naturally, the control measures, such as the protection measures regulated by the Mental Health Act (described

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<sup>219</sup> Act on Confinement, Article 66.

<sup>220</sup> Ibid.

<sup>221</sup> Act on the Juridic Status of Persons Condemned to Custodial Sentences, Article 71.

<sup>222</sup> A person serving a prison sentence established by a judicial decision with the force of *res judicata*.

<sup>223</sup> Act on Confinement, Article 77/1.

<sup>224</sup> Mental Health Act, title and Article 1. In relation to the translation of these terms, no specific information on their meaning is provided. Considering that the Mental Health Platform of Luxembourg Website (*Plate-forme de Concertation en Santé Mentale de la Province de Luxembourg*) uses the term '*malades mentaux*' and '*trouble psychiatriques*' and no reference is made to 'dementia' or 'mental debility' as in the case of the Act on Confinement, I presume that the Act on Mental Health applies only to persons with psychosocial disabilities.

<sup>225</sup> Ibid, Article 3.

below), and the security measure, prescribed in the Act on Confinement, are exceptions to those general rules,<sup>226</sup> since they are involuntary admissions with the purpose of treatment.

According to Article 2 of the Mental Health Act, the measures of protection will only be applied to persons with psychosocial disabilities if his or her condition requires so, after the failure of all other treatment alternatives available, and if the same condition severely puts his or her health or security in serious danger or constitutes a serious threat to the life or integrity of another person.<sup>227</sup> If these requirements are fulfilled, a person can be submitted to an observation period in a hospital (*'mise en observation'*).<sup>228</sup>

The act provides two different procedures in which the involuntary hospitalisation order to observation can take place: the ordinary and the urgent procedures.<sup>229</sup> The ordinary procedure is initiated by any interested person through a request<sup>230</sup> addressed to the competent judge of the Peace<sup>231</sup> (*'juge de paix'*).<sup>232</sup> If the judge accepts the request, he or she must designate a defence lawyer, a visit to the person whose hospitalisation is being demanded and a court hearing.<sup>233</sup> It is important to stress that the person has the right to choose the lawyer to his or her defence, a psychiatrist and a trusted person for support.<sup>234</sup> In the court hearing, the judge will hear the person concerned and, if possible, family members or persons with a close relationship to him or her, in the presence of his or her lawyer.<sup>235</sup> After ten days, the judge will pronounce the decision in a public hearing, with the designation of where the person shall be submitted to observation, if the request is accepted.<sup>236</sup> The judge's decision can be appealed to the Family Proceedings Court, but the hospitalisation decision remains executable.<sup>237</sup>

In the urgent procedure, the competent public prosecutor can decide where the person will be submitted to for observation, after a report by a medical expert designated by the prosecutor or a

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<sup>226</sup> Ibid, Article 1.

<sup>227</sup> Ibid, Article 2.

<sup>228</sup> Ibid, Article 4.

<sup>229</sup> Classification given by the Plate-forme de Concertation en Santé Mentale de la Province de Luxembourg, in the Guide of person submitted to observation (*'Guide de la personne mise en observation'*), available at [http://media.wix.com/ugd/d52b6c\\_b39b203048c54840a1115cb86906b29d.pdf](http://media.wix.com/ugd/d52b6c_b39b203048c54840a1115cb86906b29d.pdf) (last access 22 May 2018).

<sup>230</sup> Mental Health Act, Article 5.

<sup>231</sup> The judge of the Peace is competent to judge civil and commercial matters of an inferior amount than 1860 euros. See *Service Public Fédéral* website, '*La justice en Belgique*' (2009), available in french at [https://justitie.belgium.be/sites/default/files/downloads/La%20justice%20en%20Belgique%20\(version%202009\).pdf](https://justitie.belgium.be/sites/default/files/downloads/La%20justice%20en%20Belgique%20(version%202009).pdf) last access 6 July May 2018.

<sup>232</sup> Ibid, Article 1, para. 2.

<sup>233</sup> Ibid, Article 7, paras. 1 and 2.

<sup>234</sup> Ibid, para. 2.

<sup>235</sup> Ibid, para. 5.

<sup>236</sup> Ibid, Article 8

<sup>237</sup> Ibid, Article 30.

written request of an interested person.<sup>238</sup> Within twenty-four hours, the prosecutor will advise the competent judge, the person who may be submitted to observation and his or her legal representative, family or persons with a close relationship to him or her about his or her decision, which will be executed according to competent rules. After the notification of the competent judge, the ordinary procedure described above takes place.

The observation period is limited to forty days, during which the observed person will be monitored, extensively examined and treated.<sup>239</sup> It is possible to end the observation period before the term of forty days if the competent judge decides so, provoked by the person under observation or any other interested person, or if the prosecutor who demanded the observation decides so (in the case the judge has not yet taken charge), or if the head doctor of the establishment determines in a report that the condition of person concerned no longer justifies the observation.<sup>240</sup>

If the condition of the person concerned justifies his or her continued hospitalisation, even after the end of the observation period, the director of the establishment where the person is hospitalised will provide an expert report arguing for this continued hospitalisation, addressed to the competent judge, who will receive and consider the report according to the aforementioned ordinary procedure<sup>241</sup> and will establish its length, which will not exceed two years.<sup>242</sup> In the hypothesis of the doctor chosen by the person concerned presenting a diverging report, the judge will hear both experts, in the presence of the defence lawyer.<sup>243</sup> The hospitalisation can be extended for another period of maximum two years, following the same procedure.<sup>244</sup>

The hospitalisation will end by the presentation of a reasoned report of the head doctor of the establishment stating that the condition of the person under the protection measure no longer justifies its maintenance, which will be provided by the head doctor's own initiative, or demand of any person concerned.<sup>245</sup> This decision of the head doctor will be promptly executed.<sup>246</sup>

Those are the general conditions of involuntary placement and treatment of persons with psychosocial disabilities who are deemed dangerousness to themselves or to others in Belgium. Below,

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<sup>238</sup> Ibid, Article 9.

<sup>239</sup> Ibid, Article 11.

<sup>240</sup> Ibid, Article 12.

<sup>241</sup> Ibid, Articles 13.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid, final part.

<sup>244</sup> Ibid, Article 14.

<sup>245</sup> Ibid, Article 19, para. 1.

<sup>246</sup> Ibid, para. 4.

it will be discussed the on-going reform in the Belgian mental health system, which affects both measures of security and of protection.

#### 4.4 Reform 107 (*Réforme 107*)

In order to overcome the history of hospitalisation as the only source of care provided to persons with psychosocial and intellectual disabilities and a culture of exclusion of the community and family members in the process of treatment, Belgium adopted a reform on its mental health care delivery sector.<sup>247</sup> The reform, called Reform 107,<sup>248</sup> focuses on providing ‘multidisciplinary’<sup>249</sup> care in a community-based approach.<sup>250</sup> The patient receives care in his or her habitual environment and many different actors are engaged in the continuity of treatment, including the patient himself or herself and the family, an indispensable and complementary party in the treatment.<sup>251</sup>

Altogether, the practice is composed by five key functions, which are articulated by the action of a coordinator, whose objective is to ensure that different institutions involved in mental health care start to collaborate and work together.<sup>252</sup> The five functions of the Reform can be summarised as follows:

1. The first function consists in baseline activities of assistance and care on the prevention, early detection, screening and diagnosis of mental health problems and the promotion of mental health itself.<sup>253</sup> The goal is to build appropriate solutions to psychological difficulties or forward persons to therapeutic long-term care, if necessary.<sup>254</sup>

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<sup>247</sup> Similes – Familles et Amis de Personnes Atteintes de Troubles Psychiques, *Réforme 107 – Quand on parle de Réforme, de quoi s’agit-il?* Available at <http://wallonie.similes.org/reforme-107/> last access 20 June 2018.

<sup>248</sup> The name of the Reform refers to Article 107 of the Hospitals Act (*‘Loi sur les hôpitaux’*), which permits the reallocation of part of the federal resources to a new form of care. Legislation available in french at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=1987080732&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1987080732&table_name=loi) (last access 21 June 2018).

<sup>249</sup> Not an official translation: translation by the author of ‘réseaux multidisciplinaire’. See Plate-forme de Concertation en Santé Mentale de la Province de Luxembourg, *Réseaux 107 Qu’est-ce que c’est?*. Available in french at <http://www.plateformepsylux.be/ou-sadresser/les-institutions-et-les-reseaux/reseau-107/> (last access 21 June 2018).

<sup>250</sup> Similes – Familles et Amis de Personnes Atteintes de Troubles Psychiques (n. 163).

<sup>251</sup> Ibid.

<sup>252</sup> Similles Wallonie, *La Réforme (article 107), Vers de meilleurs soins en santé mentale par la réalisation de réseaux et circuits de soins*, at page 3. Available at <http://www.wallonie.similes.org/wp-content/pdf/R%C3%A9forme107.pdf> last access 22 June 2018.

<sup>253</sup> Similes – Familles et Amis de Personnes Atteintes de Troubles Psychiques (n. 247).

<sup>254</sup> Similes Wallonie (n. 252), at page 1.

2. The second function is to provide mobile intensive ambulatory treatment to assist patients with severe and chronic psychosocial and intellectual disabilities, at their home.<sup>255</sup> Within this function, there are specific teams to assist those persons interned under the Act on the Confinement at the place where they are detained. Those teams have the goal to support the transition and continuity of treatment between different environments where these persons are found deprived of liberty, from confinement, in Social Defence Institutes, psychiatric annex of a prison or the secured section of a psychiatric hospital,<sup>256</sup> to community-based treatment, such as the those in a secured house or with the patient's family.
3. The third function concerns rehabilitation and social inclusion teams,<sup>257</sup> which provide support for a better social and professional reintegration in the community of persons with psychosocial and intellectual disabilities receiving treatment.<sup>258</sup>
4. The fourth function of the reform is to provide intensive residential units of short stay, with the purpose of treatment of persons in a phase of serious difficulties.<sup>259</sup> This kind of treatment will only be provided when community-based care is not indicated. The residential units work in permanent dialogue with the previous cited functions to optimise the possibility of patient's return to home and reintegration in the community.<sup>260</sup>
5. The fifth function is designed for persons with chronic psychosocial and intellectual disabilities<sup>261</sup> that presents a low possibility of social reintegration.<sup>262</sup> It consists in specialised residential settings which permit adequate care, with the goal to facilitate social reintegration through individualised programs, considering the needs of autonomy expressed by the persons.<sup>263</sup>

As mentioned in the explanation of the second function, the issue of interned persons under security measures, those regulated in the Act on Confinement, was included in the reform, despite of the fact that the execution of security measures does not take place in conventional hospitals. The purpose of this inclusion is to provide this new form of multidisciplinary care to persons with

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<sup>255</sup> Ibid.

<sup>256</sup> Ibid, at page 2.

<sup>257</sup> Similes – Familles et Amis de Personnes Atteintes de Troubles Psychiques (n. 247).

<sup>258</sup> Similes Wallonie (n. 252), at page 2.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

psychosocial and intellectual disabilities (who are interned) and to facilitate their transition to community-based care.<sup>264</sup> According to Jean-Philippe Lejeune, the objective is to assay the reservation of very specialised care in Social Defence Facilities or in secured psychiatric hospitals only to severe and complex cases that cannot fit into the regular system.<sup>265</sup>

In turn, given that the protection measures, those regulated in the Act on Mental Health, take place in hospitals, they are automatically impacted by the reform. Additionally, the principle of community-based approach is already present at the Act on Mental Health, in Article 23. This provision establishes that, when the conditions of the person under protection measure and general circumstances permit and after the fulfilment of the appropriate procedure, community-based treatment<sup>266</sup> will be provided.<sup>267</sup>

Nonetheless, as explained by Similes organisation, the reform is still taking place and certain aspects still need to be enhanced. Time is needed to change the mentality and practice that were in charge for so long.<sup>268</sup>

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<sup>264</sup> J. Lejeune, *La nouvelle loi relative à l'internement des personnes: qu'est-ce qui a changé?* (Similes – Familles et Amis de Personnes Atteintes de Troubles Psychiques, 2017). Available at <http://wallonie.similes.org/2017/06/22/dossier-la-nouvelle-loi-relative-a-linternement-des-personnes-quest-ce-qui-a-change/> (last access 23 June 2018).

<sup>265</sup> Ibid.

<sup>266</sup> Author's translation of '*soins en milieu familial*'.

<sup>267</sup> Act on Mental Health, Article 23.

<sup>268</sup> Similes Wallonie (n. 247).

## **Chapter 5**

### Comparison and Recommendations

#### **5.1 Chapter's Summary**

In this chapter, I will compare the measures of security and protection of the Belgian system, outlined in chapter 4, with States Parties' obligations under the CRPD in the context of the detention of persons with psychosocial and intellectual disabilities. As articulated in chapter 3, the two most relevant articles for the discussion of the detention of persons with disabilities are Articles 12 and 14 of the CRPD, on the right of equal recognition before the law and on the right to liberty and security, respectively.

Those provisions were classified by Slobogin as 'radical provisions',<sup>269</sup> since they provide that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and that the existence of a disability shall in no case justify a deprivation of liberty. They are highly interdependent and will be addressed in this chapter in relation to other provisions of the CRPD.

Below, the compliance of the Act on Confinement and of the Act on Mental Health with State Parties' obligations under the CRPD will be analysed, with the support of the CRPD Committee's Concluding Observations on Belgium and academic articles on the issue. Recommendations will also be given on the Belgian system of detention of persons with psychosocial and intellectual disabilities.

#### **5.2 States Parties' obligations under the CRPD and the Act on Confinement**

As explained in chapter 4, the Belgian Penal Code establishes that there is no offence if, at the time of the act, the person was affected by a psychosocial or intellectual impairment that abolished his or her capacity of discernment or self-control or was constrained by a force he or she could not resist. This rationale is in line with the traditional criminal law systems worldwide, which declare that persons with psychosocial or intellectual disabilities do not have criminal liability in that case.

Generally, criminal law requires proof that an individual engaged in unlawful conduct – that is, *actus reus*, with unlawful intent – that is, *mens rea*, as explained by Randy Borum.<sup>270</sup> While law

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<sup>269</sup> C. Slobogin, 'Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons With Disabilities on the insanity defence, civil commitment, and competency law' (*International Journal of Law and Psychiatry* 40, 2015, pp. 36-42).

<sup>270</sup> R. Borum, 'Not Guilty by Reason of Insanity' *In Evaluating Competences – Forensic Assessments and Instruments*, at page 193.

presumes that one acts according to free and rational will and should be held responsible for one's own behaviour, it recognises that there can be circumstances in which the intent to act is impaired or diminished.<sup>271</sup> Therefore, the lack of capacity for rationality is the lead condition used to absolve a person from his or her responsibility.<sup>272</sup> This is the explanation why, according to Stephen J. Morse, young children and some people with psychosocial or intellectual disabilities are not held responsible in criminal law.<sup>273</sup>

In the context of Belgium, if the person with a psychosocial or intellectual disability is deemed irresponsible for his or her act and, as a consequence, no offence was considered to be committed, the security measure is applied, following the procedure provided in the Act on Confinement.<sup>274</sup> As aforementioned in chapter 4, on the considerations about the first Act on Social Defense in Belgium, adopted in 1930, the basis for such security measure, is the dangerousness of those perceived as 'abnormals' (*anormaux*). The aim of social defence is still present in the Act on Confinement, which provides that one of the objectives of the security measure is 'to protect society.'<sup>275</sup>

The second objective of the security measure is to provide treatment to persons with psychosocial or intellectual disability. As a consequence, the person will be interned in a 'hybrid institution between a prison and a psychiatric hospital'<sup>276</sup> and, despite the lack of culpability, he or she will be submitted to confinement, from which the definitive release is conditioned on the sufficient stabilisation of the impairment and the absence of a risk of recidivism, as defined in Article 66 of the Act. In other words, there is no predetermined period of time in relation to the length of the security measure for persons with disabilities.

Considering these observations, the Act on Confinement will be compared to the CRPD in the following sub-sections.

### **5.2.1. Article 12 and related provisions**

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<sup>271</sup> Ibid.

<sup>272</sup> S. J. Morse, 'The Status of Neurolaw: A Plea for Current Modesty and Future Cautious Optimism', *Journal of Psychiatry & Law* 39, at page 601.

<sup>273</sup> Ibid, at page 602.

<sup>274</sup> See Chapter 4, item 2.

<sup>275</sup> See Article 2 of the Act on Confinement.

<sup>276</sup> M. Absil, 'L'irresponsabilité pénale, une injonction paradoxale?', Centre Franco Basaglia. Available at <http://www.psychiatries.be/tag/irresponsabilite/> last access 17 June 2018.

Resuming the discussion initiated in chapter 3, the intention of the drafters of the Convention was not to change the elements of criminal culpability, but to change the denial of culpability on the basis of a psychosocial or intellectual disability. According to the interpretation of Article 12 by the CRPD Committee in General Comment no. 1, the CRPD does not allow the denial of criminal responsibility based on a diagnosis of impairment (status approach), which is precisely what the Act on Confinement does. One of the required conditions for the application of the security measure is the assessment, by a psychiatric expert, that the person, at the moment of the criminal act, was affected by a psychological or intellectual impairment and its persistence until the judicial decision.

Furthermore, from the description of the Act in the chapter 4, it was demonstrated that there is a completely different apparatus and procedure to judge the applicability of security measures in Belgium to persons with disabilities, characterising a ‘separate track of law,’<sup>277</sup> as defined by the Committee. Differently from the usual criminal procedure, the person, and not his or her conduct, is the object of judicial analysis. The examination of the dangerousness posed by that persons in society takes priority over his or her criminal conduct, which appears to be a minor concern after the finding of an impairment deemed to abolish the person’s discernment or self-control.

The Act on Confinement also provides lower human rights standards, if compared to conventional criminal law. From the information given in chapter 4, persons submitted to a security measure are more prone to be in detention for a longer period than those submitted to conventional imprisonment by means of preventive detention and prison sentences. Besides the observation period, that can last until two months, and the indetermination of the length of the security measure, persons with psychosocial and intellectual disabilities are less likely to benefit from permission to exit during the execution of security measures, since their condition is tied to the notion of dangerousness and risk, a contraindication for permission to exit.

In the Concluding Observations on Belgium, the CRPD Committee expressed that the Act on Confinement<sup>278</sup> is ‘not in conformity with the Convention,’ taking into consideration that the security measures ‘are forms of social punishment that are adopted not on the basis of the principle of proportionality, but rather in response to a person’s perceived “dangerous” state.’<sup>279</sup> Moreover, the

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<sup>277</sup> CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, adopted during the Committee’s 14<sup>th</sup> session, held in September 2015, at para. 14.

<sup>278</sup> It is important to clarify that the comments made by the CRPD Committee in the Concluding Observation on Belgium are about the former version of the Act on Confinement of 2014, before the reform of 2016. However, the issues pointed out by the Committee concern the main structure and logic of the Act, which was not object of reform.

<sup>279</sup> CRPD Committee, *Concluding Observations on the initial report of Belgium* (adoted at the twelfth session, 15 September – 3 Octobre 2014), U.N. Doc. CRPD/C/BEL/CO/1, at para. 27.

Committee expresses that the procedure used in the Act to apply the security measure ‘is not in accordance with the procedural guarantees established in international human rights law, such as, *inter alia*, the presumption of innocence, the right to a defence and the right to a fair trial.’<sup>280</sup>

People with psychosocial and intellectual disabilities are considered incapable to be held criminally responsible for their acts, which, in the analysis of Marie Absil,<sup>281</sup> is related to a trait of humanity itself. According to her, the recognition of irresponsibility by an expert causes sentiments of dehumanisation, infantilisation, interdiction of thought and disconsideration of the person concerned.<sup>282</sup> In addition, the denial of responsibility results in a barrier to the right to stand trial, in the sense that they do not participate in the procedure, only as objects of psychiatric assessment, and do not have the chance to plead ‘not guilty’, which runs counter to international human rights law, as stated above.

Therefore, the Act on Confinement is problematic in relation to Article 5(1) and (2) of the CRPD, that establishes that all persons are equal before and under the law, without any discrimination, including on the grounds of disability. The Act only applies to persons with disabilities and impedes them to enjoy rights universally recognised, due to the denial of criminal responsibility.

This denial of criminal liability based on the assessment of an impairment is a failure of States Parties’ obligations to recognise legal capacity of persons with disabilities on an equal basis with others, as provided in Article 12 (2) of the CRPD, as interpreted by the Committee and outlined in chapter 3. The absence of any procedural accommodations for the exercise of legal capacity and the consequent obstruction to the enjoyment of fundamental rights amount to the violation of the rights recognised in Article 12 (3) – access to support in exercising legal capacity - and in Article 13 (1) – effective access to justice and procedural accommodations.

### **5.2.2. Articles 14 and 25**

To discuss the Act on Confinement in relation to the right to liberty and security, as provided in Article 14 of the CRPD, it is necessary to consider that the denial of criminal responsibility based on disability apparently has the aim to protect vulnerable individuals, such as persons with psychosocial and intellectual disabilities, from the risk of unfair convictions and provide an exit from the criminal

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<sup>280</sup> Ibid.

<sup>281</sup> M Absil, (n. 276).

<sup>282</sup> Ibid.

justice system when the subjective element of crime cannot be established. Nonetheless, as mentioned in chapter 3, the negation of criminal responsibility and of capability to stand trial has the potential to create a limbo for persons with psychosocial and intellectual disabilities, in the sense that their culpability is not determined and they are exposed to compulsory treatment.

As stated by Tina Minkowitz, the denial of criminal responsibility and of capability to stand trial only ‘pretend’ to be an excuse from responsibility and to protect vulnerable disabled people.<sup>283</sup> In fact, the author states, they expose people with psychosocial or intellectual disabilities to an acute stigmatisation and discrimination, since this group of people are deemed incapable of being treated as moral subjects, on the same basis with others, which is discussed above, and they are subjected to psychiatric detention ‘due to the perception that punishment cannot effect deterrence.’<sup>284</sup>

The first aim of the security measure, as provided in the Act on Confinement, is to protect society from the apparent ‘dangerousness’ of persons with psychosocial and intellectual disabilities, and this is directly linked to the statement of Minkowitz, since these persons are deemed to be intrinsically dangerous and must be separated from society. As a consequence, the person is submitted to confinement in a social defense institutions or other secured facilities. Moreover, once in these type of facilities, the person is submitted to psychiatric treatment, which is the second aim of the security measure.

The involuntary detention in a secured facility in the Act on Confinement is based, in part, on the assessment of an impairment and the need for treatment, which is counter to the CRPD’s Article 14, namely the right to liberty and security, provided in paragraph 1, and the right not to be deprived of liberty unlawfully or arbitrarily, enshrined in paragraph 2. As discussed in chapter 3, Article 14 bans the deprivation of liberty on the ground of the existence of a disability, even if combined with other criteria.

Moreover, the Committee clarified that the detention of persons with disabilities on the ground of ‘perceived dangerousness’ or ‘alleged need for treatment’<sup>285</sup> is contrary to Article 14, which are the grounds contained in the Act on Confinement. Therefore, when compared with Article 14, the security measures in the Belgium system provide unlawful grounds for the detention of persons with psychosocial and intellectual disabilities.

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<sup>283</sup> T. Minkowitz, ‘Submission to Committee on the Rights of Persons with Disabilities on the Draft General Comment on Article 12’ (2014). Available at <https://wnusp.files.wordpress.com/2014/04/article-12-tina-minkowitz-2014.doc>, last access 29 June 2018.

<sup>284</sup> Ibid.

<sup>285</sup> UN CRPD Committee, Guidelines on Article 14 (n. 277), at para. 13.

In addition, since the second aim of the security measure is to provide psychiatric treatment, independently of the person's will, the internments and treatments provided for under the Act on Confinement are not in compliance with Article 25,(d) of the CPRD, which recognises the right of persons with disabilities to enjoy the highest attainable standard of health without discrimination and to receive treatment on the basis of free and informed consent.

### 5.2.3. Practices and breaches of the CRPD

As mentioned in the introductory chapter to this thesis, the ECtHR has ruled twenty-three times that Belgium has violated the right to liberty and security, contained in Article 5, (1) of the ECHR, as a result of its internment policy. In the latest decision of the Court on this matter, the case *W.D v. Belgium*,<sup>286</sup> documents reporting the conditions of internment in Belgium were cited.

One of documents mentioned by the Court is the Concluding observations of the UN Committee against Torture ('the UNCAT') on the third periodic report of Belgium, in which the UNCAT expressed 'concern about the conditions in which inmates with serious mental health problems are held in the State party's prison system.'<sup>287</sup> There are no specifications if the 'inmates' are persons with psychosocial and intellectual disabilities detained under security measure or an imprisonment sentence, and there is no indication if 'prison system' means social defense facilities. However, the UNCAT points out that mental health services in Belgian prisons, in general, are 'inadequate owing to the lack of qualified staff and suitable facilities.'<sup>288</sup>

The Court also mentioned the report of the Committee for the Prevention of Torture ('the CPT') related to visits to Belgian prisons between 24 September and 4 October 2013. The situation of persons with psychosocial and intellectual disabilities in the psychiatric annexes of those prisons was object of the CPT's special attention. According to the CPT, these annexes have the structure of a temporary and transitory placement of interned persons and they are not adapted to long-term care of psychiatric

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<sup>286</sup>Case *W.D v. Belgium*, no. 73548/13, ECHR 2016. Available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-166489%22%5D%7D> (last access 26 June 2018).

<sup>287</sup> UN CAT, Concluding observations on the third periodic report of Belgium (adopted at its fifty-first session, 28 October – 22 November 2013), U.N. Doc. CAT/C/BEL/CO/3, 2014, at para. 19.

<sup>288</sup> Ibid.

patients.<sup>289</sup> Nonetheless, the delegation observed that patients' periods of stay were longer than ten years.<sup>290</sup>

The CPT observed that there is a worrisome lack of psychiatrists in the psychiatric annexes of d'Anvers, de Forest and Merksplas prisons and that the majority of interned persons did not receive an individualised treatment, which was limited to pharmacology treatment.<sup>291</sup> Furthermore, the CPT verified the same issue pointed out by UN CAT: the lack of medical personnel and of multidisciplinary teams of care.<sup>292</sup> In a most recent report, the CPT stated that this lack of staff causes the confinement of patients for 22 to 23 hours per day.<sup>293</sup>

The Belgian section of the International Prison Observatory, in turn, states that the psychiatric annex of prisons are the most overpopulated places in prisons, since they receive not only the persons waiting to be transferred to a social defence facility, but also common prisoners with mental health issues.<sup>294</sup> In relation to treatment, there is no possibility for a continuous treatment, and one of the doctors characterised the situation as 'warfare medicine' since the patients are treated with 'significant amounts of neuroleptics.'<sup>295</sup>

It is true that most of these reports assess the situation of persons interned under the security measure as it applied before the adoption of the Act on Confinement, which only entered into force in 2016.<sup>296</sup> Nonetheless, as stated before, the new Act does not change the operation nor the structure of the social defense system. In fact, the CPT noted during its recent visits in 2017 that systematic problems remain in psychiatric annexes of prisons and social defence facilities, which follow the functioning of a prison system rather than a care facility and have a lack of medical and multidisciplinary staff, as well as surveillance agents.<sup>297</sup>

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<sup>289</sup> Conseil de L'Europe, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 24 septembre au 4 octobre 2013*, CPT/Inf (2016) 13 part, 31 mars 2016, Strasbourg, at para. 85.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid., at para. 92.

<sup>292</sup> Ibid., at paras. 88-90.

<sup>293</sup> UN CAT, 'Resume Executif', U.N. Doc. CPT/Inf (2018) 8, at page 5.

<sup>294</sup> Observatoire International des Prisons (section belge), *Notice 2013 de l'état du système carcéral belge*, Bruxelles, 2013. Available at <http://oipbelgique.be/fr/wp-content/uploads/2013/11/Microsoft-Word-Notice-version-2013.pdf> (last access 26 June 2018), at page 165.

<sup>295</sup> Ibid., at page 166. Author's translation of 'Les internés des annexes sont en général « soignés » exclusivement à coup de neuroleptiques...'

<sup>296</sup> As explained in chapter 4, the Act on Confinement was adopted in 2014 and entered into force in 2016. Before 2016, the legislation in force was the Act on Social Defense of 1930, which was also reformed, in 1964.

<sup>297</sup> Conseil de L'Europe, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée em Belgique par la Comité européen pour la prévention de la torture et des peines ou traitements inhumains et dégradants (CPT) du 27 mars au 6 avril 2017*, U.N. Doc. CPT/Inf (2018) 8, Strasbourg, 2018, at page 7. Author's translation of 'fonctionnement et logique de

Considering the aforementioned reports, it is possible to infer that the ongoing practices of the Belgian State concerning the conditions of application of security measures frequently submit persons under internment measures to inhuman and degrading treatment. These practices are in explicit violation of Article 15 of the CRPD, which enshrines the right of persons with disabilities to be free from torture or cruel, inhuman or degrading treatment or punishment and creates States Parties' obligations to take measures to prevent persons with disabilities from being subjected to these kinds of treatment or punishment.

Following the CPRD Committee's considerations on the communication of Marlon James Noble, articulated in chapter 3, indefinite detention without any finding of guilt causes irreparable psychological effects and results in inhuman and degrading treatment. The Act on Confinement, similarly to the Australian legislation, allows indefinite detention without the possibility of pleading not guilty, due to the lack of recognition of legal capacity, which is another breach of Article 15 of the CRPD.

### **5.3 States Parties' obligations under the CRPD and the Act on Mental Health**

The Act on Mental Health regulates the protection measures, applied to persons with psychosocial disabilities only if their condition requires so, after the failure of all alternatives available, and if this condition severely puts his or her health or security in serious danger or constitutes a serious threat to the life or integrity of another person. Following the procedure described in chapter 4, the person submitted to the protection measure can be involuntarily hospitalised for up to four years in total.

The procedure provided for the application of protection measures is a very simplified procedure, if compared to conventional procedures on deprivation of the right to personal liberty. Such simplification is deemed to be justified by the preventative role of the protection measure, namely to hospitalise the person considered to put his or her health or security in danger or to threaten the life or integrity of another person before this imminence manifests itself, and by its civil character, since no act prohibited by criminal law was committed.

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prise en charge de type carcéral, manque cruel de personnel médical et socioéducatif, agents de surveillance en nombre insuffisant et sans formation spécialisée'.

As explained by Christopher Slobogin, the preventative role of deprivation of liberty of persons with psychosocial disabilities is not only applied when they have been acquitted from criminal responsibility and submitted to security measures, such as the measures under the Act on Confinement, but also ‘in the absence of criminal charges, upon sufficient proof of mental disability and risk,’<sup>298</sup> which is the case of protection measures, under the Act on Mental Health.

### **5.3.1. Article 12 and related provisions**

Although in the procedure provided for in the Act on Mental Health, the person with a disability can exercise his or her legal capacity, there are still references to a ‘legal representative,’ which essentially means a substituted decision-making regimes. This system clashes with the essence of the Convention to support persons with disabilities to make their own decisions, as articulated in chapter 3. Moreover, there are no procedural accommodations for the exercise of legal capacity in the Act on Mental Health, which leads to the violation of Articles 12, paragraph 3 and 13, paragraph 1 of the CRPD, on the obligation of States Parties’ to provide support in exercising legal capacity and procedural accommodations during trials for an effective access to justice.

In the Concluding Observations on Belgium, the Committee expressed concern that the Act on Mental Health ‘allows for the involuntary hospitali[s]ation of persons with psychosocial disabilities’.<sup>299</sup> The involuntary hospitalisations allowed in the Act on Mental Health are problematic in relation to the right to legal capacity, enshrined in Article 12, paragraph 2, and the right to enjoy the highest attainable standard of health without discrimination and to receive treatment on the basis of free and informed consent, provided in Article 25(d) of the CRPD. Both articles are strictly related since giving consent to treatment is an exercise of legal capacity.

Furthermore, the protection measures under the Act on Mental Health are not in compliance with the obligation of States Parties’ to repeal discriminatory laws on the basis of disability, under Article 5, paragraphs 1 and 2. One of the required criteria for the application of an involuntary hospitalisation measure is the existence of a psychosocial disability, which demonstrates that the Act allows the detention for treatment only with regard to persons with disabilities.

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<sup>298</sup> C. Slobogin (n. 269), at page 39.

<sup>299</sup> CRPD Committee, Concluding Observations on the initial report of Belgium (n. 279), at para. 25.

### 5.3.2. Article 14

The protection measure, besides being an involuntary hospitalisation measure, is also a measure of deprivation of liberty. The Act on Mental Health is not in compliance with Article 14, paragraphs 1 and 2 of the CPRD, which prohibits the deprivation of liberty on the ground of disability as well as arbitrary detention. As aforementioned, the Committee understands, in the Guidelines on Article 14, that perceived dangerousness and alleged need for treatment are not legitimate grounds for detention. Those are the grounds employed in the application of protection measures. Consequently, the detentions under the Act on Mental Health are arbitrary detentions if compared to the standards of the Convention.

### 5.3.3 Practices and breaches of the CPRD

In relation to the practices promoted by the Belgian State in the application of protection measures, there is information available in the CPT report of 2016, in relation to visits to Belgian hospital in 2013. The CPT visited the Brugmann hospital, where there were persons under protection measures, and did not receive any complaints of ill treatment.<sup>300</sup> According to the report, there are good conditions of treatment, with the assistance of multidisciplinary teams and an individualised plan of care.<sup>301</sup> Nevertheless, the CPT noted the use of instruments of physical restraint on patients for several days, such as handcuffs or immobilisation devices, a practice that cannot have any medical justification and may amount to ill treatment.<sup>302</sup>

The visit of the CPT to Brugmann hospital is only one example of Belgian practice. However, it shows that there are less violations in relation to Article 15 of the CPRD, if compared to the practices articulated in the sub-section above. Nonetheless, the practice of protracted physical restraints may amount to the violation of Article 15 and Article 17 of the CPRD. Moreover, the perpetration of forced treatment itself is considered a violation to the right of physical and mental integrity, enshrined in Article 17.<sup>303</sup>

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<sup>300</sup> Conseil de L'Europe (n. 289), at paras. 154 and 155.

<sup>301</sup> Ibid, at paras. 157 and 158.

<sup>302</sup> Ibid, at para. 162.

<sup>303</sup> CRPD Committee, General Comment no. 1 (2014) – Article 12: Equal recognition before the law (eleventh session, 31 March-11 April 2014), CRPD/C/GC/1, para. 42.

## 5.4. Recommendations on the Belgian system

In the case *W.D v. Belgium*, the ECtHR held that Belgium has a structural problem in relation to its internment policy as a source of recurrent violations of the ECHR<sup>304</sup> and adopted, in this case, the pilot judgement procedure, which has the aim of ‘identifying the structural problems of underlying repetitive cases against many countries and imposing an obligation on States to address those problems.’<sup>305</sup> This section will articulate recommendations on Belgium considering its structural problem on the matter under discussion, but bearing the CRPD as a standard, not the ECHR.

As stated before, the CRPD provides a paradigm shift in relation to the rights of persons with disabilities and, despite all the work of the CRPD Committee in providing authoritative interpretations, there is still heated discussions about the interpretation of and compliance with the obligations established in the Convention in the legal academic field. In this regard, the recommendations will be divided in two sub-sections, addressing the security and the protection measures, that will introduce, very briefly, the relevant academic discussion on each of these measures.

### 5.4.1. Recommendations on the Belgian security measures system

As mentioned in chapter 3, the UN Commissioner for Human Rights, in its Annual Report, stated that Article 12 demands that States Parties abolish defences on the ground of the ‘negation of criminal responsibility because of the existence of a [psychosocial] or intellectual disability’, since it is discrimination on the basis of disability. States Parties should apply, instead, disability-neutral doctrines on the subjective element of the crime (*mens rea*), taking into consideration the situation of the individual defendant.<sup>306</sup> Nonetheless, the term ‘disability-neutral’ is not used in the text of the CRPD, nor in the CRPD Committee’s documents and practices. All the same, the position of the High Commissioner is supported by legal scholars, such as Slobogin and Minkowitz.

In the considerations of Slobogin, in order to comply with the obligations contained in the CRPD, psychosocial and intellectual disability defences, such as the insanity defence, must be

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<sup>304</sup> Case *W.D v. Belgium* (n. 286), at para. 159.

<sup>305</sup> European Court of Human Rights, Factsheet-Pilot judgments, Press Unit, February 2018. Available at [https://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf), at page 1.

<sup>306</sup> Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, Adopted in Tenth Session, A/HRC/10/48, 2009, at para. 47.

abolished, or at least substantially revised, and if a person with psychosocial or intellectual disabilities ‘is to have any type of excuse for criminal acts, it must be one that focuses on the “subjective element” of the offence.’<sup>307</sup> This is what Slobogin calls the ‘integrationist’ approach, which moves towards a subjectification of *mens rea*. This means that blameworthiness is assessed based on the defendant’s actual desires and beliefs rather than on their provenance or according to what a reasonable person would have desired or believed.<sup>308</sup> Moreover, only the desires and beliefs that indicate an absence of intent to cause harm or a belief in justificatory facts would be excused.<sup>309</sup>

An example provided by Slobogin of how integrationist approach would function is the famous case of John Hinckley, who was found not guilty by reason of insanity, after trying to shoot the American president Ronald Reagan because he believed it would unite him with the actress Jodie Foster. Slobogin explains that Hinckley would not have a defence under the integrationist approach considering that he intended to assassinate Reagan to impress the actress, ‘even though he did not feel threatened by Reagan or anyone else.’<sup>310</sup> On the other hand, in the case of Daniel M’Naghten, who was also acquitted on the basis of insanity defence, he would have a viable defence under the integrationist approach, since ‘he believed that if he did not assassinate Prime Minister Peel he would himself be killed.’<sup>311</sup>

The disability neutral line of thought is followed also in the writings of Minkowitz, in the sense that, for her, ‘mental diversity, including unusual mental phenomena beliefs’ should be considered in the same way as any other perception, beliefs and worldview and would not imply an absence of criminal intent, since it amounts ‘to a stereotyped view of disability as a status that exempts the person from moral and legal accountability.’<sup>312</sup> The consequence of such an approach would be acquittal if there is failure to prove criminal intent or if any other affirmative defense is established, with non-discrimination and reasonable procedural accommodation in every phase of the trial.<sup>313</sup>

Despite the well-founded positions presented above, there are legal scholars against disability-neutral defences, for several reasons.<sup>314</sup> I will consider the positions of Peter Bartlett and Arlene Kanter in this sub-section. In the opinion of Bartlett, the use of disability-neutral criteria in criminal law, as

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<sup>307</sup> C Slobogin, (n. 269), at pages 37 and 38.

<sup>308</sup> Ibid., at page 37 and 39.

<sup>309</sup> Ibid, at page 39.

<sup>310</sup> Ibid, at page 38.

<sup>311</sup> Ibid, at page 39.

<sup>312</sup> T Minkowitz, Rethinking Criminal Responsibility From a Critical Disability Perspective: the Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond, at page 41.

<sup>313</sup> Ibid,

<sup>314</sup> For instance, Bartlett (2012), Craigie (2015), Kanter (2015) and Wondemaghen (2017). See the bibliography section.

referred to by the High Commissioner, is ‘counter-intuitive’, since the problem of over-representation of people with disabilities in prison would be exacerbated.<sup>315</sup> The author presents numbers on the prison population of the United Kingdom; however, according to the World Health Organisation (‘WHO’) and the International Committee of the Red Cross (‘ICRC’), psychosocial and intellectual disabilities are especially prevalent in prison populations. Moreover, these disabilities ‘may be present before admission to prison, and may be further exacerbated by the stress of imprisonment’ or develop as a consequence of imprisonment.<sup>316</sup>

Bartlett also argues that by having disability neutral defences and removing the diagnostic of an impairment, one of the criteria of defence, would be useless if the claim is precisely that the individual is unable to be held responsible for his acts due to his or her disability.<sup>317</sup> Therefore, the reformed law would be indirectly discriminatory, given that the impairment would be associated to the incapability of conducting a defence or irresponsibility for one’s actions.<sup>318</sup> However, the proposition of Slobogin and Minkowitz of an integrationist approach on the subject element of the crime and consideration of the person’s belief and worldview seem to give a good way out of the issue present by Bartlett, since even if the impairment is indirectly relevant, the person’s ‘mental diversity’ would be considered as any other perception and beliefs.

Kanter, in turn, also notes with concern the likely increase in the number of incarceration of people with disabilities and states that disability-neutral defences seem to violate the general principles of the CRPD.<sup>319</sup> For Kanter, the appropriate reading of Article 14 of the CRPD is to call the repeal of all laws that authorise the treatment and detention of people with disabilities on the basis of disability, and not to replace them with disability-neutral laws. Additionally, following Kanter’s rationale, disability-neutral laws may violate Article 19 of the CPRD to live in the community, since people with disabilities would be detained, even on a basis other than their disability,<sup>320</sup> for an example on the basis of a criminal conviction.

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<sup>315</sup> P Barlett, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, *The Modern Law Review*, Vol. 75, no. 5, 2012, pp. 752-778. Available at <http://www.jstor.org/stable/41682870> (last access 29 June 2018), at page 776.

<sup>316</sup> WHO and ICRC, ‘Information Sheet - Mental Health and Prison’, (n.d). Available at [http://www.who.int/mental\\_health/policy/mh\\_in\\_prison.pdf](http://www.who.int/mental_health/policy/mh_in_prison.pdf) (last access 30 June 2018).

<sup>317</sup> P Barlett (n. 315), at page 776.

<sup>318</sup> Ibid.

<sup>319</sup> A S Kanter, *The Development of Disability Rights Under International Law: from Charity to Human Rights*, Routledge, New York, 2015, at page 144.

<sup>320</sup> Ibid., at page 45.

The positions of Bartlett and Kanter bring very important reflections, which will be considered in the following recommendations. However, it does not seem that Articles 14 and 19 of the CRPD prohibit the detention of persons with disabilities outright where criminal intent is present, for example, as explained in chapter 3. The problem with the defences based on disability, such as insanity defence, is that they perpetuate the false notion that persons with psychosocial or intellectual disabilities are more dangerous than people without these kinds of disability and allows their indefinite detention. In applying neutral-disability laws, there would be no imposition of detention on the basis of disability and no submission to involuntary treatment.

The propositions of the UN High Commissioner for Human Rights, Slobogin and Minkowitz appear to be in line with the CRPD Committee's Concluding Observations on Belgium, even though the Committee does explicitly use the term 'disability-neutral law.' As the CRPD Committee, I recommend the State party to remove the system of security measures and apply the 'ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system'.<sup>321</sup>

In relation to involuntary treatment as a consequence of the application of security measures, my recommendations to Belgium are, besides the abolishment of security measures and the application of ordinary criminal procedure, already pointed out by the Committee, the abolishment of any measure that allows involuntary treatment as a consequence of an acquittal or criminal conviction. In this sense, if a person is absolved, the penal system should hold no control over him or her, including in the form of treatment, and, if criminally convicted, him or her should be held responsible on an equal basis with others. In addition, as argued above by the Committee, Belgium must provide access to procedural accommodations and support to persons with disabilities during their participation in trials, where necessary.

In relation to detention in prison, as the Committee recommended, Belgium must guarantee the right to reasonable accommodations for all persons with disabilities who are detained in prison, which confirms the position that persons with disabilities can be detained in prisons, as long as reasonable accommodations are provided, including 'their access to health care on an equal footing with others, on the basis of their free and informed consent, and to the same level of health care as that provided in society at large.'<sup>322</sup>

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<sup>321</sup> CRPD Committee, Concluding Observations on the initial report of Belgium (n. 279), at para 28.

<sup>322</sup> Ibid, at para. 29.

Belgium's compliance with the recommendations made so far are vital to the fulfilment of the State party's obligations under the main articles of the CRPD discussed in this thesis. For instance, the obligation to equal recognition before the law and access to justice are fulfilled by the ability of persons with disabilities to stand trial on an equal footing with others; the obligations to respect the right to liberty and security, the right to give consent to medical treatment and to non-discrimination on the basis of disability are fulfilled by the abolishment of security measures, given that, if a person with disabilities is found guilty, his or her deprivation of liberty will be based on a criminal conviction, not in their disability and involuntary detention in special facilities, such as social defence facilities, will cease to exist.

Nonetheless, it is key to consider that a possible increase in the number of persons with disabilities in prisons is against the purpose of the CRPD. As stated in the WHO and ICRC's Information Sheet, factors such as overcrowding, violence, solitude, isolation, lack of privacy, insecurity about future prospects and inadequate health services, elements present in Belgian prisons, have very negative effects on mental health and very often lead to depression and an increased risk of suicide.<sup>323</sup> Additionally, the stigma and marginalisation of people with disabilities persists in prison.<sup>324</sup>

The obligation to provide community-based support services, as provided in Article 19 of the CRPD, is an important tool to prevent higher rates of incarceration of people with disabilities and even decrease current rates of imprisonment. The execution of criminal sentences for persons with disabilities should give way to community-based services and only apply imprisonment as *ultima ratio*, as part of reasonable accommodation procedures, taking into account its detrimental effect on persons with psychosocial and intellectual disabilities.

On this matter, it is essential that Belgium reinforces the ongoing Reform 107 and its multidisciplinary teams. Firstly, to examine, in collaboration with the competent judge, the need for imprisonment in each individual case, and, secondly, to provide community-based services to persons with psychosocial and intellectual disabilities. This would have the aim to promote support during the criminal procedure, that is, before the criminal sentence, foster the discussion and the construct of an individualised accountability and rehabilitation processes and offer treatment on a voluntary basis.

Lastly, regarding persons currently under the security measure, Belgium must establish 'an independent formal complaint mechanism accessible to all persons detained in prisons or in forensic

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<sup>323</sup> WHO and ICRC, Information Sheet (n. 316), at page 1.

<sup>324</sup> Ibid, at page 2.

institutions,<sup>325</sup> as recommended by the CRPD Committee, in order to comply with their right to access to justice on an equal basis with others and their right not to be submitted to unlawful or arbitrary detention.

#### **5.4.2. Recommendations on the Belgian protection measures system**

Having the reflections of the UN High Commissioner for Human Rights again as a starting point, he also states that laws providing for the detention for care and treatment or to preventive detention of persons considered dangerous on the basis of their disability, even though no crime was committed (as in the case of the Belgian protection measures), should be de-linked from disability, or have disability-neutral legal grounds, that should be applied to restrict the liberty of all persons on an equal basis.

Slobogin follows the solution given by the UN High Commissioner for Human Rights and proposes the ‘undeterrability’ formulation, that would apply to persons ‘who tend to cause harm in the delusional belief that they are not violating the criminal law,’ which would be those persons acquitted in the ‘integrationist test’, mentioned above; and ‘those who have urges so strong that they tend to commit crime despite a high risk of apprehension and punishment,<sup>326</sup> and the preventive detention would be used to impede commitment of a very likely criminal act.

According to Slobogin, the preventive detention of persons considered ‘dangerous beyond their control’ would be neutral, since it would apply to other categories, such as people with contagious diseases and enemy combatants, and would be in compliance with the CRPD.<sup>327</sup> Moreover, Slobogin clarifies that such dispositions should be subjected to limitations, namely the ‘risk proportionality principle,’ requiring proof of risk and harm before the confinement and greater proof as this confinement becomes prolonged, and the ‘least dramatic means principle,’ which requires the application of the least restrictive method, that can be community-based treatment programs for people with psychosocial or intellectual disabilities.<sup>328</sup>

The counterpoint to the views of the UN High Commissioner for Human Rights and of Slobogin is the position of Barlett, who states that the solution of disability-neutral criteria does not solve the problem of compliance of protection measures with the CRPD, since disability would still be relevant

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<sup>325</sup> CRPD Committee, CRPD Committee, Concluding Observations on the initial report of Belgium (n. 279), at para. 29.

<sup>326</sup> Slobogin (n. 269), at page 39.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

and would simply become an implied discrimination.<sup>329</sup> Additionally, he observes that, following the rationale of the UN High Commissioner for Human Rights,

a disability-neutral law could be introduced to detain people who are perceived as dangerous, irrespective of disability. While this might satisfy the problems of interpretation of Article 14, it is difficult to see it as a good idea. It is difficult to see that it would be wise in human rights terms to encourage autocratic regimes to introduce laws allowing the detention of people perceived as dangerous (whether mentally disabled or not), as such law invites political abuse.<sup>330</sup>

Further, Barlett recognises that if such law is open to abuse if applied to all people, since dangerousness 'is such an unclear category and may be open to abuse and misuse,' it only demonstrates how discriminative these kind of laws are to people with disabilities,<sup>331</sup> since people without disabilities are not submitted to forced treatment after an assessment of dangerousness. Another critique made by Bartlett is that, by applying the statement of the UN High Commissioner for Human Rights, current detentions would be lawful if based on a neutral criteria and this is highly problematic, considering that the move to community-based treatment is still in progress and policies for people with disabilities 'must include the removal of these people from hospital and similar institutions to community-based alternatives.'<sup>332</sup>

According to Barlett, Article 19 of the CRPD should be interpreted to achieve community-based treatment and the restriction on institutional detention and 'disability-neutral detention legislation does not imply a move to that end, however; it merely changes the justification for detention.'<sup>333</sup> According to Bartlett, persons with disabilities acting in dangerous ways should be dealt with on a voluntary basis, but there is a social perception nowadays that this may not be enough and criminal law should be invoked.<sup>334</sup> Nonetheless, as explained by the author, police cells and prisons are not appropriate places

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<sup>329</sup> P. Barlett, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, *The Modern Law Review*, Vol. 75, no. 5, 2012, pp. 752-778. Available at <http://www.jstor.org/stable/41682870> (last access 29 June 2018), at page 763.

<sup>330</sup> *Ibid.*, at page 773.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*, at page 774.

to detain someone with psychosocial or intellectual disability and the consequences of a criminal process can be especially damaging to their prospects after the release in the community.<sup>335</sup>

After having addressed the above difficult discussions, I recommend that Belgium should abolish or significantly review its Act on Mental Health in regard to protection measure, in a manner to repeal ‘involuntary hospitali(s)ation of persons with psychosocial disabilities on the basis of their disability,’ as recommended by the CRPD Committee.<sup>336</sup> In my opinion, voluntary treatment should be the priority of mental health systems, given ‘that people with or without disabilities are free to seek and receive treatment on a voluntary basis,’ which ‘has much better outcomes than forced treatment, of any kind,’ as contended by Kanter.<sup>337</sup> Furthermore, following Kanter’s rationale, if a person is behaving in a dangerous way, Belgium ‘should apply existing criminal laws or write new criminal laws to address the behavior that the State seeks to control.’<sup>338</sup>

The abolishment of hospitalisation measures, such as the protection measure, is essential to the realisation of States Parties obligations under the CPRD, including Articles 5, on the prohibition of discrimination on the basis of disability, Article 12, on the obligation to recognise to legal capacity, Article 14, on the obligation to provide liberty and security, Article 17, on the obligation to provide personal integrity and Article 25(d), on the right to give free and informed consent to treatment.

Following the common idea of Slobogin, Bartlett and Kanter on the importance of voluntary community-based treatment in dealing with persons with disabilities acting in ‘dangerous ways,’ I recommend, again, the reinforcement of the Reform 107. More investment must be provided to multidisciplinary teams, in order to provide quality service of support and treatment, on a voluntary basis, and to promote deinstitutionalisation, at the end to comply with its obligations under Article 19 of the CRPD and the recommendations of the CRPD Committee of working ‘towards deinstitutionali[s]ation by reducing investment in collective infrastructure and promoting personal choice.’<sup>339</sup>

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<sup>335</sup> Ibid.

<sup>336</sup> CRPD Committee (n 11), at para. 25.

<sup>337</sup> A. S. Kanter (n 49), at page 152.

<sup>338</sup> Ibid, at page 145.

<sup>339</sup> CRPD Committee (n 11), at para. 33.

## 6.4 Final considerations

The recommendations articulated in this chapter have the aim to afford a starting point to the changes required in Belgium to confront its structural problems in relation to its mental health and internment policies. I acknowledge the difficulty of the subject, given the divergence of opinion in the academic field, and the difficulties in providing new policies and legislation in accordance with the CRPD, given its change of paradigm not completely integrated in our western society. Yet, new solutions need to be constructed in close contact with multidisciplinary mental health professionals and, more importantly, with representatives of the Belgian disability rights movement, ‘both as stakeholders and as subject-matter experts.’<sup>340</sup>

The participation of persons with disabilities in this process is meant to give effectiveness to one of the general principle of the CRPD, which is their full and effective participation and inclusion in society, as provided in Article 3(c). It is also intended to fulfil the general obligation to consult and closely involve persons with disabilities in decision-making processes of their concern through their representative organisations, enshrined in Article 4, paragraph 3.

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<sup>340</sup> T. Minkowitz (n. 312), p. 14.

## **Chapter 6**

### **Concluding Remarks**

#### **6.1 Summary of the main conclusions**

The objective of this thesis was to investigate whether Belgian law, policy and practices with regard to involuntary institutionalisation of persons with psychosocial and intellectual disabilities are in compliance with the CRPD, as indicated in the main research question pinpointed in chapter 1. In order to respond to the main research question, I established four other sub-research question, which will be referred to and answered below, as well as the main question.

##### **6.1.1 States Parties' obligations under Articles 12 and 14**

The first sub-research question – ‘what are States Parties’ obligations under the CRPD with regard to Articles 12 and 14 of the Convention?’ – demanded an interpretation of both articles, in accordance with the interpretative tools provided in Articles 31 and 32 of the VCLT, namely the literal, the systematic, the teleological and the historical approaches, as explained in chapter 1. Using the VCLT methodology, I consulted not only the CRPD’s text but also subsidiary sources of interpretation, such as general comments and concluding observations of the CRPD Committee, preparatory works and writings of legal scholars.

With the objective to provide a contextualisation, I articulated in chapter 2 how the paternalist tradition and the medical model of disability result in a cultural perception that persons with disabilities are incapable to make their own decisions and are objects of charity and treatment. These perceptions are reflected in law by the denial of legal capacity on the basis of an impairment or in findings that a person’s decision-making skills are deficit or have negative consequences. This approach is often discriminatorily applied to persons with disabilities and is often used to justify their institutionalisation, regardless of their will.

I will start this summation with the interpretation of Article 12 of the CRPD developed in chapter 3. Articles 12(1) and (2) establish the obligation of States Parties to respect, protect and fulfil the right of persons with disabilities to equal recognition before the law, which includes the obligation to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. In other words, States Parties must abolish denials of legal capacity based on the personal trait

of disability, be it on the ground of the diagnosis of an impairment or on findings of deficit or ‘bad’ decision-making skills. Instead, States Parties have the obligation to provide persons with disabilities with the required support in exercising their legal capacity, as provided in Article 12, paragraph 3.

Article 12 is at the very centre of the human rights model of disability, which perceives disability as part of human diversity and regards persons with disabilities as subjects of rights, who may need support as any other person without disabilities. Hence, regimes of substituted decision-making, such as guardianship or trusteeship laws, must be replaced by regimes of supported decision-making, in order to preserve the person’s exercise of legal capacity.

The obligations contained in Article 12 have effects also in the criminal field, in the sense that States Parties have the obligation to remove defences and assumptions based on the existence of a disability and provide support, such as accommodations measures to facilitate the participation of persons with disabilities in courts and trials. Such defences and assumptions prevent persons with disabilities to fully exercise their legal capacity and impede the resolution of their criminal culpability.

Following this interpretation, the answer to the second sub-research question – ‘is the denial of criminal responsibility on the ground of disability a breach of the right to equal recognition before the law?’ – is positive, for same reasons pointed out above. States Parties also should apply disability-neutral doctrines on the subjective element of the crime (*mens rea*), as contended by the UN High Commissioner for Human Rights and supported by the drafting history of the CRPD.

Regimes of substituted decision-making, the negation of criminal responsibility and declarations of unfitness to stand trial, based on the existence of a psychosocial or intellectual disabilities, are closely related to the exposure this group of people to involuntary institutionalisation, such as hospitalisation and internment in psychiatric annexes of prison or in secured health facilities. Article 14 of the CPRD on the right to liberty and security tackles this situation of vulnerability of persons with disabilities to be deprived of their liberty in the name of their ‘well-being’ and treatment.

As outlined in chapter 3, Article 14, paragraph 1(b), bans the deprivation of liberty of persons with disabilities on the ground of the existence of a disability, even if combined with other criteria, such as the alleged need for treatment; or inability to care for oneself; or considerations that they pose danger to self or to others. Therefore, States Parties have the obligation to repeal laws and policies that allow the deprivation of liberty of persons with disabilities based on their disability, including the security measures that impose the internment of persons considered incapable of being held criminally responsible.

Furthermore, Article 14, paragraph 1(b) and paragraph 2 of the CRPD prohibits any unlawful or arbitrary deprivation of liberty, including those based on the criteria of disability. Those provisions create the obligation of States Parties to ensure that persons with disabilities are deprived of their liberty through processes that are in accordance with human rights international laws and standards and in compliance with the objectives and principles of the CRPD.

The above answers the first and second sub-research questions. Below, the third sub-research question will be addressed.

### **6.1.2 The relation of Articles 12 and 14 with other provisions of the CRPD**

The third sub-research question – ‘what is the relation between States Parties’ obligations under Articles 12 and 14 with other inherent rights provided by the CRPD?’ – was discussed along with the interpretation of Articles 12 and 14 in chapter 3. Naturally, all the provisions of the CRPD are highly related, particularly with two central provisions, such as Articles 12 and 14. However, this thesis has demonstrated that those provisions are also interlinked with other core provisions of the CRPD that are related to the deprivation of liberty of persons with psychosocial and intellectual disabilities.

Firstly, Article 12 gives effectiveness to the right of equality and non-discrimination on the basis of disability, as provided in Articles 5, paragraphs 1 and 2 of the CRPD, since the right to equal recognition before the law prohibits exactly the discriminatory denial of legal capacity. The obligation of States Parties to take the appropriate measures to provide persons with disabilities with support in exercising legal capacity is also closely related to the obligation enshrined in Article 13, paragraph 1. This article requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including procedural accommodations during trials and court procedures.

Article 25(d) of the CRPD, on the right to enjoy the highest attainable standard of health, is intrinsically linked to the right to exercise legal capacity in Article 12 and the right to liberty and security in Article 14. Article 25 creates the obligation of States Parties to ensure that mental health services are provided on the basis of free and informed consent, giving way to the exercise of legal capacity, and to ensure that no one is detained against their will in a medical facility on the basis of their disability, as that would constitute arbitrary or unlawful detention.

Articles 15, 16, 17 and 19 of the CRPD, which must be read in conjunction, are correlated to Article 14 of the CRPD, in the sense they refer to right of persons with disabilities to be free from torture or cruel, inhuman or degrading treatment or punishment; and from exploitation, violence and

abuse; to have their personal integrity protected; and the right to live in the community. Such inherent rights are often disregarded in the context of involuntary institutionalisation in mental health facilities, where persons with psychosocial and intellectual disabilities are vulnerable to all kinds of abuses and medical interventions, as pointed out by the UN Special Rapporteurs Juan E. Mendéz and Manfred Nowak. These conditions also run counter to the prohibition of forced institutionalisation, implicated by Article 19(a) – the obligation of States Parties not to oblige persons with disabilities to live in a particular living arrangement.

The provisions of the CRPD articulated above contain States Parties' obligations and rights of persons with disabilities that indivisible to the rights and obligations provided for in Articles 12 and 14 in relation to the detention of persons with psychosocial and intellectual. All of them should be read in conjunction with the purpose and principles of the CRPD, established in its Articles 1 and 3. Below, the fourth sub-research question will be referred to.

### **6.1.3 The Belgian system and its compliance with the CRPD's standards**

In chapter 4, I outlined the control measures applied to persons with psychosocial and intellectual disabilities in Belgian law, namely the security measures, imposed on those considered not responsible for committing a criminal act and regulated in the Act on Confinement. I also highlighted the protection measures, implemented in cases where a person's condition is considered to put his or her security in danger or constitutes a threat to the life or integrity of another person, regulated in the Act on Mental Health. The Reform 107 policy, which has the objective to foster community-based treatment as primary form of mental health care delivery, was also briefly described. This policy is composed of five key features, which have the efforts to engage different actors in the process of care (multidisciplinary teams and family) and avoid the institutionalisation of patients.

In chapter 5, I analysed the compliance of the above-mentioned control measures (*i.e* the security measures and protection measures) with the States Parties obligations under the articulated provisions of the CRPD, in order to answer the fourth sub-research question – 'do the criteria set out under Belgian law create lawful grounds for detention under the CRPD's standards?'. Both control measures demand the proof of an impairment as one of the criteria that justify the deprivation of liberty of the person submitted to these measures. As a result, the security and protection measures are discriminatorily applied to persons with psychosocial and intellectual disabilities, on the ground of their disability.

The discriminatory criteria contained in Belgian security and protection measures are problematic in relation to Articles 5, paragraphs 1 and 2, 12, 14 and Article 25(d), in the sense that they deprive persons with disabilities from their right to liberty on the ground of their disability and submit them to involuntary treatment.

The situation of internment of persons under the security measures in psychiatric annexes of prison and in secured facilities and under protection measures in hospitals was also addressed with the support of UNCAT, the CPT and International Prison Observatory reports. In the case of practices related to the implementation of security measures, it was considered that Belgium has a structural problem in its internment policy, which amounts to recurrent breaches of Articles 15 and 17 of the CRPD. The practices related to the protection measures do not configure a structural problem, however certain practices were problematic with regard to Articles 15 and 17 of the CRPD, such as the prolonged use of physical restraints (handcuffs or immobilisation devices).

Going back to the main research question – ‘are Belgium law, policy and practices with regard to the institutionalisation of persons with psychosocial and intellectual disabilities in compliance with the CRPD?’, I conclude that the law, meaning the control measures, as well as the policy and practices related to them, reported by international treaty bodies and NGOs, are not in compliance with the CRPD standards. The control measures allow the detention of persons with psychosocial and intellectual disabilities on the basis of their disability, making a clear link between their disability and a supposed intrinsic dangerousness. Such findings are highly stigmatising and expose the group concerned to all kinds of abuse and ill treatment, segregated from mainstream society, in some cases, for life. Nonetheless, it is worth noting that the ongoing Reform 107 is a policy in compliance with the CRPD, which should be expanded and optimised, since it has the potential to radically change the current failed policies of institutionalised-care in Belgium to community-based care.

## **6.2 A Consideration of Current Challenges**

The control measures contained in the Belgian system, particularly the security measures, regulated by the Act on Confinement, are based on the concept of the intrinsically ‘dangerous individual’, as articulated by Michel Foucault in a text of 1978.<sup>341</sup> According to him, the Belgian Social

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<sup>341</sup> M Foucault, ‘About the Concept of the “Dangerous Individual” in the 19<sup>th</sup> Century Legal Psychiatry’ (translated by Alain Baudot and Jane Couchman), *International Journal of Law and Psychiatry*, Vol. 1, p. 1-18, 1978, Pergamon Press.

Defence theory, foundational behind the Act on Social Defense of 1930, which is mentioned in chapter 4, was based on degeneration and eugenics theories and links the individual with psychosocial and intellectual disability with the notion of the pathological, of the undeterrably violent and of imminent risk of violence.<sup>342</sup> Since the Act on Confinement of 2014 does not represent a significant shift from the logic behind the Act of 1930, the Social Defence theory continues to normatively justify the application of the security measures in Belgium.

Furthermore, the model of disability behind the Belgian laws articulated in this thesis is the medical model, in the sense that they portray persons with disabilities as incapable of taking responsibility for their actions, with little or no way to the support for the exercise of their legal capacity nor for their full participation in procedures where their right to liberty and to consent to treatment are at stake. The medical model of disability is still embedded in our culture, as pointed out in chapter 2, and the disability rights movement and the CPRD have only begun to open our eyes to a new, more inclusive way to perceive disability.

Concurrently, as noted by Peter Bartlett, the risk analysis of persons with psychosocial and intellectual disabilities is back on the academic and political agenda, and, certainly, in the attention of the media, since the crimes committed by this group of people ‘sell newspapers’<sup>343</sup> and only reinforces the myth of the damned and fearful ‘dangerous individual.’ As an extension of this phenomena, a segment of neuroscience has been researching a possible link between aggression and biological abnormality, evoking images of ‘the eugenics movement and the misappropriation of biology to provide a rationale for oppressive social policies.’<sup>344</sup>

As explained by Nigel Eastman and Colin Campbell, neuroscientific findings are being employed by defence lawyers in the US as attempts ‘to demonstrate that particular defendants are both abnormal and not (fully) responsible for their actions – it wasn’t me, it was my brain’ and also by the UK government to build ‘new laws towards preventive detention of those deemed to express ‘dangerous and severe personality disorder’’, even if no criminal act was committed.<sup>345</sup> It is important to note that these considerations do not have the aim to criticise neuroscience itself, but to point out that its findings are being used in court as evidence of criminal responsibility and as justification of preventive detention of particular individuals, on the basis of their disability. Thus, reflects the medical

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<sup>342</sup> Ibid.

<sup>343</sup> P Bartlett, ‘The Test of Compulsion in Mental Health Law: Capacity, Therapeutic Benefit and Dangerousness as a Possible Criteria’, *Medical Law Review*, 11, Autumn 2003, pp. 326-352, Oxford University Press 2003, at page 331.

<sup>344</sup> N Eastman and C Campbell, ‘Neuroscience and legal determination of criminal responsibility’, *Nature Reviews*, Volume 7, April 2006, at page 312.

<sup>345</sup> Ibid, at page 311.

model of disability. In addition, Eastman and Campbell contend that the use of neuroscientific evidence is highly debatable, since its interpretation is problematic and they have no ‘predictive validity.’<sup>346</sup>

In the same way that Foucault alerted how psychiatry was used as a tool of social control through its interventions in the penal system with the objective to protect society from individuals deemed to be dangerous, as mentioned in chapter 2, Eastman and Campbell identify the same logic of social control in modern neuroscience, recalling the image of the intrinsically or biologically dangerous individual. This is particularly threatening to the right to liberty of persons with psychosocial and intellectual disabilities since their disability still is a justification for detention and, in addition, there is an increased vulnerability of this group to be submitted to preventive detention. Their vulnerability is heightened by a ‘new culture of crime control,’<sup>347</sup> characterised by a ‘policy era of ‘zero tolerance of risk,’<sup>348</sup> mass incarceration and a more punitive trend, that affects mostly the poorest and more marginalised groups of society,<sup>349</sup> in which there is a higher incidence of people with psychosocial and intellectual disabilities, as demonstrated by the data mentioned in chapter 2.

### 6.3 Conclusion

This thesis has provided a thorough analysis of States Parties’ obligations under the CRPD with regard to the detention of persons with psychosocial and intellectual disabilities and the compliance of the Belgian law – the system of control measures (*i.e.* security and protection measures) – and the related practices and policies related, with the standards provided for in the Convention. As summarised in this concluding chapter, the Belgian control measures are not in compliance with States Parties’ obligations, reflecting a perception of persons with disabilities considered obsolete by the disability rights movements and by the Convention itself.

The link between disability and dangerousness found in the Belgian system is a highly stigmatising relationship still present in many mental health and criminal laws worldwide, and finding a solution that is compliance with the CRPD is anything but simple, as demonstrated by the diversity of legal scholars’ opinions on this matter, articulated in my recommendations. Nonetheless, the denial of the exercise of legal capacity by persons with disabilities, their involuntary institutionalisation and

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<sup>346</sup> Ibid, at page 313.

<sup>347</sup> Term coined by D. Garland in his book *The Culture of Control: Crime and Social Order in Contemporary Society*, 2002, Oxford Scholarship Online, March 2012.

<sup>348</sup> Ibid, 311.

<sup>349</sup> Those features were identified by D Garland (n. 347).

treatment against their will are practices that are no longer acceptable under the Convention and the human rights model of disability.

Despite the all of the efforts of the disability movement and the advent of the CRPD, the objectifying myth that persons with psychosocial and intellectual disabilities are more dangerous or more prone to commit violent acts than persons without disabilities continues to play a role in politics and science, which is reflected in laws and policies aswell. This is even more worrying in a society that is clearly moving away from ideas of inclusion and equality, with a growing social inequality and a logic of incarceration of marginalised groups.

I emphasise these challenges posed by our society not to nullify all of the achievements of the disability rights movements, whose main accomplishments were addressed throughout this thesis and which have the CRPD as major emblem of this struggle. I acknowledge these challenges to underline the importance of the disability rights movement and of the CRPD, since they promote the full participation and inclusion of persons with disabilities in society. The participation of persons with disabilities in the academic and political fields are key to fight the structural inequalities underlying a culture of exclusion of the poor and the ‘unfit.’

I end this thesis echoing the words of the distinguished member of the Italian deinstitutionalisation movement, the psychiatrist Franco Basaglia: ‘From the pessimism of reason, to the optimism of practice.’<sup>350</sup> The CRPD opens the way to a transformative and meaningful practice, with the potential to tackle the very roots of a logic of oppression and segregation of difference, towards a richer, more diverse and inclusive society.

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<sup>350</sup> Author’s translation of ‘dal pessimismo della ragione all’otimismo della pratica’, In F Basaglia, ‘Conferenze Brasiliane’, Raffaello Cortina Editore, Milano, 2000, available in italian at <https://anarcosurrealisti.noblogs.org/files/2010/10/Franco-Basaglia-Conferenze-brasiliane.pdf> last access 8 July 2018.

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