Global Campus Europe

UNIVERSITY OF NOTTINGHAM

**European Master's Programme in Human Rights and Democratisation**
**A.Y. 2023/2024**

# Healing or Jailing?

## Reconciling Fundamental Contradictions between the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities in Psychiatric Confinement Cases

Author: Emma Chiera
Supervisor: Peter Bartlett

Word Count Declaration: 27 158

Abstract

This essay presents a thorough analysis of the case law of the European Court of Human Rights, both prior to and following the entry into force of the Convention on the Rights of Persons with Disabilities (CRPD). The research will focus on cases involving violations of Article 5 of the European Convention on Human Rights (ECHR), which permits the involuntary confinement of persons of 'unsound mind'. As is discussed in this paper, the CRPD expressly prohibits confinement on the basis of disability; this essay asks how the Court has considered the CRPD in its case law in light of this contradiction between the two conventions. It will be shown that the Court has struggled to define the 'unsound mind' or equate it to a mental disability, and has been generally reluctant to include the CRPD in its rulings on psychiatric confinement cases. The Court has therefore neglected to apply the CRPD properly, or even to allow the CRPD to develop its case law in any way. The paper will conclude by suggesting methods for a more harmonious interpretation of the two conventions, and how the Court can be more progressive in its treatment of persons with disabilities and all those involuntarily confined.

Acknowledgements

*I am very grateful to my supervisor, Peter Bartlett, for all of your guidance. Without your suggestions and research materials, this dissertation could not have been completed. I truly appreciated our discussions.*

*I also offer my gratitude to the Global Campus of Human Rights and the European Union for funding this program and making this research experience possible. Thank you as well to my academic director, Jeffrey Kenner, for your warm welcome to Nottingham and your support.*

*Finally, I would like to thank my family, friends, and classmates – in particular Silvia Sattolo, India O'Hagan, and my lovely parents – for their helpful comments, reflections, and patience with me throughout this journey. I owe you!*

Table of Contents

# 1. Introduction

## 1a. Topic Introduction and Reason for Study

As of 2024, a mental health crisis has spread across Europe. The COVID-19 pandemic, which began in 2020 and lasted for approximately two years, had a lasting impact on the mental health of Europeans which has not yet subsided. An early estimate by the World Health Organization revealed that "in Europe the pandemic led to a 25% increase in mental disorders"[1] and that long-term effects might be much more severe. A 2023 survey by Eurobarometer also showed that almost 1 in 2 people in the European Union "had experienced emotional or psychosocial problems [..] in the previous 12 months"[2].

Keeping up with the demand for access to mental healthcare services is currently a challenge in some European countries, and tends to vary widely across different regions. Problems in mental healthcare across Europe include the quality of care, the quantity of professionals available, and the cost for patients[3]. More specifically,

> *"In 2019, according to Eurostat, there were 73 psychiatric care beds per 100 000 inhabitants […]: this ratio ranged from a high of 141 beds in Belgium down to a low of 8 beds in Italy. In 2020, […] there were between 9.2 and 28.2 psychiatrists per 100 000 inhabitants across Member States."*[4]

This era of increased incidence of mental disorders in Europe (and strain on mental healthcare systems) has been interestingly accompanied by a movement of increased awareness for disability rights. The Convention on the Rights of Persons with Disabilities, which entered into

---

[1] Angelini Pharma, 'The incidence of mental disorders in European countries' [2024] (Rome) <https://www.angelinipharma.com/our-responsibility/headway-a-new-roadmap-in-mental-health/the-incidence-of-mental-disorders-in-european-countries/> accessed 8 May 2024.
[2] European Council, 'Mental health' [2024] Council of the European Union <https://www.consilium.europa.eu/en/policies/mental-health/#:~:text=The%20state%20of%20mental%20health%20in%20the%20EU,-Before%20the%20COVID&text=Anxiety%20disorders%20affected%20an%20estimated,in%20the%20previous%2012%20month> accessed 8 May 2024.
[3] European Parliament, 'Briefing: Mental health in the EU' [2023] European Parliamentary Research Service <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751416/EPRS_BRI(2023)751416_EN.pdf> accessed 8 May 2024.
[4] Ibid.

force in 2008, was the first international treaty to emerge as a result of lobbying conducted extensively over the Internet[5], and since its emergence the disability rights movement has only grown. Disability rights are beginning to be more recognised, and afforded the same value as other minority rights within some legislations[6]; the disability rights movement is becoming more inclusive, with an increase in awareness of disability in LGBTIQ+ and racialized communities[7]; and in general, "the disability rights movement is a growing field in social science, especially in the backdrop of the ever-growing awareness of social and cultural change of the 21st Century"[8].

The current state of Europe described above establishes a perfect backdrop for studying how international law is affecting these dual cultural shifts. This paper will investigate how the European Court of Human Rights is utilising relevant international law instruments (particularly in the area of disability rights) in its judgment on cases dealing with forced psychiatric confinement. At a time when mental health is more precarious than ever across Europe, this research could not be more relevant. How are our legal structures aiding or failing us in times of global trouble? This study will reveal distressing shortcomings in the protection of human rights in psychiatric care, and the mishandling of these human rights violations by the institutions that are meant to protect the public. In particular, the European Court of Human Rights will be scrutinized for its failings in this regard as of recent years. All is not lost, however; international law can be used as an important tool for social progress if properly applied. Though many scholars, such as János Fiala-Butora, Oliver Lewis and Silvia Favalli, have noted the Court's shortcomings in acknowledging certain international conventions, they make few tangible recommendations for how to effectively integrate these conventions into case law. This paper will suggest such strategies for optimising international law that the Court could easily implement, hopefully leading towards a brighter future where mental health can be treated in Europe while human dignity is always maintained.

---

[5] Lecture by Dr. Andrea Broderick, Global Campus of Human Rights (Venice, 17 October 2023).
[6] Equality and Human Rights Commission, 'Disability discrimination' [2020] <https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/disability-discrimination#:~:text=The%20Equality%20Act%202010%20says,known%20as%20discrimination%20by%20association)> accessed 8 May 2024.
[7] Nu, 'Guest blog: promoting the inclusion of LGBTIQ+ people with disabilities' [2023] Social Development Direct <https://www.sddirect.org.uk/blog-article/guest-blog-promoting-inclusion-lgbtiq-people-disabilities> accessed 7 May 2024.
[8] Theerawut Rirattanapong, 'The disability rights movement in the EU and Europe' [2022] Chulalongkorn University Theses and Dissertations <https://digital.car.chula.ac.th/chulaetd/8104/> accessed 7 May 2024.

## 1b. Research Question

The question investigated in this paper will be the following:

In the context of deprivation of liberty (Article 5 of the European Convention on Human Rights) in psychiatric or social care, how has the European Court of Human Rights managed contradictions between the European Convention on Human Rights (ECHR) and United Nations Convention on the Rights of Persons with Disabilities (CRPD)?

To answer this, the following sub-questions will be researched:

- Has the Court addressed the following contradiction in Article 5 cases: that CRPD Article 14 does not allow for deprivation of liberty on the basis of disability, and ECHR Article 5 permits the deprivation of liberty for those of "unsound mind"[9]?
- How much has the Court actually considered the CRPD in Article 5 cases/judgments since it came into effect in 2008? Has the Court's stance on psychiatric confinement changed at all since then?
- How could the Court more fully incorporate the underlying principles of the CRPD into its case law?

## 1c. Methodology

I will begin with an analysis of both Conventions, examining relevant articles and analyzing contradictions in terms of discrimination and disability rights. This will establish the international human rights framework that will contextualize the European Court cases. I will also include an overview of a few relevant cases from before the entry into force of the CRPD, for a holistic understanding of the Court's stance on psychiatric confinement leading up to 2008.

The largest part of my research will be an examination of cases involving psychiatric deprivation of liberty since the CRPD came into force, comparing those where the Court cites the CRPD and the ones where the Court does not mention it at all. I will be checking for inconsistencies in the Court's approach, and for any signs of progression with time since the CRPD entered into force.

---

[9] European Convention on Human Rights, 1950.

Finally, I will include a literature review to investigate how the Court's limited use (or ignorance) of the CRPD has been perceived by scholars. To conclude, I will analyse suggestions from various scholars for how the Court could more effectively incorporate the principles of the CRPD into its interpretation of the ECHR, and offer my own recommendations.

# 2. Background

## 2a. The European Convention on Human Rights – Overview and Relevant Articles

The ECHR was adopted in 1950 and entered into force on September 3rd, 1953[10]. The rights entrenched in the Convention mirror many of the rights in the Universal Declaration of Human Rights. The difference was that, for the first time, this human rights instrument was legally binding[11]. The ECHR places a legal obligation on all 46 Council of Europe Member States to uphold the fundamental freedoms outlined therein. The ECHR contains 51 articles and numerous Protocols. The articles have not been amended since the document's original creation, and this paper will primarily be concerned with Article 5 - the right to liberty and security of person.

Though the ECHR articles have not been changed since their inception, the ECHR is still considered to be a "living instrument", as its interpretation is constantly revised through case law at the European Court of Human Rights[12]. (Whether or not the ECHR has actually been consistently treated as a "living instrument" will be discussed in the last chapter.) The Court was established in 1959 and sits in Strasbourg, France. The Court is meant to safeguard the ECHR and hear cases of human rights violations in all CoE Member States[13]. This paper will be concerned with cases of Article 5 violations - the Court's judgments, interpretations and resulting case law. European Court decisions have lasting impacts that can play a determining role in the future of human rights in Europe.

Before diving into European Court cases, we must examine Article 5 in further detail.

*ARTICLE 5*[14]

---

[10] Council of Europe, 'A Convention to protect your rights and liberties' (*Council of Europe* 2024) <https://www.coe.int/en/web/human-rights-convention#:~:text=A%20Convention%20to%20protect%20your%20rights%20and%20liberties&text=It%20was%20adopted%20in%201950,Council%20of%20Europe%20member%20states> accessed 26 February 2024.

[11] European Court of Human Rights, '70 years of the European Convention on Human Rights' (*European Court of Human Rights*) <https://www.echr.coe.int/70-year-of-the-european-convention-on-human-rights> accessed 26 February 2024.

[12] Amnesty International, 'What is the European Convention on Human Rights (ECHR)?' (*Amnesty International UK*, 17 August 2023) <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 26 February 2024.

[13] Ibid.

[14] European Convention on Human Rights, 1950.

*Right to liberty and security*

*Article 5(1)*

*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(a) the lawful detention of a person after conviction by a competent court;*

*(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

*(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

*(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

The European Court publishes a Guide to each article, to elaborate on the specific interpretation of each provision. When it comes to defining the "deprivation of liberty", the Guide says the following: "In proclaiming the "right to liberty", Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary

fashion."[15] Arbitrariness will continually be a point of contention in the European Court cases examined here.

In psychiatric cases, deprivation of liberty is often justified as being in the best interest of the patient. However, the Guide specifies that this may not always be an acceptable justification: "Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty"[16].

The Guide also offers some further clarity on how the deprivation of liberty is measured. Several factors are considered, including "an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question"[17].

All of the above considerations will come into play in the close analysis of European Court cases of this nature. For the purposes of this paper, we will primarily be concerned with 5(1)(e), the detention of persons of "unsound mind, alcoholics or drug addicts or vagrants". This clause has been accompanied by a fair degree of controversy.

The concept of the "unsound mind" is especially relevant here, considering that this is the basis for most psychiatric deprivation of liberty cases. However, the idea of the unsound mind has been criticized for being unclear and unspecific. The Court has stated in the past that "only a person who has been reliably diagnosed with a mental disorder and who poses a danger to himself or others can be legally detained as 'a person of unsound mind'"[18]. On the other hand, the Court has actually applied the ECHR to people with personality disorders as well, and even to those diagnosed with paedophilia[19]. There has been considerable confusion over what constitutes unsound mind and what constitutes dangerousness to the Court. In *Anatoliy Rudenko v Ukraine*, the Court declared that the definition of unsound mind "is continually evolving as research in psychiatry progresses and increasing flexibility in treatment is developing"[20], though admitted that the concept should nevertheless have certain limits. Scholars such as Marcin Szwed

---

[15] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights' (31 August 2022).
[16] Ibid.
[17] Ibid.
[18] *Winterwerp v The Netherlands* 6301/73 [1979] ECHR.
[19] *Ilnseher v Germany* 10211/12 [2018] ECHR.
[20] *Anatoliy Rudenko v Ukraine* 50264/08 [2014] ECHR.

argue that the definition of a person of unsound mind is not sufficiently clear in the ECHR and should be restricted to a limited category of people[21]. Furthermore, "unsound mind" is outdated language today when it comes to describing mental illness or psychological disorders. Connecting the concept of the unsound mind to dangerousness can even be seen as contributing to the stigma surrounding mental illness[22].

In fact, this entire clause is problematic. The inclusion of alcoholics and drug addicts in the article was originally intended to fight alcoholism, spearheaded by Sweden in the drafting process[23]. On the other hand, connecting substance abuse struggles with dangerousness has rather the opposite effect, stigmatizing those with substance use disorders rather than offering them the assistance they need. Scholars such as Damon Barrett have suggested that a better solution is obliging States to provide services to these populations, rather than detaining them: "Perhaps the wider application of the ECHR to drug policies is a good place to start, foregrounding positive obligations towards, as opposed to enumerating limitations on the rights of, people who use drugs"[24].

Finally, there is considerable debate on what is meant by "vagrants" in Article 5. Even the Guide to Article 5 is vague on the subject, openly admitting that the Court has not provided much clarity:

> *"The case-law on 'vagrants' is scarce. The scope of the provision encompasses persons who have no fixed abode, no means of subsistence and no regular trade or profession. These three conditions, inspired by the Belgian Criminal Code, are cumulative: they must be fulfilled at the same time with regard to the same person"*[25].

---

[21] Marcin Szwed, 'The notion of 'a person of unsound mind' under Article 5 § 1(e) of the European Convention on Human Rights' [2020] 38(4) Netherlands Quarterly of Human Rights <https://doi.org/10.1177/0924051920968480> accessed 26 February 2024.
[22] Peter Bartlett, "A Mental Disorder of a Kind or Degree Warranting Confinement': Examining Justifications for Psychiatric Detention', [2012] 16(6) International Journal of Human Rights 831-844.
[23] Damon Barrett, "Drug Addicts' and the ECHR' (*EJIL: Talk!* 3 September 2018) <https://www.ejiltalk.org/drug-addicts-and-the-echr/> accessed 26 February 2024.
[24] Ibid.
[25] European Court of Human Rights (n 17).

This outdated language presents an issue when compared with the CRPD, which will be addressed later on. As we have sufficiently established the gaps in Article 5(1), let us now move on to 5(2), (3), (4) and (5).

*Article 5(2)*[26]

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*

Though Article 5 in general was written more for cases of detention in criminal cases, it can be easily applied to detention outside of prisons. In psychiatric cases, this clause applies more to diagnosis/reason for treatment and admission. In essence, patients have the right to be informed of their diagnosis and the rationale for holding them in the psychiatric or social institution.

*Article 5(3)*[27]

*3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

Again, in the cases we will be examining, this clause applies more for diagnosis time. Patients should be examined by a psychiatric professional and given a diagnosis with a reasonable period of entering the institution in question.

*Article 5(4)*[28]

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

Unlike in criminal cases, the length of detention is not firmly defined at the start. Therefore, in psychiatric cases, one should expect reasonable reassessment times and continual rationale for

---

[26] European Convention on Human Rights, 1950.
[27] Ibid.
[28] Ibid.

continued treatment/detention[29]. At such point that the patient is deemed cured (or given treatment that can be reasonably expected to work long-term), no longer a danger to society and/or able to reintegrate smoothly, the patient should be released, otherwise this clause will come into question[30].

> *Article 5(5)*[31]
>
> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

Whether or not the patient is allowed compensation and how much is to be determined by the Court in judgments. This will be seen in the cases examined. Before continuing on with the Court, I will provide an overview of the other Convention at play.

## 2b. The Convention on the Rights of Persons with Disabilities – Overview and Relevant Articles

The CRPD is a United Nations (UN) treaty, legally binding on States under international human rights law. The CRPD came into force on May 3, 2008, and has been ratified by 189 States, plus the European Union. The CRPD is the most rapidly negotiated United Nations treaty of all time[32].

The CRPD also includes an Optional Protocol, ratified by fewer countries, which outlines the communications procedure for bringing cases of violations to the Committee on the Rights of Persons with Disabilities[33]. The Committee offers their own judgments and interpretations of the CRPD, sometimes at odds with other courts.

The CRPD contains 50 articles, not all of which will be relevant to this study. We will focus on Article 3, 5 and 14 as the others are beyond the scope of this research.

---

[29] *N v Romania* 59152/08 [2017] ECHR.
[30] Ibid.
[31] Ibid.
[32] Lecture by Dr. Andrea Broderick, Global Campus of Human Rights (Venice, 17 October 2023).
[33] Ibid.

*Article 3 – General principles*[34]
*The principles of the present Convention [CPRD] shall be:*

1. *Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*
2. *Non-discrimination;*
3. *Full and effective participation and inclusion in society;*
4. *Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;*
5. *Equality of opportunity;*
6. *Accessibility;*
7. *Equality between men and women;*
8. *Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.*

All of the other articles in the CRPD should be considered in the context of these basic principles. The Court cases studied will be judged based on these principles as well. Article 5 goes into further detail on the principles of equality and non-discrimination:

*Article 5 – Equality and non-discrimination*[35]
*1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*

*2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*

[34] Convention on the Rights of Persons with Disabilities, 2008.
[35] Ibid.

*3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*

*4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention [CPRD].*

Article 5(2) is especially pertinent, as deprivation of liberty on the grounds of disability has been and can be considered a form of discrimination by the State. This might be presented as an argument in some of our Court cases. The following article will make this even more clear:

*Article 14 – Liberty and security of person*[36]

*1. States Parties shall ensure that persons with disabilities, on an equal basis with others:*

*a) Enjoy the right to liberty and security of person;*

*b) 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.*

*2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention [CPRD], including by provision of reasonable accommodation.*

[36] Ibid.

The most important clause in the entire CPRD to this study is 14.1.b): *"the existence of a disability shall in no case justify a deprivation of liberty"*[37]. The Committee has confirmed that Article 14 to be interpreted to prohibit "involuntary hospitalisation and involuntary treatment of all persons with disabilities, including persons with psychosocial disability"[38]. This may seem at odds with the ECHR, which states that the deprivation of liberty can in fact be justified in cases of persons with unsound mind - a psychosocial disability, one might say. Let us further explore this problematic contradiction.

## 2c. Interpreting the Convention on the Rights of Persons with Disabilities

There is considerable debate over how the CRPD, and this article in particular, should be interpreted. This essay supports a literal reading of Article 14, as backed by scholars such as Tina Minkowitz[39], Piers Gooding[40] and Oliver Lewis[41], an assortment of UN bodies including the UN High Commissioner on Human Rights, and the CRPD Committee itself[42]. Specifically, The Committee's Guidelines on Article 14 "make clear that the CRPD Committee considers detention on the ground of impairment contrary to the CRPD, even if it is coupled with other factors, such as dangerousness"[43]. The Guidelines, like the ECHR Guide to Article 5, explain how a given article should be interpreted[44]. The prohibition of involuntary detention was also made clear in the Committee's judgment of *Noble v Australia*[45], and in one of its General Comment on legal capacity[46]. In any case, it would be obtuse to suggest a reading of the treaty

---

[37] Ibid.
[38] János Fiala-Butora, 'The influence of the convention on the rights of persons with disabilities on the European court of human rights in the area of mental health law: Divergence and unexplored potential' [2024] (94) International Journal of Law and Psychiatry <https://www.sciencedirect.com/science/article/pii/S0160252724000141#:~:text=Despite%20the%20two%20treaty%20bodies,relevance%20of%20capacity%2C%20and%20the> accessed 22 April 2024.
[39] Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions' [2007] 34 Syracuse Journal of International Law and Commerce <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481512> accessed 1 May 2024.
[40] Piers Gooding, 'A New Era for Mental Health Law and Policy' (Cambridge University Press, 2017, Melbourne).
[41] Oliver Lewis, 'Council of Europe' [2018] The UN Convention on The Rights of Persons with Disabilities in practice. A Comparative Analysis of the Role of Courts 89.
[42] János Fiala-Butora (n 37).
[43] Ibid.
[44] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights' (31 August 2022).
[45] *Noble v Australia* CRPD/C/16/D/7/2012.
[46] Committee on the Rights of Persons with Disabilities, 'General comment No. 1. Article 12: Equal recognition before the law' [2014].

that is contrary to the Committee's interpretation; the fundamental role of the Committee is to interpret and uphold the document.

In a treaty that quite literally states that under no circumstances shall a person be deprived of their liberty because of their disability, searching for subtext is essentially just an academic strategy for evading State responsibility to uphold Article 14. Admittedly, the CRPD is more progressive than its time; scholars have called the convention "idealistic"[47] as in 2008, and even today, confinement in psychiatric institutions continues to occur in many of the CRPD's State parties[48]. Indeed, "mental health laws across the world […] provide for involuntary detention and treatment of persons with disabilities in combination with other factors"[49]. That being said, an argument could be made that the CRPD encourages the *progressive realisation* of Article 14.

Human rights historically has made a distinction between civil and political rights and economic, social and cultural (ESC) rights[50]. While civil and political rights are expected to be immediately upheld by States, ESC rights often require more effort from governments (in terms of time, resources, etc.). This being taken into account, treaties involving ESC rights often demand the "progressive realisation" of the rights therein[51]. Rights in the healthcare system, for example, cannot reasonably be achieved overnight; these treaties demand that steps be taken gradually to create a system that allows for these rights to eventually be realised. Though the right to liberty is a civil and political right under most circumstances, the added factor of disability aligns Article 14 with the right to health; therefore Article 14 could easily be read as an ESC right. The CRPD itself actually mandates the progressive implementation of the Convention's ESC rights in Article 4(2)[52] but does not specify which articles belong to which category; since the immediate realisation of Article 14 is impossible – it requires the implementation of new programming and alternative measures in psychiatric treatment – Article 14 can be considered to fall within the category of rights discussed in Article 4(2).

---

[47] Peter Bartlett, 'Beyond the Liberal Subject: Challenges in Interpreting the CRPD, and the CRPD's Challenges to Human Rights' [2024].
[48] European Union Agency for Fundamental Rights, 'Involuntary placement and involuntary treatment of persons with mental health problems' (Luxembourg: Publications Office of the European Union, 2012).
[49] János Fiala-Butora (n 37).
[50] Elif Gözler Çamur, 'Civil and Political Rights vs. Social and Economic Rights: A Brief Overview' [2017] 6(1) Journal of Bitlis Eren University Institute of Social Sciences <https://dergipark.org.tr/tr/download/article-file/318915> accessed 1 May 2024.
[51] International Covenant on Economic, Social and Cultural Rights, 1966.
[52] Convention on the Rights of Persons with Disabilities, 2008.

This all being considered, Article 14 should be read as an end goal, suggesting that States make steps to adjust their current systems for psychiatric confinement to reduce and eventually eliminate the practice altogether. This can be achieved in a host of ways; for example, "In 2017 and 2020, the Special Rapporteur on the Right to Health (himself a psychiatrist) published reports […] looking at next steps in progressing towards CRPD compliance [which argued] for more and better community services, and more extensive provision of social and non-chemical treatments"[53]. States should be looking for alternatives to confinement that still result in effective treatment. Later this paper will explore how the European Court itself can contribute to the progressive realisation of the CRPD, as it has failed to thus far. Essentially, though, the CRPD "points up a variety of ways in which human rights law has failed some of the most vulnerable, and by implication asks how we need to do and to think about things differently"[54].

2d. Contradictions between the Conventions

A leading European Court case for the deprivation of liberty is *Winterwerp v Netherlands* (1979). This case will be discussed more in-depth below; it is relevant here because the Court's reasoning set an important precedent for future deprivation of liberty cases. The Court established the following condition for the deprivation of liberty under Article 5:

> *"In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder"*[55].

In this judgment, the Court equated "unsound mind" with "true mental disorder" - and not just a mental disorder, but one severe enough to warrant initial confinement and persistent enough to

[53] Peter Bartlett, 'Beyond the Liberal Subject: Challenges in Interpreting the CRPD, and the CRPD's Challenges to Human Rights' [2024].
[54] Ibid.
[55] *Winterwerp v The Netherlands* 6301/73 [1979] ECHR.

warrant continued confinement. According to experts, mental disorders can be considered disabilities if they impact the person's ability to conduct day-to-day activities[56]. The CRPD itself defines disability as resulting 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"[57]. Therefore, it would follow that a mental disorder severe enough to impact a person's day-to-day life might be similarly severe enough to warrant confinement according to the European Court. It can be easily argued, then, that being of "unsound mind", by the Court's definition, is a psychosocial disability. Therefore, the ECHR expressly permits the deprivation of liberty on the basis of disability, which the CRPD seems to prohibit. On the other hand, some scholars even argue that forced psychiatric treatment violates the prohibition of torture[58], which is also included in the ECHR under Article 3. Article 3 is a non-derogable right, meaning that it cannot be suspended under any circumstances. If one considers compulsory confinement to be equal with torture – which is up for debate between mental health experts – here lies a glaring contradiction between the two Conventions.

Not only can "unsound mind" be categorized as a disability, but so too can drug addiction and alcoholism. Addiction specialist John T. Maier argues that whether or not addiction is considered a disease, it is nonetheless a disability on the grounds that the afflicted person is impaired, limited in some way and faces discrimination[59]. By this logic, this population should *also* be protected under the CRPD.

Another interesting contradiction between the two conventions, though not one that will be the primary focus here, is the fact that one of the general principles of the CRPD, important enough to also have its own article, is non-discrimination; yet, as discussed in the analysis of Article 5(1), the language of the ECHR is overtly discriminatory. Not only is the phrase "unsound mind" outdated, but in addition, alcoholics, drug addicts and vagrants are expressly targeted, with no rationale for singling them out from other groups. "Vagrants" has not even been properly

---

[56] NI Direct, 'Mental health and disability discrimination' (NI Direct Government Services) <https://www.nidirect.gov.uk/articles/mental-health-and-disability-discrimination#:~:text=If%20your%20mental%20illness%20has,protected%20under%20disability%20discrimination%20law> accessed 28 February 2024.
[57] Convention on the Rights of Persons with Disabilities, 2008.
[58] Tina Minkowitz (n 38).
[32] John T. Maier, 'Addiction is a Disability, and it Matters' [2021] 14 Neuroethics 467-477.

defined, leaving ample room for unfounded categorization of people as vagrants. The ECHR actually includes its own article on non-discrimination[60], and yet seemingly violates it within its own treaty.

Most importantly for the scope of this paper, however, we return to the fact that the CPRD does not allow for deprivation of liberty on the basis of disability. So where does that leave us? How can the Court possibly reconcile these two seemingly opposite doctrines of international law?

2e. Article 5 Cases: Context Pre-Convention on the Rights of Persons with Disabilities

These cases will be discussed in chronological order to demonstrate a progression of the Court's stance on compulsory confinement. In the following three cases, the Court becomes increasingly inflexible on arbitrariness in psychiatric detention in the lead-up to the drafting of the CRPD. The following three cases were chosen because they established several key principles that would be carried through the Court's case law even after the CRPD came into effect.

What will be shown through the discussion of the below three cases, and then the cases that followed the CRPD's entry into force, is that the Court was progressing steadily up until 2008 in becoming more protective of human rights in psychiatric confinement; however, though the CRPD should have caused a further spurring of protection for those with disabilities, progress appeared to slow after 2008. It will be argued that the entry into force of the CRPD did not inspire major change from the Court, and therefore did not have the effect that was perhaps envisioned in its drafting. The Court's disregard for the CRPD will be condemned as a failure on its part, and suggestions will be made for how the CRPD can be more fully incorporated into case law in the future.

**Winterwerp v The Netherlands (1979)**

60 European Convention on Human Rights, 1950.

The cases in the following chapter will show that the Court's stance has not much changed since the monumental judgment in *Winterwerp v The Netherlands*. Indeed, this case is cited in almost every case that will be examined going forward.

Mr. Winterwerp was committed as an emergency procedure after having stolen documents from a registry office. His detention was extended for years despite his objections, at the request of his wife. Mr. Winterwerp complained that he was not suffering from a mental disorder and did not have an opportunity to contest his detention in a court of law. Though the Court found that there had been a violation of Article 5(4), as the applicant had not been able to have his detention judicially reviewed, the Court controversially found that there had been no breach of Article 5(1).

In *Winterwerp*, it is acknowledged by the Court that "The Convention does not state what is to be understood by the words "persons of unsound mind""[61], but the Court insists that no specific definition can be given. This being said, the Court expressed the importance of medical evidence of a poor mental state, "except in emergency cases"[62]. The Court also found that Mr. Winterwerp's emergency detention of six weeks, though lengthy, was not prolonged enough to be unlawful. Detention times and periods between medical assessments will come up repeatedly in the cases studied in this paper.

In essence, *Winterwerp* was a groundbreaking case because of the citation included in the previous section, which established three important conditions for the justification of psychiatric confinement:

1. That the mental disorder must be "of a kind or degree warranting compulsory confinement"[63], determined with "objective medical expertise"[64];
2. That the legal authority to detain lasts only so long as the above mental disorder is proven to persist; and

[61] *Winterwerp v The Netherlands* 6301/73 [1979] ECHR.
[62] Ibid.
[63] Ibid.
[64] Ibid.

3. The person detained has the right to challenge their detention in court (and have the necessary legal representation/aid to do so).

The first two criteria have become known as the "Winterwerp criteria" or the "Winterwerp principles" as found in national legislations[65]. Thus *Winterwerp* was the start of the Court establishing parameters for psychiatric detention that might be further elaborated on in the future. Though the ECHR is not very clear on the conditions for detention, the Court began cracking down on arbitrariness in compulsory confinement in its judgments and the avoidance of arbitrariness became even more strict in the CRPD.

**Johnson v UK (1997)**

Almost twenty years later came another important case. The applicant was admitted to a psychiatric hospital in 1984 and diagnosed with schizophrenia and psychopathy. His detention was reviewed in 1989, where it was determined that the applicant was no longer suffering from mental illness and should be moved to a hostel; however, authorities could not find a place in a hostel so the applicant's discharge was postponed indefinitely.[66]

This case was important because it dealt not with the initial confinement of the applicant, not the length of confinement, but the time it took for discharge once it was established that the applicant was healthy. Here, "the Court stressed that it was of paramount importance that discharge must not be unreasonably delayed and that there exist safeguards to prevent this"[67]. This principle would be carried through the Court's case law post-2008, as several of the cases to follow would include an issue of this kind.

Even before the 2000s, the Court was carefully considering the rationale for detention in each case. Confinement that is not specifically necessary was already being considered a violation by the Court, and this case could be considered an extension of *Winterwerp* – not only does the persistence of the mental disorder matter for continued confinement, but during the discharge

---

[65] 'The ECHR and mental health law' [2021] Mental Health Law Online <https://www.mentalhealthlaw.co.uk/The_ECHR_and_mental_health_law> accessed 19 April 2024.
[66] *Johnson v UK* 22520/93 [1997] ECHR.
[67] 'Case of Johnson v. the United Kingdom' [2007] 1(4) The International Journal of Human Rights <https://www.tandfonline.com/doi/abs/10.1080/13642989708406697> accessed 20 April 2024.

process as well. One could observe a trend of the conditions for justifying compulsory treatment becoming stricter and more detailed as time went on; again, with the CRPD tightening the requirements even further.

**HL v UK (2004)**

Commonly known as the Bournewood case, this case established important distinctions for voluntary and involuntary admission (also known as informal vs. formal admission), and also addressed the issues of capacity and best interest.

The applicant in question was non-verbal autistic and was admitted to a psychiatric hospital after committing self-harm. The applicant did not resist admission and was therefore designated an "informal patient"[68]; he also did not attempt to escape the hospital. Though he did apply for leave, the domestic court insisted that he had never been involuntarily detained in the first place[69].

However, it had been established prior to the admission that the applicant lacked the "capacity to consent or object to medical treatment"[70]. Therefore, the Court found the applicant's lack of resistance to his detention irrelevant. Henceforth a new condition for avoiding arbitrariness was established: the applicant is required to understand the basis of their detention and to "reasonably have foreseen his detention on that basis"[71].

Consequently, even though in this case there was no doubt that the applicant was suffering from a true (and persistent) mental disorder, it was still not enough to justify his detention, since the applicant did not have the capacity to provide informed consent. Legal capacity would come into play in many more cases to come and would be considered as an important factor by the Court. This case also featured the phrase "best interest" of the patient; here, the medical authorities took it upon themselves to determine what was in the "best interest" of the applicant. Where the applicant does not have legal capacity, whose responsibility is this really? The applicant's

---

[68] *HL v UK* 45508/99 [2004] ECHR.
[69] Ibid.
[70] Ibid.
[71] Ibid.

guardian, their doctor, or still the applicant themselves regardless? The CRPD would contest this idea of others making decisions in the "best interests" of a person with disabilities. It also raises the question: should a distinction not be made between mental capacity and legal capacity? The CRPD would certainly indicate that they are two different things – a person should not be treated differently under the law on the basis of their mental disability, as per Article 5 CRPD[72].

This case also led to a change in the national legislation with an amendment to England and Wales's *Mental Health Act*, as well as the introduction of the *Mental Capacity Act*, both incorporating safeguards for vulnerable groups of persons who are unable to consent to psychiatric treatment[73]. Evidently, the European Court was having a considerable impact on domestic laws and procedures leading up to the entry into force of the CRPD. Not only had the *Winterwerp* criteria been embraced, but so too were the new safeguards for capacity outlined in Bournewood. But would this strengthening of human rights protection continue on the same progression in the later 2000s? The following chapter will reveal a decline in the Court's development in this area in the last two decades.

[72] Convention on the Rights of Persons with Disabilities, 2008.
[73] Department of Health, 'Mental Capacity Act 2005. Deprivation of liberty safeguards in England' [2008] <https://www.bfwh.nhs.uk/wp-content/uploads/2015/11/Mental-Capacity-Act-2005-Deprivation-of-liberty-safeguards-in-England.pdf> accessed 9 May 2024.

## 3. Study of Article 5 Cases since Entry into Force of the Convention on the Rights of Persons with Disabilities

### 3a. Overview

Since its entry into force in 2008, the CRPD has been cited in almost 50 European Court cases. This thesis will discuss a sample of 12 cases from this assortment. These cases all involve alleged violations of Article 5 ECHR in psychiatric or social care and cite the CRPD, either in the Court's ruling, in a separate judge's opinion or in a third party's submission. Cases involving the CRPD will be grouped together in each of these categories (and therefore not in chronological order). Though these 12 cases share many similarities, the use of the CRPD in the Court's ruling is anything but consistent. This collection of cases will show a lack of standardization on the part of the Court when it comes to applying the CRPD, resulting in less protection for applicants with disabilities. Then, for contrast, I will discuss three examples of Article 5 cases involving psychiatric care where the CRPD was not mentioned, despite being in effect at the time.

Please note that in several of these cases, the applicant also complained of violations other than Article 5, which are beyond the scope of this paper, and will not be included.

### 3b. Where the CRPD is Cited by the Court

This chapter will begin with five cases where the CRPD was considered by the Court to be directly applicable. These are all examples of the Court making an effort to include the context of this relevant international instrument and the applicant's rights embedded therein. For contrast, the other cases that will be examined display a range of interest in the CRPD from the Court – even in instances where the circumstances are strikingly similar to each other.

**Stanev v Bulgaria (2012)**

Reason for study: *This was a landmark case for the Court as it was the first time the Court found an Article 5 violation in a social care facility. It was important to include for its contribution to the Court's case law.*

The applicant complained of violations of Article 5(1), 5(4) and 5(5) ECHR. The applicant had previously been diagnosed with schizophrenia with a 90% degree of disablement. In 2000, a court judgment found him to be partially incapacitated and he was appointed a guardian.

In 2002, the applicant's guardian signed an agreement to place him in a social care home, without informing the applicant. The care home was decaying, poorly insulated, and unhygienic. The applicant was given anti-psychotic medication and evaluated once a year. His evaluations deemed it impossible for him to re-integrate into society and he was therefore not offered any services to that effect.

From 2004 to 2006, the applicant tried unsuccessfully to regain legal capacity. In 2006, an outside psychiatrist found that his condition had stabilised; however, the applicant's requests to leave the home were refused.

In this case, the Court mentioned the CRPD as a relevant international instrument. This is interesting because though the convention had been signed by Bulgaria, Bulgaria had not actually ratified it at the time of this case. Therefore, like in *D.D. v Lithuania* (which will be discussed below), Bulgaria was not legally bound by the CRPD and was not required to uphold the applicant's rights outlined in the convention. Here is a display of inconsistency: the Court found the CRPD relevant where the respondent State was not yet a party, and yet in other cases where the State is a party, the Court does not mention the CRPD at all (this will be seen later).

The Court acknowledged the severity of the applicant's detention and his complete physical removal from society. The Court also noted that the duration of the applicant's stay was never specified and "was thus indefinite since the applicant was listed in the municipal registers as having his permanent address at the home, where he still remains"[74]. Evaluations of the applicant's condition were not regular or thorough enough to determine whether he needed to stay. Therefore, the Court found a violation of Article 5(1). The domestic courts had also not

[74] *Stanev v Bulgaria* 36760/06 [2012] ECHR.

enabled the applicant to challenge the lawfulness of his confinement in any way. For this reason, the Court also found a violation of Article 5(4). Finally, the applicant's difficulty in reaching the domestic courts had denied him his right to compensation, which led the Court to find a violation of Article 5(5).

Analysis: *This was a key case for the European Court because it was one of the first cases to find deprivation of liberty in a social care home – going beyond psychiatric institutions or prisons. For the first time, persons in social care homes could challenge the conditions of their confinement and thus the scope of deprivation of liberty was broadened*[75]*. This was also one of the very first times that the Court considered the context of the CRPD in its judgment – in a case that did not even involve a State party to the CRPD. Though the Court's dedication to the CRPD would waver throughout the years, social care cases continued to be taken seriously by the Court regardless of the CRPD.*

*The core issues here were the conditions of the applicant's detention and his ability to challenge his detention on a regular basis – not the fact itself of being confined in the first place. The CRPD does not specify that certain conditions of detention are valid since it outright prohibits confinement on the basis of disability in the first place. Therefore, though cited as relevant by the Court here, Article 14 CRPD again did not actually factor into the Court's final judgment in the way it is purposely written.*

**D.D. v Lithuania (2012)**

Reason for study: *This case is significant because the Court did not find violations in all of the claims for Article 5, which is somewhat of a rarity in cases which involve the CRPD. This case also includes the issue of legal capacity and an applicant who was already categorised as disabled by her home country, making her an ideal subject for this study.*

---

[75] Lycette Nelson, 'Stanev v. Bulgaria: The Grand Chamber's Cautionary Approach to Expanding Protection of the Rights of Persons with Psycho-Social Disabilities' (*Strasbourg Observers*, 29 February 2012) <https://strasbourgobservers.com/2012/02/29/stanev-v-bulgaria-the-grand-chambers-cautionary-approach-to-expanding-protection-of-the-rights-of-persons-with-psycho-social-disabilities/> accessed 22 March 2024.

The applicant complained that her involuntary admission to a social care institution violated Articles 5(1) and 5(4) ECHR. At the time that the case was processed, the applicant had already been classed as Category 2 disabled and diagnosed with schizophrenia.

In 2000, the applicant was declared legally incapacitated. Over the course of the next six years, the applicant was treated at a psychiatric hospital and a social care home against her will, and was not allowed to be present at any guardianship proceedings. She attempted to escape her confinement several times[76].

In the European Court's overview of the case, the CRPD was mentioned as a relevant international instrument, noting that Lithuania had signed it in 2007 and ratified in 2010. Articles 12 (equality before the law) and 14 in particular were deemed relevant. In the applicant's submission, she held that her confinement at a psychiatric hospital had been extreme, as she had not been allowed to leave the home, and had been medicated by force and tied down. Furthermore, "all aspects of her life [were] controlled by the staff"[77] including diet, visitors, daily activities and sleeping hours. Unfortunately for the applicant, the Court nevertheless found that the applicant's detention had been lawful since qualified professionals had diagnosed her with schizophrenia (therefore being of unsound mind) and considered the social care placement to be in her best interest. For this reason, the Court found no violation of Article 5(1).

On Article 5(4), the applicant maintained that she was unable to obtain her release. The Court agreed that the applicant's dependence on her legal guardian rendered her unable to challenge the grounds of her detention at her discretion, and thus did find a violation of Article 5(4).

Analysis: *The applicant had been categorised as disabled prior to the proceedings, so it follows that the Court would consider the CRPD relevant. However, the CRPD was absent from the Court's actual assessment of the merits of the case, which is particularly notable in the ruling on Article 5(1). Article 14 CRPD says that the existence of a disability cannot justify the deprivation of liberty; however, the Court found the applicant's detention to be lawful on the very grounds that she had been diagnosed with schizophrenia (her mental disability) and the social care home was the recommended treatment. It is odd that the Court would mention the CRPD, if only then*

---

[76] *D.D. v Lithuania* 13469/06 [2012] ECHR.
[77] Ibid.

*to completely contradict it in its final ruling. This indicates a more performative use of the CRPD by the Court, rather than a serious consideration of its implications in this case. In fairness, Lithuania had not yet ratified the CRPD at the time of the applicant's confinement, which the Court could use as a rationale for its conclusion. It will be shown time and time again that the Court's mention of the CRPD does not in any way give a clue as to how the case will be judged.*

**N. v Romania (2017)**

Reason for study: *This case also involves an applicant that had been already categorised as disabled. This applicant was subjected to involuntary confinement and medical treatment, and requested repeatedly for his release. These types of scenarios will be established as themes throughout the case studies, and cases have been selected based on the inclusion of these factors.*

In this case, the applicant alleged violations of Articles 5(1), 5(2), 5(4) and 5(5) ECHR. At the time of the judgment, the applicant was detained at a psychiatric hospital and had been receiving disability allowance since 1993. In 2001, the applicant was charged with incest and sexual corruption and, and a psychiatric examination found chronic paranoid schizophrenia and recommended compulsory medical treatment[78].

The applicant was detained for two years in the first psychiatric hospital, and then transferred for three more years to a different one, where he underwent neuroleptic- and tranquiliser-based treatment. In March 2007, a review of the applicant's detention was finally called for, which concluded that some of the applicant's symptoms persisted. The applicant requested his release, but was denied.

Seven more reviews were conducted over nine years, accompanied by the applicant's continued requests for release. Finally in 2017, the domestic court ordered "the replacement of the detention measure with a compulsory treatment order until the applicant had made a full

[78] *N v Romania* 59152/08 [2017] ECHR.

recovery"[79]. The applicant subsequently asked to remain in the hospital until he could be effectively re-integrated into society, for which he had not received adequate support.

In this case, the European Court included the CRPD as a relevant international instrument, as Romania had ratified the convention in 2011. The Court specifically mentioned Article 14, alongside two other CRPD articles. Not only that, but the Court also included the Committee on the Rights of Persons with Disabilities' Guidelines on Article 14, *and* cited a Committee case against Australia, which also involved a detainee charged with sex abuse who had not received adequate social services.

The consideration of the CRPD by the Court was perhaps because the application himself included it in his submission, claiming a violation of Article 14(1) CRPD. The applicant alleged that in the forensic medical reports, his potential danger to society had not been thoroughly investigated, the assessment had been stigmatising, and his treatment had not included any plan for his reintegration into society. He also alleged that some of the reports had been misinterpreted, and that the perceived likelihood of his committing domestic violence was not enough to warrant keeping him in detention. Finally, with still no social services available, the applicant's detention in the hospital was being delayed indefinitely.

The Court, considering the CRPD, the Committee's interpretation and its own former case law, found that there had been a violation of Articles 5(1) and 5(4), owing to a lack of thorough assessment of the applicant's needs and social measures required, resulting in arbitrary detention; the failure to provide sufficient legal safeguards in the judicial reviews of the applicant's continued detention; and those reviews not being conducted in reasonable time (not meeting the "speediness" requirement).

Analysis: *This case pertains to involuntary detention based on mental illness and insufficient review times, which will be a consistent theme in all of these cases. Here, the CRPD was given a fair amount of attention – which is not always the Court's strategy. After all, the circumstances of the case were quite similar to* D.D. v Lithuania *– in both cases, the applicants were schizophrenic and categorised as disabled; both were detained in social care homes; and both*

[79] Ibid.

*alleged mistreatment during their confinements. However, in* D.D. v Lithuania*, the Court contradicted the CRPD altogether, whereas in this case, the Court seemed to emphasise it. Why would this be?*

*The Court's emphasis on the CRPD could be because it was suggested by the applicant in* N v Romania*, or perhaps due to the fact that the applicant had already been receiving disability allowance and was thus considered legally disabled by his national government. In this case, Romania had also already ratified the CRPD by the time most of the events had taken place. This would indicate that the Court will only consider the CRPD if it is suggested by one of the parties first, and does not take the initiative to consider it as part of the larger international legal framework contributing to the case. This might be considered irresponsible considering the Court's prominent role in international human rights law.*

*Did the CRPD actually make a different in the final ruling here, though? The ruling was mostly based on the speediness requirement for re-assessment – which comes from European Court case law, not the CRPD. According to the CRPD, this person should have been detained at all; to the Court, the real issue was that the persistence of the applicant's mental disorder had not been sufficiently established. Had it been adequately proven that the applicant was still suffering from a disorder or still a potential danger to society, the Court likely would not have found a violation of Article 5 – which goes against the relevant article of the CRPD.*

**Lashin v Russia (2013)**

Reason for study: *This applicant had received disability status, making the CRPD expressly relevant. This case also featured the removal of legal capacity and repeated attempts to restore it. Some of the cases studied include applicants with legal capacity and some do not, making for an interesting comparison on how their respective care is handled.*

This applicant claimed that his confinement in a psychiatric hospital violated Article 5(1) and 5(4) ECHR. The applicant was first diagnosed with schizophrenia in 1987, and in 1998 was given second-degree disability status. From 1989 and 2000 he had beem committed nine times to a psychiatric hospital. In 2000, at a court hearing that did not include the applicant, he was declared

not legally capable, based on a medical examination from a few months prior. However, this report did not mention any violent incidents or imply that the applicant could not look after himself.

Over the next two years, members of the applicant's family made multiple requests and appeals attempting to restore the applicant's legal capacity. A second psychiatrist submitted a report saying that the applicant's condition was not as severe as had been previously thought. This was disregarded and in 2002, the applicant was placed in a psychiatric hospital once more, where his condition was determined to have worsened. His indefinite confinement was authorised and the hospital was given guardianship. After several legal battles, the applicant's daughter was finally given guardianship and the applicant was released from the hospital at the end of 2003.

In this case, the Court again included the CRPD as a relevant international instrument; however, Article 14 was notably excluded from consideration (only Articles 12 and 23 were cited – equal recognition before the law and the right to marry). Every other time that the Court has considered the CRPD, Article 14 has been at the forefront. Its absence here is confusing, seeing how the right to liberty certainly seems to be at play in this case: the applicant was involuntarily confined due to his mental disorder.

The applicant, in his submission, claimed that his disorder was not severe enough to warrant confinement. He also noted that, according to Russian law, "the courts were required to verify every six months whether the patient's non-voluntary confinement continues to be necessary"[80] and this had not occurred.

The Court determined that the period of confinement following the hospital's guardianship was a violation. Based on previous case law, having the consent of the guardian does not necessarily render the detention voluntary; and since the guardian is the same medical institution confining him, there was considerable conflict of interest. Therefore, the applicant's confinement between the end of 2002 and the end of 2003 represented a violation of Article 5(1) ECHR. Since the applicant's detention was not reviewed at the six-month point, and he himself was not even present at proceedings, this period also constituted an Article 5(4) violation.

---

[80] *Lashin v Russia* 33117/02 [2013] ECHR.

Analysis: *Similarly to N v. Romania, his case involves lengthy review times and involuntary confinement, this time with the added factor of legal capacity. Interestingly, unlike in N. v Romania, Article 14 CRPD is not mentioned at all here. Yet, as will be seen in all the other cases examined here, Article 14 CRPD always comes up. Why does the Court not consider deprivation of liberty based on disability to be a factor in this case? The applicant himself had even been granted disability status. The Court offers no rationale for leaving it out.*

*This could be because under the ECHR, the applicant's confinement in the first place was lawful. However, that was true for the two previous cases as well, and yet Article 14 CRPD was at least given a mention. One can already begin to see the inconsistency of the Court's treatment of the CRPD in cases that are very much alike.*

**Rooman v Belgium (2019)**

Reason for study: *This was a landmark case for the deprivation of liberty, specifically in the realm of mental health law*[81]*. This case would be continuously cited by the European Court in the next few years. It brought up the importance of appropriate treatment.*

The applicant alleged a violation of Article 5(1) ECHR, on the basis that he had not received adequate psychiatric treatment in the social-protection facility where he was detained. The applicant was still detained at the time of the case.

The applicant was an imprisoned convicted sex offender. The prison terms were set to expire in February 2004; however, due to recidivism during his prison time, it was deemed necessary for the applicant to be placed in another kind of compulsory confinement. This was supported by a psychiatric report made just before his release. The applicant was placed in a social protection institution. In 2005, another expert psychiatric opinion was drawn up, identifying the applicant as suffering from paranoiac psychosis that must be treated in German, his native language.

[81] Alex Ruck Keene, 'Deprivation of liberty – appropriate places and appropriate treatment' (*Mental Capacity Law and Policy*, 11 June 2019) < https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-appropriate-places-and-appropriate-treatment/> accessed 19 March 2024.

The applicant's institution did not have the resources to treat him in German. His conditional release was postponed until another institution was found that could.

In 2006, the applicant was transferred to a prison so that the German-speaking psychosocial team there could assess his mental health. Their report, issued in 2007, "indicated that the applicant had a psychotic personality and paranoid character traits (high self-esteem; lack of respect for others, whom he used only for his own purposes; a feeling of omnipotence; lack of self-criticism; use of threatening remarks), and that he was refusing any treatment"[82]. In 2008, the applicant applied for day release, while the psychiatric wing admitted that "it had proved impossible to provide any treatment and that the search for a German-language institution had proved fruitless"[83]. A new application was hence made for conditional discharge. After some back-and-forth, in 2010 the Social Protection Board decided to keep the applicant in confinement, since there was no possibility of his receiving proper treatment anywhere else, and his mental condition had not sufficiently improved.

In 2013 the applicant applied once again for discharge. A 2014 report from the institution confirmed that though the applicant had only been visited by a German-speaking psychologist once, his condition had nevertheless improved. However, the report recommended that he remain in prison. The applicant appealed and was dismissed.

The European Court in this case included the CRPD as a relevant international instrument, specifically Articles 14 and 15 (freedom from torture). For once, the Court actually considered the CRPD in its judgment as well, stating that "in the light of the developments in its case-law and the current international standards […] there exists an obligation on the authorities to ensure appropriate and individualised therapy"[84]. The Court further expanded by stating that "[a]ny detention of mentally ill persons must have a therapeutic purpose"[85] and go beyond basic care, with the goal of helping the detainee achieve liberty again. In sum, there were insufficient grounds of the long-term deprivation of liberty of the applicant, since the core reasoning was that the institution itself was unable to provide the necessary accommodations.

---

[82] *Rooman v Belgium* 18052/11 [2019] ECHR.
[83] Ibid.
[84] Ibid.
[85] Ibid.

Analysis: *This case established the essential requirement of appropriate treatment, which is meant to be specific to each person's circumstances and needs (including language needs). The CRPD may have actually played a role in making this judgment happen, considering the CRPD's stance on providing reasonable accommodation for persons with disabilities.*

*Though Article 14 CRPD would not allow this person's detention in a psychiatric facility, the Court's final judgment here might have actually stemmed from the underlying principles of the CRPD. The CRPD, after all, states that persons with disabilities should be offered equal treatment as the rest of society; this specific person was not given equal treatment during confinement. Interestingly, this was not due to the applicant's disability, but his particular language needs. Nevertheless, the CRPD is grounded in the social model of disability – more on this later on – which demands that institutions provide accommodations to allow for equal opportunities for all. This applicant was not afforded the opportunity to heal, due to institutional shortcomings. Though the CRPD was not cited in the final judgment of this case (only as a relevant instrument), all of the above could have actually impacted the Court's decision. Since it is not made clear in the judgment, it is difficult to know for sure.*

3c. Where the CRPD is Cited in Another Judge's Opinion

As per Article 45(2) ECHR, sometimes in the European Court, a judge may give a separate opinion, which is included in the final published version of the ruling. The separate opinion may be given when a judgment is not unanimous across the Chamber[86]. In both of the cases below, a judge found the CRPD important to mention in their dissenting opinion.

**Kuttner v Austria (2015)**

Reason for study: *This case examines length of review times for a person's confinement, which has been treated very inconsistently by the Court. I also felt it important to include judgments*

[86] European Convention on Human Rights, 1950.

*where the Chamber of judges and other judges disagreed with each other, to examine different perspectives from within the same institution.*

The applicant in question complained of a violation of Articles 5(4) of the ECHR, due to the unreasonable length of proceedings for his application for release from a detention centre.

In 2005, the applicant was convicted of causing serious bodily harm. The Austrian court found that he was "suffering from a grave mental disorder, was dangerous to the public and was likely to re-offend"[87] and therefore ordered his detention in an institution for mentally ill offenders.

In 2006, the applicant applied for conditional release, which was denied. In January 2007, the applicant applied to be transferred to an ordinary prison. The cour requested a new psychiatric report, and six months later, the applicant's request was again denied. He applied again in 2008. The application was not examined until September 2009, when he was finally transferred.

In the European Court's processing of the case, it included the UN General Assembly's Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (including articles on non-discrimination, review body and criminal offenders) as a relevant international instrument.

Upon finding the case admissible, the Court considered that Article 5 ECHR calls for the speedy review of detention, and for the order of release if the detention is proven unlawful. However, the Court also noted that "it is not its task to attempt to rule on the maximum period of time between reviews which should automatically apply to a certain category of detainees"[88]. The Court is therefore unwilling to draw up a precise review schedule, even for psychiatric cases, and prefers to evaluate on a case-by-case basis (which is far more troublesome for the applicants). Despite this, the Court still found that "under the specific circumstances of the present case, the interval of sixteen months between the final decisions in the first and the second set of proceedings (9 May 2006 to 10 September 2007) on the applicant's further detention in a psychiatric institution did not fulfill the "speediness" requirement under Article 5 § 4 of the Convention"[89]. Therefore, the Court held that there had been a violation of Article 5(4).

---

[87] *Kuttner v Austria* 7997/08 [2015] ECHR.
[88] Ibid.
[89] Ibid.

Interestingly, the CRPD was not mentioned by the sitting Court at all, but by Judge Pinto de Albuquerque in his Opinion. The Judge agreed that there had been a violation of Article 5(4), but this time on the basis of the CRPD (ratified by Austria in 2008), stating that the applicant's detention, transfer to the other institution and review time had been discriminatory on the basis of disability, and that "the involuntary detention of persons with disabilities based on presumptions of risk or dangerousness linked to disability labels is contrary to the right to liberty"[90]. Judge de Albuquerque stated in his conclusion that beyond Article 5(4) ECHR, the applicant's extensive detention "is a form of discrimination based on mental disability in the context of criminal sanctions and violates Article 14 CRPD"[91].

Analysis: *It is striking that, despite their mention of the UN General Assembly Resolution, the Court did not consider the CRPD relevant at all in their judgment, while it formed the principal basis for Judge de Albuquerque's opinion. It is difficult to see how this case is much different from the ones examined above, where the CRPD was mentioned by the Court as relevant.*

*This is the first instance we have seen so far where the CRPD was not simply mentioned as relevant, but in fact formed the entire justification for a judge's decision. Judge de Albuquerque points out that this applicant's detention was discriminatory, as it was extended on the basis on disability; however, this has been exactly the case for every case we have seen so far. Every initial confinement, and extension thereafter, in every case has been justified based on the applicant's mental state. Had this judge been involved in all of the previous cases, would this have been pointed out every time?*

*This case is revealing in that it shows that there is no consensus between European Court judges for how much the CRPD is used. The degree of consideration of the CRPD must vary amongst all of the individual judges. Should this not be standardised across the entire Court? Otherwise we will only see further inconsistency in the rulings.*

**Ruiz Rivera v Switzerland (2014)**

[90] Ibid.
[91] Ibid.

Reason for study: *This case involves an applicant who had been convicted of a violent and serious crime. This case is included to show that convicted criminals are entitled to the same rights under international law as those who have never exhibited violent behaviour.*

The applicant here claimed a violation of Article 5(4) ECHR. In 1995, the applicant was charged with murder. The prosecutor asked for a psychiatric assessment, which found that "the applicant had been suffering for several years from chronic paranoid schizophrenia and had a drug addiction"[92] and was therefore not criminally responsible. In the interest of public safety, the domestic court ordered his confinement, initially in a prison. His requested discharge from the prison was refused four times. Five years following his original confinement, in 2001, a second psychiatric evaluation was ordered. The experts said that he was still suffering from schizophrenia but had been doing relatively well in prison. In 2004, a therapy report was issued confirming the 1995 and 2001 assessments and again recommending that the applicant not be discharged. The applicant appealed the report, claiming that the refusal of his discharge was based on a now four-year-old assessment and that a fresh one should be conducted. He was denied free legal aid and the appeal was dismissed.

The applicant referred to *Winterwerp v The Netherlands* in his submission to the European Court, arguing that the validity of his confinement depended on the persistence of his disorder, which had not been proven for four years. The Court agreed that the most recent report was not an adequate evaluation, since "the therapy report in question did not constitute an independent psychiatric assessment"[93]. Then some inconsistency comes into play. The Court acknowledges that in a recent case (*Dörr v Germany*), it had "accepted a decision to keep an individual in preventive detention […] even though the latest medical opinion on which the decision relied dated back six years"[94]. On the other hand, the Court found this case to be more similar to *H.W. v Germany*, in which medical assessment was not conducted for twelve years. According to the Court, in both *H.W. v Germany* and the current case, "the applicant's refusal to follow the prescribed therapy could be explained by a breakdown in the relationship of trust with the staff of the institution in which he

[92] *Ruiz Rivera v Switzerland* 8300/06 [2014] ECHR.
[93] Ibid.
[94] Ibid.

was placed and by the deadlock situation which ensued"[95]. Therefore, a mere four years without assessment in this case was enough to qualify as a violation of Article 5(4).

Like in *Kuttner v Austria*, the Court failed to mention the CRPD in its main judgment at all, but the CRPD was heavily featured in the separate Opinion of another judge. Judge Sajó agreed with the Court's judgment, but his main reason was that the judgment reflected the human rights progression in the CRPD and aligned itself with the fundamental principles included. Two other judges disagreed with the judgment and did not acknowledge the connection to the CRDP at all.

Analysis: *This case is similar to N. v Romania and Kuttner v Austria for example in that it deals with prolonged periods between review and re-assessment; the only major difference being that this applicant, despite being diagnosed with a mental disorder, was never moved to a psychiatric hospital and spent his entire detention period in prison.*

*Also similarly to Kuttner, some judges emphasized the connection to the CRPD while others (including the main Court) did not deem it relevant at all. It is fascinating that both those who found a violation and those who didn't felt that the CRPD was not worth mentioning. Here is another revealing inconsistency – even when judges come to the same conclusion, the rationales for the decision have the potential to vary wildly. Even without using Article 14 CRPD as a concrete foundation, Judge Sajó's opinion was grounded in CRPD principles, which might be a good starting point. The specific relevant Articles of the CRPD might not need to be considered to an elevated degree in every case – but each decision should be grounded in the fundamental principles of disability rights.*

### 3d. Where the CRPD is Cited by a Third Party

In European Court cases, the applicant and the State accused of the violation each have the opportunity to make a submission to the Court. As per Article 36 ECHR, third parties are typically allowed to make a submission as well[96]. These third parties are usually national or

[95] Ibid.
[96] European Convention on Human Rights, 1950.

international organisations ("High Contracting" parties[97]) advocating on the applicant's behalf, as in the five cases below. Each of the third parties felt it important to draw attention to the CRPD in their submissions.

**M.B. v Poland (2021)**

Reason for study: *This case involves length of review times, but also features an applicant being qualified as "dangerous". As discussed in Chapter 2, dangerousness is often used as justification for psychiatric confinement, in spite of the supposed aim of confinement being to treat illness.*

The applicant alleged a violation of Article 5(1) ECHR. In 2014, the applicant was charged with causing bodily harm. Experts concluded upon examination that the applicant suffered from paranoid schizophrenia and therefore could not participate in criminal proceedings. He also allegedly posed a danger to his family and should be committed to a facility. It was therefore found that he could not be held criminally responsible because of his unsound mind and he was placed in a psychiatric hospital.

In the year that followed, the applicant submitted reports and evidence to his domestic court of his improvement, but his stay was extended until 2016 when finally he was deemed unlikely to re-offend and released.

The CRPD was again included as a relevant international document (Articles 14 and 19 – living independently), as were the Committee's Guidelines on Article 14. The Court then evaluated the applicant's claim that "his detention in a psychiatric hospital had been unlawful in that it had not been based on recent medical evidence"[98]. The applicant stated that he should have been at least re-examined before being transferred to the psychiatric hospital, since his condition had greatly improved at the prior facility. Therefore, him being of unsound mind had not been proven sufficiently recently to justify the length of his detention.

---

[97] Ibid.
[98] *M.B. v Poland* 60157/15 [2021] ECHR.

The third-party intervener, the Mental Disability Advocacy Centre, contributed to the application on the applicant's behalf, citing both the CRPD and the Committee in their submission. The Advocacy Centre pointed out that forced psychiatric treatment violates several articles of the CRPD, and that according to the Committee, there was a need for less severe measures to be available.

The Court evaluated the frequency of the applicant's evaluations throughout the course of his detention. After April 2016, the applicant had been evaluated at six-month intervals, and eventually found to be no longer harmful; the Court found this acceptable. However, the Court agreed that there had been a violation of Article 5(1) in respect to the applicant's detention between 2015 and 2016, during which time there was inadequate review of the applicant's condition.

Analysis: *The CRPD was included in this case by the Court, though less comprehensively; it is interesting that the third party pointed out that any forced psychiatric treatment is a violation of multiple sections of the CRPD. In all of the cases seen so far, the applicants have been treated despite applying/asking for release, implying that the treatment was forced. In this case, the third party mentioned that according to the CRPD, "forced psychiatric treatment was not only in violation of the right to freedom from torture, but also of the rights to personal integrity, freedom from violence, exploitation and abuse, and the right to decide about medical treatment"*[99]*. In previous cases, only Articles 14 and 19 had been considered – this one raises questions about more CRPD articles and their applicability to other cases as well.*

*Again, the fact the Court only found an issue with the period of detention that did not include adequate re-assessment proves that the Court is fine with confinement on the basis of disability, or "dangerousness" in this case, as long as it is consistently proven that the patient is still disabled or dangerous (as per the* Winterwerp *criteria). The Court is still holding faithful to the ECHR in this manner – but then it seems rather pointless to include the CRPD.*

[99] Ibid.

**M.S. v Croatia (no. 2) (2015)**

Reason for study: *This case involved an applicant who went to her doctor complaining of back pain, only to be institutionalized and forcibly medicated. It is an obvious failure of Croatia's healthcare system and therefore represented an important case for the Court to judge.*

This applicant complained of violations of Articles 5(1)(e) and 5(4) ECHR, on the basis of unlawful confinement and ill-treatment in a psychiatric hospital. This case included two separate third-party submissions from advocacy organisations.

At the time of the application, the applicant had had a few physical health issues. In October 2012, the applicant went to her doctor complaining of pain in her lower back. She was sent to emergency, where a neurologist diagnosed her with anxiety disorder, before a psychiatrist also diagnosed her with "acute psychotic disorder, systemic delusional disorder and delusional dysmorphic disorder"[100] and she was immediately committed to a hospital's psychiatric clinic. Once involuntarily admitted to the clinic, the applicant was allegedly tied to a bed, injected with drugs and restrained for approximately 13 hours. The next day, the hospital told the domestic court that "the applicant had been involuntarily admitted for treatment on 29 October 2012, that she had refused further hospitalisation and that her mental condition prevented her from making a sound decision in that respect"[101]. Consequently, a judge extended her involuntary stay for another week, and then another month. The applicant appealed, which was dismissed.

In the European Court's consideration of the case, they included not only the CRPD as a relevant international material, but also several of the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991). From the CRPD, Articles 13, 14 and 19 were included, as well as many observations from the Committee's country reports. Yet more international instruments were included from the UN, Council of Europe, and the European Union. This was an extremely comprehensive overview of the international framework for these types of cases.

[100] *M.S. v Croatia (no. 2)* 75450/12 [2015] ECHR.
[101] Ibid.

The third parties submitted that Article 5 ECHR should be read together with Article 14 CRPD – an interesting take considering that these are the very articles which contradict each other. The third party stressed that deprivation of liberty should not be arbitrary nor on the basis of disability. The Court admitted in response that it "has not previously formulated a global definition of what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5(1)"[102]; however, certain criteria can be piecemealed together from case law (including the variable factor of the type of detention involved). The Court judged that the proceedings leading up to and during the applicant's detention did not allow for the applicant to fully state her case, due to insufficient legal assistance, a lack of accommodations during the judge's visit, and the absence of a chance for the applicant to comment on the medical reports. The Article 5(4) violation was deemed inadmissible because the applicant had not exhausted domestic remedies, but the Court found a violation of Article 5(1).

Analysis: *In this case, the CRPD was both considered by the Court and submitted by a third party. This was a very extreme case and could be said to involve both a physical disability (extreme lower back pain) and a mental one. This could be a reason that the CRPD was paid so much attention. The use of torture, though beyond the scope of this paper, also played a significant role in this case, and represents an important section of the CRPD.*

*The advocacy organisation's submission is also notable. According to the organisation, it is possible to read Article 5 ECHR and Article 14 CRPD together – there is a harmonious application of both that can be found. Their suggested strategy appears to be a more restrictive interpretation of Article 5, which narrows down the basis of "arbitrariness". The viability of this strategy, as well as several others, will be discussed in this paper's final chapter.*

**Mihailovs v Latvia (2013)**

Reason for study: *This is a very similar case where the applicant was suffering from something that seemingly did not require psychiatric or social care at all, and yet ended up confined in an*

[102] Ibid.

*institution against his will. It again reflects poorly on a national system and is therefore interesting to compare.*

In this case, the applicant complained of violations of Article 5(1) and 5(4) ECHR. The applicant was recognised as Category 2 disabled since 1994, as he suffered from epilepsy.

In 2000, the applicant was admitted to a psychiatric hospital. It was concluded from his preliminary examination one month after admission that he was not suffering from a mental illness, only epilepsy. It was recommended that he be declared legally incapable. His wife was appointed guardian and requested the applicant's placement in a social care institution, where he was moved in 2002. He had to request his guardian's permission to leave the premises.

Five years later, an update was given by the Centre on the applicant's health, which reported a diagnosis of epileptic dementia on top of the epilepsy. In 2007, the applicant applied to regain legal capacity, and did not succeed. In 2010, the applicant was moved to a different location.

In 2011, a psychiatrist at the second location gave an opinion maintaining that the applicant needed to stay under social care due to a variety of difficult symptoms. Then in 2012, an attempt to re-admit the applicant to a psychiatric hospital was made based on a new report from another psychiatrist. The applicant's guardian refused to move him, stating that he had been doing well in the social care home and believing his diagnosis of dementia to be erroneous.

In this case, not only were Articles 12 and 14 CRPD considered by the Court as relevant international law, Article 14 was also stressed by a participating third party. In this applicant's submission, he pointed out that the Court does not specify what is meant by "unsound mind", and that he had not experienced a single seizure during his stay. He also held that he had spent years there against his will, "together with seriously mentally ill people, and that his freedom of movement had been restricted"[103]. The third party supported the applicant, asking the Court to also consider the conditions of the applicant's detention.

The Court observed that as the applicant had lived in the first institution for over eight years, "(t)his period is sufficiently long for him to have felt the full adverse effects of the restrictions

[103] *Mihailovs v Latvia* 35939/10 [2013] ECHR.

imposed on him"[104]. The Court also noted that the applicant had not consented to the entire duration of the stay, not having been permitted to participate in legal proceedings. Additionally, based on the sporadic reports of the applicant's health, the applicant had not been sufficiently shown to be suffering from a persistent mental disorder at all. In this vein, "regulatory framework for placing in social care centres individuals who, like the applicant, have been totally deprived of legal capacity, did not provide the necessary safeguards at the material time"[105]. For this reason, the Court found a violation of Article 5(1) for the applicant's stay at the first Īle Centre until 2010. The Court also noted that the domestic courts were barely involved in determining the length of the applicant's stay, and there were therefore insufficient regulatory frameworks in this regard as well. Therefore, there was also a violation of Article 5(4).

Analysis: *Though the CRPD was considered as a relevant instrument and mentioned by the third party, the Court did not mention it in its judgment. Based on this case's judgment, sometimes even when CRPD violations are pointed out by a third party or by the applicant, the Court still does not take it into adequate consideration. Yet in* M.S. v Croatia*, a case with strikingly similar circumstances, the Court actually did consider the CRPD. In* Mihailovs v Latvia*, the applicant had actually already been categorised as disabled. Of the two cases, would it not make more sense for the CRPD to be applicable in this one?*

*Here is another example of the Court relying more on its own case law – specifically Winterwerp – than other international instruments like the CRPD. The main issue in this case was the lack of evidence of a persistent mental disorder, being the principal reason the Court found an Article 5 violation. It was not considered, however, that the applicant had been detained in the first place on the basis of a disability – epilepsy – rather than given alternative treatment. This is a blatant violation of Article 14 CRPD, but again, the Court would rather lean on its own Convention and its prior interpretations of it.*

**Červenka v The Czech Republic (2016)**

[104] Ibid.
[105] Ibid.

Reason for study: *This case involved an applicant who was considered an alcoholic, which was important to include since the categorisation of "alcoholics" features in the ECHR. I was curious if this case would be treated any differently from those suffering from "unsound mind".*

This case concerned violations of Articles 5(1), 5(4) and 5(5) ECHR. In 2005, the applicant was stripped of his legal capacity, based on the domestic court's conclusion that the applicant suffered from alcoholic dementia, considered a permanent mental disability. The applicant unsuccessfully tried to regain capacity many times over several years. In 2010, "refusing another request to restore legal capacity to the applicant, the District Court banned him from lodging further requests for one year because there was no possibility of his condition changing within that period"[106], relying on an expert opinion from the same year. In 2012, the applicant's legal capacity to act was reduced yet further.

The applicant was admitted to a psychiatric hospital seven times between 2004 and 2010, for weeks and sometimes months at a time. His final discharge included an assessment stating that he was suffering from a mental disorder caused by alcohol. Between the end of 2010 and the start of 2011, the applicant's symptoms appeared to worsen, impacting his neighbours and family. In February 2011, the applicant's guardian brought him to a social care home, where he was forcefully admitted, and his movements were extremely restricted.

Three times over the next few months, the applicant "informed the District Court that he was being held in the social care home against his will and demanded his release"[107], with no reaction. The applicant's lawyer continued to lobby on his behalf, until in September 2011, the applicant was released, without having been informed prior. His discharge report showed no signs of dementia and therefore no reason to continue depriving this person of his rights.

In his submission to the Court, the applicant insisted that he had been deprived of his liberty as his guardian had signed the agreement with the social care home without his consent. He also argued that he had been "unable to institute any court proceedings to have the lawfulness of his detention examined and his release ordered"[108]. The Bazelon Centre for Mental Health Law

---

[106] *Červenka v The Czech Republic* 62507/12 [2016] ECHR.
[107] Ibid.
[108] Ibid.

acted as a third-party advocate in this case, and reminded the European Court to keep its case law in conformity with the CRPD in assessing whether reasonable accommodations had been made for a person with disabilities.

The Court noted that it had already judged some placements in social care homes (of persons with mental disorders) as deprivations of liberty. The Court also observed that "the lawfulness of the applicant's detention was not reviewed by a domestic court, as would be the normal procedure in cases of involuntary hospitalisation"[109] because the guardian had consented and therefore it was presumed that the applicant was there voluntarily. However, there was no evidence that the guardian had clearly explained to the applicant the circumstances of his future placement in the social care home. This could therefore not be considered informed consent. The applicant's struggle to obtain judicial review also proved that his placement "was not lawful as it was not accompanied by sufficient guarantees against arbitrariness"[110]. The applicant's detention amounted to an Article 5(1) violation, and the lack of legal proceedings counted as a violation of Article 5(4) and 5(5), since he had not been afforded the opportunity to receive compensation.

Analysis: *Again in this case, the third party suggested that the Court align itself with the CRPD, and though the Court did offer a judgment that the third party was going for, it did not address the CRPD specifically in its ruling. This is also an interesting case because the applicant could be considered not only to be of "unsound mind", but also an "alcoholic", according to the ECHR; this went tactfully unmentioned by the Court in its ruling. In fact, this applicant seemed to fall into the "alcoholic" category far more than "unsound mind"; he had not been consistently diagnosed with a standard mental disorder unrelated to substance abuse. This could be considered evidence that the Court itself recognises that the singling-out of "alcoholics" in the ECHR is inappropriate and outdated. Had this phrasing still be considered seriously, this judgment could have gone the other way.*

*This case would indicate, then, that the Court still sometimes employs the "living instrument" principle, and concedes that certain parts of the ECHR are outdated and no longer apply. This concept seems to be reserved only for the "alcoholic" part, and not for the "unsound mind"*

---

[109] Ibid.
[110] Ibid.

*condition. This is telling: the Court judges do not seem to consider the "unsound mind" clause as discriminatory as the "alcoholic" one, though they are both included in Article 5.*

**Blokhin v Russia (2016)**

Reason for study: *This case is a little different in that it involves an applicant with a mental disorder, but takes place in a detention centre for juvenile offenders. Here we can compare the deprivation of liberty in different locations with applicants with similar psychiatric needs.*

In this case, the applicant claimed a violation of Article 5(1) ECHR. From 2002 to 2005, the applicant committed a serious of offences as a minor, so he was placed in a juvenile detention centre for 30 days. The applicant had been previously diagnosed with attention deficit hyperactivity disorder (ADHD) and a neurogenic disorder. In 2004 and 2005, he was examined and prescribed medication and counselling.

In 2005, the applicant was arrested without being informed why. He was taken to the police station, detained, and allegedly coerced into confessing to extortion. Though no further criminal proceedings were brought against him, the applicant's grandfather complained of his treatment in the police station to the prosecutor's office. The applicant complained of the conditions at the detention centre, alleging that the lights were kept on all night, he shared a room with seven other inmates, and severe collective punishments were carried out daily. The applicant's poor health was also not accommodated.

The European Court considered many relevant international instruments, including the UN Convention on the Rights of the Child (CRC), UN General Comments and Council of Europe Recommendations. The CRPD was notably absent, however.

In his submission, the applicant pointed out that the purpose of his detention was to correct his behaviour and did not include "educational supervision"[111], which is mandated for the detention of minors in Article 5(1). His detention did not serve any of the other purposes in Article 5(1) and therefore fell outside the scope of the ECHR. Though the State argued that the applicant's

[111] *Blokhin v Russia* 47152/06 [2016] ECHR.

confinement had not amounted to a deprivation of liberty and therefore was not required to serve a purpose outlined in the ECHR, the Court disagreed. The applicant was not permitted to leave the centre and the centre did not constitute a school by any means. Therefore, the Court found a violation of Article 5(1).

The third party involved, the Mental Disability Advocacy Center, surprisingly did not mention the CRPD in its submission pertaining to the Article 5 violation, and only mentioned it briefly in the separate claim of a violation of Article 6. In the Article 5 dispute, the CRC was much more heavily relied upon. It is difficult to discern in this case how much of the applicant's detention came down to his disability, since it is given so little attention. It is also unclear if the applicant received adequate treatment for his health problems during the detention period. Much more attention in this case is devoted to the applicant's status as a minor.

Analysis: *Based on the outcome and ruling of this case, does an applicant's rights as a child supersede their rights as a person with a disability? The CRPD only receives the briefest of mentions in this case, in spite of the applicant's disorder potentially having been a factor in his wrongdoings. After all, the applicant was even held in a psychiatric hospital following his detention in the juvenile centre. This does not seem have been considered relevant by the domestic courts or the European Court at all. The one factor that makes this case particularly distinct from the others is that the applicant is a child at the time of the violation of his rights.*

*It is also important to consider the distinction between medical care in prisons vs. hospitals. Like in Rooman v Belgium, the necessary medical treatment did not seem to be available at the detention centre in question. The Court might consider that, should this be the case, the person should be transferred immediately to a place where they can receive appropriate care. This could potentially become a requirement imposed by the Court in its case law.*

### 3e. No Mention of the Convention on the Rights of Persons with Disabilities

The following three cases were all judged after 2008, the year that the CRPD entered into force. All of the cases are against countries that had ratified the CRPD by the time the judgment was made. All of the cases also involve involuntary confinement on the basis of disability (or perceived disability). Yet the CRPD is completely absent in the final rulings of all of them. Each

of these example cases will be examined in term to demonstrate where the CRPD would have been useful to consider, and to hypothesise why it was excluded.

**Atudorei v Romania (2010)**

The applicant alleged that her placement in a psychiatric hospital violated Article 5(1) ECHR. The applicant had been suffering physical and mental abuse from her family for years. In this case, in 2003, the applicant's parents discovered that she was taking yoga classes and took her to a psychiatric hospital against her will, where she was held for a week and diagnosed with reactive depression and anxiety.

Two years later, the applicant's family kidnapped her off the street and locked her in her grandparents' house. Three days later, she was diagnosed by a doctor with schizo-paranoid behavioural disorder and referred to a psychiatric hospital. (The Court received no evidence that this doctor ever met or assessed the applicant at all.) Her parents took her to an isolated psychiatric hospital in the woods, where the applicant's mother signed an form on her behalf consenting to her impending drug treatment. On this day, the applicant was further diagnosed with "evolving borderline disorder"[112]. During her two-month stay, the applicant was given "psychotropic drug treatment"[113]. Management maintained that her stay was voluntary.

The applicant brought disciplinary proceedings against the doctor who treated her in the hospital, offering two medical reports from psychiatrists affirming that she was psychologically healthy and did not require medication or forced placement. Her complaint was dismissed.

For relevant statutes, the Court only included domestic law, and disregarded international law altogether. The applicant argued that the "unsound mind" clause of the ECHR did not apply to her since she had not been proven to be "suffering from a mental problem attested by an objective medical expert report"[114] and that she "involuntarily hospitalised in the absence of any procedural safeguard"[115]. The Court noted as well that "the medical staff had full control over

[112] *Atudorei v Romania* 50131/08 [2014] ECHR.
[113] Ibid.
[114] Ibid.
[115] Ibid.

whom the applicant could see or speak to"[116], for example, denying the police officers the right to interview her about criminal proceedings brought by her fiancé against the applicant's family. It was also the Court's view that her stay had been long enough for her to feel adverse effects. The State had not provided any argument as to why the applicant could not be treated for her alleged condition without being deprived of her liberty. The applicant was also of legal age at the time of her hospitalisation, and there was no evidence that she did not have the legal capacity to consent for herself. Since the mother had consented on her behalf, the Court concluded that there had been a violation of Article 5(1).

Analysis: *This case bears a resemblance to* Lashin v Russia *and* Mihailovs v Latvia *in that it involves the issue of legal capacity – namely, one person consenting to treatment on another's behalf, without adequate proof that the applicant is unable to consent for themselves. In all three cases, the applicant had not committed any acts of violence or really any actions that would lead one to believe they were not able to look after themselves; yet family members were making medical decisions on their behalf. In all three cases, this led to involuntary confinement.*

*This case also resembles* M.S. v Croatia *and* Mihailovs v Latvia *in that there does not seem to be evidence of the applicant being of "unsound mind" at all. In this case, the applicant simply attended a yoga class and was institutionalized for it. A parallel might have been drawn by the Court in their ruling of* M.S. v Croatia*, where the applicant was simply suffering from lower back pain; but since the CRPD was not mentioned in this case, the relevance of the CRPD could not be carried through. Though the CRPD was mentioned in* M.S. v Croatia*, this case could have contributed to the development of case law applying the CRPD, but the Court chose to ignore it.*

*Why was the CRPD relevant in the other similar cases, but not in this one? In fact, in this case, the Court did not consider international doctrines at all. Is it because the applicant does not seem to have any kind of disability after all? If so, the CRPD would not apply in some of the above cases, either – like where the applicant simply had back pain, or the dementia diagnosis turned out to be incorrect. Yet in those cases, the CRPD received a mention.*

---

[116] Ibid.

**Gorobet v Moldova (2011)**

The applicant alleged a violation of Article 5(1) ECHR. In 2008, the police came to the applicant's house and asked him to come to the police station. The applicant was brought instead to a psychiatric institution, where he was detained without consent for 41 days in a room for persons "suffering from serious mental disorders, some of whom could not attend to their basic needs and who intimidated him on a regular basis"[117]. After a few days, he was transferred to a different ward, where "[t]hroughout his stay […] the applicant was administered injections which provoked in him a state similar to paralysis and as a result of which he lost consciousness" and was "forced to take a large amount of tablets on a daily basis"[118]. The hospital claimed to be treating him for paranoid depression.

Following his confinement, the applicant obtained two medical reports from the hospital stating that he was not addicted to alcohol or drugs and was not suffering from any psychiatric disorder. The prosecutor's office dismissed the applicant's complaint.

Again here, the Court did not consider any international law. The domestic law cited in this case was also scarce. Based on the facts of the case and the applicant's submission, the Court concluded that "at the time of the applicant's forced hospitalisation there existed no expert opinion at all from a doctor concerning his state of health or the need for his compulsory confinement in a medical institution"[119] and that it had "not reliably been shown by the Government that the applicant was of unsound mind prior to his hospitalisation"[120]. The lack of evidence of a true mental disorder was the primary reason that the Court found a violation of Article 5(1).

Analysis: *The CRPD is absent from this case potentially because it relies so much on whether or not the applicant was in fact of unsound mind. The Court seems to imply in its ruling that, had it been sufficiently proven that the applicant was suffering from a mental disorder, his confinement would have been legally justified. Under the CRPD, the applicant's detention still would not be*

---

[117] *Gorobet v Moldova* 30951/10 [2011] ECHR.
[118] Ibid.
[119] Ibid.
[120] Ibid.

*lawful. The Court avoided this issue by excluding the CRPD from consideration altogether. This might explain the CRPD's absence from the previous case, as well.*

*The application of the CRPD is simply inconsistent. In some cases, even where there was a perceived disability – whether it turned out to exist or not – the CRPD was mentioned as a relevant international instrument. For example, in* M.S. v Croatia*, where the applicant was only proven to be suffering from lower back pain, the CRPD was considered relevant by the Court. In cases such as* M.S. v Croatia and Mihailovs v Latvia*, however, the CRPD was mentioned by a third party first. One could argue that it is not the responsibility of the Court to consider the applicability of the CRPD to each case, considering that it is not their convention to interpret. However, this implies that the onus falls on the applicant to have an extensive knowledge of international law, and bring it to the Court's attention. There is already a great deal of responsibility on the applicant – for instance, the responsibility to exhaust all domestic remedies before bringing a complaint to the Court – and it is not reasonable to expect the applicant to demand consideration of the CRPD. Persons with disabilities should be automatically protect under this convention.*

*Not only is the CRPD cited inconsistently, but all other international law as a whole. There is not discernable pattern for when domestic law is enough for the Court to form a legal basis for the case, or when international law comes into play as well.*

**L.M. v Slovenia (2014)**

The applicant claimed that her confinement in two separate psychiatric institutions constituted a violation of Articles 5(1), 5(2), 5(4) and 5(5) ECHR. Prior to the events in question, the applicant had been diagnosed with a psychotic disorder.

In 2005, the applicant was found by the police after breaking into an unoccupied house. The applicant was consequently referred by her doctor to a closed ward of a psychiatric hospital. She signed a consent form on admission and was diagnosed with schizophrenia. A few days later, a hearing was held about the applicant's confinement, where the applicant complained that she

wanted to go home. No formal decision was rendered, but the applicant was discharged after a month of confinement, at her own request.

Three days later, however, the applicant was brought to emergency medical services in a state of distress. From there, she was referred to a new psychiatric hospital and placed in a closed ward. After a week, the applicant informed her local court of her confinement and applied to discontinue her treatment. The local court ordered that she remain confined for another month. The applicant was finally released after six months.

During both of her stays at the two hospitals, the applicant was transferred from closed to open wards. The Court found her confinement in the closed wards to be Article 5(1) violations; however, there was debate as to whether the open wards also constituted a deprivation of liberty. In the second hospital, the Court noted that "at the time of the applicant's transfer to the open ward, the order of confinement was still in effect, meaning that she could have been returned to the closed ward without there being any requirement for the hospital to notify the competent court"[121] and that the open ward therefore violated her Article 5(1) right as well. The Court also found that, upon admission, the applicant lacked the capacity to fully understand the reasons for her confinement and thus had not properly given informed consent. Therefore, there was an Article 5(2) violation. In addition, the Court pointed out that the applicant herself had to notify the court of her confinement, despite that being the hospital's legal responsibility, and had to take judicial review into her own hands. This should have been carried out periodically by the State; therefore, Article 5(4) had been violated as well. Finally, there did not seem to be any remedy available to her from the State to compensate her for her confinement; therefore, there was a violation of Article 5(5).

Analysis: *An interesting fact of this case was the distinction made between closed and open wards. Open wards often allow patients to come and go freely – does this constitute deprivation of liberty, then? Without movements being completely restricted, an argument could be made that this is simple medical treatment in a specific space. There is little consistency across Europe for how open wards are designed and operated, though. This could potentially be standardised.*

---

[121] *L.M. v Slovenia* 32863/05 [2014] ECHR.

*An increased use of open wards could be a useful transitional step for decreasing the deprivation of liberty in psychiatric cases – an objective that will be discussed in the following chapter.*

*As a whole, this case involved confinement in two separate psychiatric institutions and an applicant suffering from a psychotic disorder. The issues of capacity and informed consent arise in the Court's judgment. The applicant could easily be considered disabled considering her medical history. Why, then, was the CRPD not considered at all? The Court found multiple Article 5 violations, indicating that this ruling would align with the provisions of the CRPD.*

3f. Case Analysis

This group of cases was selected for a specific reason: though the applicants' complaints share many of the same characteristics, the Court's rationale for its rulings is differs wildly case by case. The inconsistencies in the Court rulings in the above fifteen cases do not indicate any standard procedure for when the Court considers the CRPD relevant or to what degree the Court takes the CRPD into account. Since the CRPD is so staunchly against the deprivation of liberty on the basis of disability, it follows that the Court has found Article 5 violations (that the applicant was, at some point at least, deprived of their liberty) in almost all of the above cases since the CRPD came into effect. However, upon closer observation, the CRPD seemed to factor very little into the rulings of most of the cases above.

Accurate diagnosis is called into question in several of the cases that involve the CRPD (*Červenka v The Czech Republic, N. v Romania, M.S. v Croatia, Lashin v Russia*), with some medical reports contradicting each other, some applicants doubting the neutrality of their assessments, and in the case of *M.S. v Croatia*, the applicant initially exhibiting symptoms of something completely unrelated to mental health. This could also explain why the CRPD was not mentioned in *Atudorei v Romania* or *Gorobet v Moldova* – in both cases, there was serious doubt as to whether the initial diagnosis was correct. Both applicants submitted evidence from psychiatric experts disproving their initial assessments. Then again, by this logic, it does not follow that the CRPD would have been included as relevant in *M.S. v Croatia.*

One must question whether it is justifiable to detain someone based on a disability, is it even justifiable to detain someone when there may not be a disability at all? Is there a degree of certainty that should be required prior to a person's detention in a facility?

Another issue that arises consistently is the relationship between the length of time between re-assessments of the applicant's condition and therefore the lawfulness of their confinement. In *Kuttner v Austria*, the Court claimed that it was not the Court's role to establish a minimum time between reviews. In fact, the Court has not even provided a modicum of clarity in this regard. If one studies some of these cases, some patterns might initially be uncovered. In *Kuttner v Austria*, sixteen months between reviews was deemed too long to be lawful; in *N v Romania*, five years before re-assessment followed by seven reviews over nine years also failed to meet the so-called speediness requirement; in *Lashin v Russia*, even a period of more than six months between reviews was enough for the Court to see a violation. In *M.B. v Poland*, the Court again found that a year was too long to go without a review and that there should have been one conducted at the six-month mark. In *Ruiz Rivera v Switzerland*, even the quality of the assessment was called into question, as using a therapy report as justification for continued confinement was not considered adequate by the Court. In *Červenka v Czech Republic* and *L.M. v Slovenia*, the Court found that since there had been no *judicial* review of the applicant's confinement, the continued confinement was unlawful. All of the above might lead one to believe that the Court's general stance is that, at approximately six-month intervals, a full judicial and psychiatric review of the patient's confinement should be conducted in order to legally justify the patient's continued care.

However, in *D.D. v Lithuania*, the applicant's intermittent confinement in a social care institution over a three-year period was based on a single medical panel's opinion prior to admission, which the Court found acceptable. There was no evidence in that case that the applicant underwent regular psychiatric assessment during her stay in the social care home. There was also no consistent judicial review carried out by the State, as the applicant herself had to initiate all legal proceedings.

In addition, though not included in this study (except in a mention from the Court in *Ruiz Rivera v Switzerland*), in *Dörr v Germany*, the Court found a six-year period in between reviews acceptable. The disparities between the judgments are so extreme that an applicant could not

possibly guess what length of time might constitute a violation in the eyes of the Court. This renders it difficult for States to establish national standards and for patients to be adequately protected under medical law. It is understandable for the Court to want to evaluate review times on a case-by-case basis; however, the circumstances of some of these cases seem so similar that it is difficult to discern what distinguishes one from the other and leads to inconsistent rulings. The CRPD offers little clarity on this – even less than the Court's case law, having no speediness requirement. The CRPD stresses that persons should not be deprived of their liberty on the basis of disability, yet goes into little detail as for how deprivation of liberty should be evaluated if it does occur. But since the CRPD discourages involuntary confinement in the first place, so it would not be a big reach to assume that the CRPD would, at the very least, demand re-assessment periods to be less than 6 months apart. This does not appear to have been taken into consideration by the Court at all.

Then in the ECHR, "Article 5(1)(a) allows for a fixed period of detention, up to and including for life, determined at the point of trial with no requirement for re-assessment"[122]. As long as the Court is interpreting the ECHR, even if it does take the CRPD into consideration, there is no telling how long it will allow persons to remain confined without review. Evidently, the Court is still relying on its *Winterwerp* criteria when it comes to proving the existence of a mental disorder and its persistence – this case law is the only tool the Court has available, since neither the CRPD nor the ECHR offer much detail in this regard. This is a significant shortcoming of both documents.

All of the above has demonstrated a general lack of consistency in many aspects of the Court's rulings, which establishes a pattern for the lack of consistency when it comes to applying the CRPD. How could the Court be expected to apply the CRPD in the same way to all relevant cases, when it cannot seem to establish a standard procedure for re-assessment times or diagnosis accuracy either?

It would be obtuse, however, to attribute the Court's haphazard consideration of the CRPD to a general lack of competence or initiative on the part of the judges. The Court judges are some of

---

[122] Peter Bartlett, Oliver Lewis and Oliver Thorold, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers 2007).

the most qualified experts in international law in their respective countries[123]. What it actually comes back to is the fact that the role of said judges is to interpret the ECHR; which, as was established in Chapter 2, is undeniably vague.

The CRPD applies to persons with disabilities; it has been established that the unsound mind can be interpreted as a mental disorder, which in turn qualifies as a disability. However, the Court has frequently shifted in its definition of "unsound mind", and whether or not it considers the applicant actually disabled.

For example, many of the above cases involve applicants who have been diagnosed with schizophrenia or a related disorder. The Court tends to agree with national medical expertise that schizophrenia, as a mental disorder, qualifies as a disability. For example, in *D.D. v Lithuania*, upon the applicant's diagnosis of schizophrenia, they were designated as Category 2 disabled, with which the Court had no issue. The Court went on to evaluate the Article 5 violations accordingly in light of the "unsound mind" principle. It is therefore fair to assume that the Court agrees that schizophrenia a) falls under the definition of "unsound mind", b) is a disability, and therefore c) qualifies the applicant for protection under the CRPD.

However, as was shown above, those cases where the applicant was reliably shown to have schizophrenia often did not compel the Court to consider the CRPD any more seriously in its rulings than in any other cases, or even to consider the CRPD at all. In *L.M. v Slovenia*, the applicant was diagnosed with schizophrenia at the psychiatric hospital; and yet the Court did not find the CRPD even relevant enough to mention.

It has proven a difficult task for the Court to determine what kinds of mental states should fall under the definition of "unsound mind", and therefore disability. More recently, in *Ilnseher v Germany*, the Court found that the applicant's diagnosis of sexual sadism qualified as "unsound mind"; yet again here, the CRPD was notably absent[124]. Evidently, the Court qualifies a wide

---

[123] 'Who are the judges of the European Court of Human Rights?' (*UK in a Changing Europe*, 23 Feb 2024) <https://ukandeu.ac.uk/the-facts/who-are-the-judges-of-the-european-court-of-human-rights/> accessed 17 May 2024.
[124] *Ilnseher v Germany* 10211/12 [2018] ECHR.

range of psychiatric disorders as "unsound mind"; but with such an open interpretation of the concept, there is so much room for confusion.

These contradictions within the case law are due to a simple lack of standardisation. Once the Court has accepted a specific mental disorder as a disability, this categorisation should therefore be set as a precedent and carried forth into all future cases. Then the CRPD would be automatically considered in cases where the applicant is detained on the basis of a similar mental state. Keeping track of which disorders have been qualified as "unsound mind" would also help to narrow down this term's definition.

What should also be noted here is that, as was shown in Chapter 2, there was a clear progression in the cases leading up to 2008, where the Court was becoming more protective of those of "unsound mind" and enacting stricter criteria for psychiatric confinement. Though there have been a few developments since 2008 – *Rooman v Belgium*, for example, led to the Court insisting on psychiatric institutions providing appropriate, tailored treatment to each patient[125] – it is unclear if the CRPD really had anything to do with it. The Court cited the CRPD as relevant in that case, but that is hardly proof that the CRPD's principles influenced the Court's decision; after all, as we have seen, the Court has been known to include the CPRD as a relevant instrument only to utterly contradict it in its ruling (like in *D.D. v Lithuania*).

Also, while *Rooman v Belgium* did represent a step forward in Article 5 case law, this development was concerned more with the standard of treatment for those with disabilities, once already confined; it avoided the controversial issue of confining these people in the first place. When it comes to observing the CRPD's stance on involuntary confinement, it is difficult to see any progress in recent years. In fact, in the past five years there have been only three Article 5 cases which mentioned the CRPD, and there has been no mention of the CPRD for the past two years in any Article 5 case at all[126]. The most recent Article 5 case which mentioned the CRPD – albeit extremely briefly – was *P.W. v Austria* in 2022, where, in spite of the applicant's involuntary confinement on the basis of her diagnosed schizophrenia, the Court actually found

---

[125] Gérard Niveau, Camille Jantzi and Tony Godet, 'Psychiatric Commitment: Sixty Years Under the Scrutiny of the European Court of Human Rights' [2021] Front Psychiatry <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8129177/> accessed 18 May 2024.
[126] As per the HUDOC database.

that there had been no violation of Article 5[127]. Though the CRPD was acknowledged as part of the overall relevant legal framework, the Court utterly disregarded it in its ruling, and relied instead on its *Winterwerp* criteria for establishing whether the applicant was reliably of unsound mind.[128] One must keep in mind that the *Winterwerp* criteria were established in 1979, almost three decades before the entry into force of the CPRD, and 43 years prior to the events of this case. If the Court is still using its original *Winterwerp* case law in modern-day cases, without any consideration of the active CRPD, it is evident that not much as changed.

While the case law prior to 2008 seemed to be marching towards confining fewer people (and for less time) – which can be interpreted as a key objective of the CRPD – the case law following 2008, as seen above, does not make any significant leaps or bounds in this regard. The next chapter will discuss how the Court can continue to move towards a future where, in accordance with the CRPD, there is far less deprivation of liberty on the basis of disability.

[127] *P.W. v Austria* 10425/19 [2022] ECHR.
[128] Ibid.

# 4. Conclusion and Recommendations

## 4a. Literature Review

As was discussed in Chapter 2, some of the barriers to a harmonious interpretation of the CRPD and the ECHR include a lack of clarity in the ECHR (specifically around the definition of "unsound mind"); the CRPD drawing a hard line on deprivation of liberty; and the consequential contradictions between the two Conventions. This section will analyse, considering the cases discussed in the previous chapter and the opinions of various scholars on the subject, how the Court is currently managing said contradictions.

In the cases studied in Chapter 4, it was noted that even when the Court mentions the CRPD, the Convention is never really used as evidence or justification in the final ruling. One could therefore argue that the Court's use of the CRPD up until this point has been largely performative; this has been pointed out by human rights scholars as well. János Fiala-Butora remarks that the Court "has been oscillating from openly embracing [the CRPD] to ignoring it"[129] and that the inconsistent application of the CRPD in the Court's case law makes harmonious interpretation between the CRPD and ECHR nearly impossible to accomplish.

As discussed in Chapter 2, the CRPD Committee reads Article 14 as completely prohibiting involuntary psychiatric hospitalisation under any circumstances. But as was seen in cases like *D.D. v Lithuania*, the Court still found the applicant's involuntary hospitalisation as lawful since the applicant had been previously diagnosed with schizophrenia and was therefore discernably of "unsound mind". This ruling was made in spite of the fact that the CRPD was in full effect at the time and had been ratified by Lithuania. The Court acknowledged the CRPD as a relevant international instrument, and yet did not apply its relevant provisions to the case. In the years following *D.D. v Lithuania*, there has not been a notable change in the Court's stance, given that the CRPD has not been paid any extra attention in any of the later cases analysed. Evidently, "The European Court has never accepted the CRPD Committee's categorical rule of prohibiting involuntary hospitalisation"[130].

---

[129] János Fiala-Butora (n 37).
[130] Ibid.

Actually, as was seen in Chapter 2, prior to 2008, the Court was getting steadily more progressive. Each judgment included further safeguards for the protection of individuals in compulsory confinement, and more requirements for the professionals involved in such cases. Since the entry into force of the CRPD, however, this progression seems to have lulled. Fiala-Butora argues that in the first few years after the CRPD came into effect, the Court was quite enthusiastic about it and "found in favour of persons with disabilities in areas such as, inter alia, inclusive education, the right to vote, guardianship, lack of disability-specific benefits or pensions, and lack of disability-specific tax exemption"[131] but then dwindled after a few years, especially in cases involving psychiatric confinement. Even during the early years of the CRPD, involuntary confinement was never included in the Court's enthusiastic approach to the Convention; in cases such as *Lashin v Russia*, which occurred only 5 years after the CRPD entered into force, Article 14 was ignored by the Court altogether. The CRPD should have stimulated further growth from the Court, being such a progressive document, but it apparently failed to do so. Even the enthusiasm for other disability rights did not last: "In a series of cases adopted between 2018 and 2021, the Court distanced itself from the CRPD, respectively the CRPD Committee's interpretation of it, sometimes overruling its own earlier case law"[132], specifically in right to marry and right to vote cases.

Indeed, the Court's treatment of the CRPD tends to vary wildly depending on the nature of the case and the disability rights in question. In *Glor v Switzerland*, the Court stated that it views the CRPD as an indication of "a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment"[133], which sounds promising; however, that case was to do with an applicant incurring a penalty tax for non-completion of military service, and did not involve psychiatric confinement at all. The connection to the CRPD was purely on the basis of the non-discrimination principle. There were also judgments made in cases such as *Guberina v Croatia* and *Kiyutin v Russia* where the Court DID in fact take the CRPD into account in making its final ruling; again, though, these were non-related to psychiatric treatment[134]. It appears that the Court actually takes the CRPD more seriously in those cases

---

[131] Ibid.
[132] Ibid.
[133] *Glor v Switzerland* 13444/04 [2009] ECHR.
[134] Delia Ferri, 'The European Court of Human Rights and the 'Human Rights Model of Disability'. [2019] 261 Convergence, Fragmentation and Future Perspectives <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011395> accessed 2 May 2024.

which do not involve persons of "unsound mind". The existence of Article 5 ECHR may be what is holding the Court back from using the CRPD to its full potential in psychiatric confinement cases.

Legal capacity cases sometimes involve psychiatric care; Delia Ferri argues that the case law from the Court dealing with the CRPD is inconsistent there too. Ferri argues that in cases which involve legal capacity, the Court's consideration of the CRPD is all over the place, seemingly contradicting itself in cases *A.-M.V. v Finland* and *Delecolle v France* – mentioning the CRPD in the former but not the latter[135]. These cases were so strikingly similar that it does not follow that the CRPD would not be relevant for both – especially since the Court makes a point to include a section on relevant international instruments in its rulings. Overall, Ferri finds that "the Court seems to run 'hot and cold' in its case law on disability rights"[136].

In general, the European Court has relied far more on its previous case law or on domestic practices than on international instruments in coming to its final judgments. As was seen in the cases in the previous chapter, though the Court might include the CRPD as a relevant instrument, it never ends up factoring into the ruling and seems to be only included for show. Fiala-Butora noted the same trend in Article 5 cases: "In a series of […] cases concerning Article 5, the Court referenced the CRPD, but did not elaborate on its relevance for its own standards. When it found in favour of the applicants, it did so because their hospitalisation did not conform to the Winterwerp criteria; if the criteria were met, the Court accepted the hospitalisation, and did not refer to the CRPD"[137]. Evidently the Court prefers to fall back on its own case law than hold itself to outside international law standards. This is an indication that the Court finds itself (and the ECHR) to be of a higher authority than the CRPD or its Committee. Of course, this is natural considering that the Court's primary function is to interpret the ECHR, not any other conventions. But is it right that other conventions not factor into judgments whatsoever?

In *Rooman v Belgium*, this stance was made quite clear. Though the Court acknowledged that the CRPD was relevant, and that the Committee's Guidelines of Article 14 do in fact absolutely prohibit compulsory confinement, since the ECHR's Article 5 does not ("as currently

---

[135] Ibid.
[136] Ibid.
[137] János Fiala-Butora (n 37).

interpreted"[138]) Article 5 ECHR then supersedes Article 14 CRPD. In this 2019 case, the Court found that where there was a contradiction between the two documents, the ECHR should be upheld; and this stance does not appear to have wavered in the 5 years since.

Some scholars, like Silvia Favalli, insist that the Court has accepted the CRPD as customary law, or general principles that should be kept in mind while interpreting the ECHR. However, even Favalli concedes that "The Court does not clarify what the consequences of the qualification of disability rights are, as stated in the UNCRPD, as 'general principles of international law'"[139] and that this had led to inconsistencies in the Court's use of the CRPD. For example, in *Hiller v Austria*, the CRPD was cited *both* in the Court's ruling and a judge's dissenting opinion[140]. How can it be argued that the CRPD is being properly applied by the Court if the judges themselves cannot even agree on what the CRPD says?

The Court is also happy to accept domestic laws, practices, and medical expertise, even where they contradict with the CRPD. As was seen in the cases involving detention review times, the Court very much prefers to assess cases on an individual basis, rather than adopting universal standards. In none of the cases reviewed did the Court question medical expertise; if an applicant was diagnosed with a mental disability, the Court accepted this as fact. (This is in spite of the fact that, in more than one of the cases discussed, the original diagnosis turned out to be wrong.) The Court was also comfortable accepting the justifications for detention stemming from domestic law and did not question them nor impose any of its own criteria[141]. Though the *Winterwerp* criteria come from the Court's case law, they have been adapted by many national legislations in some form or another[142] and the Court accepts these national interpretations as harmonious with the ECHR. Indeed, "States enjoy a certain 'margin of appreciation' in

---

[138] *Rooman v Belgium* 18052/11 [2019] ECHR.
[139] Silvia Favalli, 'The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: 'from Zero to Hero'' [2018] 18 Human Rights Law Review <https://academic.oup.com/hrlr/article-abstract/18/3/517/5098124?redirectedFrom=fulltext> accessed 3 May 2024.
[140] *Hiller v Austria* 1967/14 [2016] ECHR.
[141] János Fiala-Butora (n 37).
[142] 'The ECHR and mental health law' [2021] Mental Health Law Online <https://www.mentalhealthlaw.co.uk/The_ECHR_and_mental_health_law> accessed 19 April 2024.

determining the legality of psychiatric detention"[143] and the Court does not intervene in each State's process, in conformity with the "principle of subsidiarity"[144].

The problem is that national practices often do not align with international law standards – like the CRPD – at all. As Fiala-Butora says, "the European Court trusts national authorities to be able to convincingly identify persons who are a threat to society, and accepts the marginalisation of these persons"[145]. However, this means that the Court must rely on the risky assumption that national practices are foolproof– that is, until this is proven otherwise on a case-by-case basis. In reality, psychiatric health systems across Europe are deeply flawed, and often allow for people who have not been proven to be suffering from a mental disorder to be unlawfully detained. This was seen in *M.S. v Croatia* and *Atudorei v Romania,* where the Court demanded national systems meet a higher standard. However, the issue may be far more omnipresent than singular European Court cases would indicate. Widespread failures in psychiatric treatment have been found in numerous studies across the continent; for example, a study conducted in the UK interviewing involuntary detainees in psychiatric hospitals found that the patients who participated were receiving inadequate medical care and found themselves unable to challenge their detention – in violation of ECHR Article 5(4)[146]. Other studies have found that Eastern European healthcare systems rely overwhelmingly on psychiatric detention in the treatment of mental disorders, and have little to provide in terms of alternative treatments that does not include compulsory confinement[147]. The hands-off approach of the Court is also a problem for "applicants when the domestic statutory test for psychiatric inculpation is easy to meet and where there is no culture of domestic courts disagreeing with the opinion of the treating doctor"[148]. To challenge their

---

[143] Oliver Lewis and Ann Campbell, 'Violence and abuse against people with disabilities: A comparison of the approaches of the European Court of Human Rights and the United Nations Committee on the Rights of Persons with Disabilities' [2017] 53 International Journal of Law and Psychiatry <https://www.sciencedirect.com/science/article/pii/S0160252717300316> accessed 3 May 2024.
[144] Ibid.
[145] János Fiala-Butora (n 37).
[146] Mary Chambers et al., 'The experiences of detained mental health service users: issues of dignity in care' [2014] BMC Medical Ethics <https://bmcmedethics.biomedcentral.com/articles/10.1186/1472-6939-15-50#:~:text=The%20service%20users%20considered%20their,more%20talking%20therapies%20and%20therapeutic> accessed 1 May 2024.
[147] Dzmitry Krupchanka and Petr Winkler, 'State of mental healthcare systems in Eastern Europe: do we really understand what is going on?' [2016] 13(4) BJPsych International <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5619493/> accessed 1 May 2024.
[148] Oliver Lewis and Ann Campbell (n 130).

detention, applicants must first exhaust all domestic remedies[149] – meaning they must go to their domestic courts, who are unlikely to side with them, and only after receiving a verdict domestically can they bring their case to the European Court. As a result, applicants may remain deprived of their liberty for months or even years during legal proceedings. A third problem is that domestic practices vary so wildly across the continent, that "detention becomes a lottery"[150]; those suffering from a particular disorder in one country may be detained when they would not in any other Council of Europe state. In general, the Court's deference to national practices makes progress in reducing psychiatric confinement difficult; Lewis and Campbell note that "change at the domestic level seems currently an uphill battle and so it does too at the ECtHR level, as the Court often takes its cue from common practice across the 47 Member States"[151].

Of course, the absolute prohibition of deprivation of liberty is only one interpretation of Article 14 – the one endorsed by the Committee and argued for in this paper. The fact that there are other scholarly interpretations, though, does indicate a certain vagueness in the Convention and potentially explains how the European Court can possibly evade this provision without reproach from international law bodies. Scholar Anna Nilsson that the Convention "neither authorises nor prohibits compulsory interventions"[152] and therefore there exists some room for the Court to skirt around the prohibition that other scholars find to be abundantly clear in the text. So long as we cannot all agree on what the CRPD demands, the Court is able to circumvent Article 14 whenever it is most convenient. This applies not only to cases where the Court did not adequately consider the CRPD in its final ruling, but also in the cases where the Court does not cite the CRPD at all, like *Atudorei v Romania*, *Gorobet v Moldova*, and *L.M. v Slovenia*. The Court is able to fall back on Article 5 ECHR and the "unsound mind" principle without much consequence, as long as a hard line is not drawn on the CRPD.

---

[149] European Court of Human Rights, 'Q&A – Exhaustion of Domestic Remedies' [2023] <https://www.echr.coe.int/documents/d/echr/Press_Q_A_Exhaustion_domestic_remedies_ENG#:~:text=Exhausting%20domestic%20remedies%20is%20one,Ordinarily%2C%20it%20is%20rejected.> accessed 14 May 2024.

[150] Karen Reid et al., 'A Practitioner's Guide to the European Convention on Human Rights' (5th edition: Sweet & Maxwell, 2023).

[151] Oliver Lewis and Ann Campbell (n 130).

[152] Anna Nilsson, 'Objective and reasonable? Scrutinising compulsory mental health interventions from a non-discrimination perspective' [2014] 14(3) Human Rights Law Review <https://academic.oup.com/hrlr/article-abstract/14/3/459/644294> accessed 1 May 2024.

4b. Recommendations

It has been well established that the Court is not managing the contradictions between the two Conventions effectively. This chapter will discuss solutions for how to harmoniously interpret the two, moving towards a more progressive model of psychiatric care and an enlightened view on disability in Europe.

As discussed in the previous chapters, the CRPD essentially argues for the non-existence of psychiatric compulsion, which the ECHR outright contradicts. The ECHR is meant to exist as a "living instrument" – meaning that it is to be interpreted "in light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights"[153]. The first instance of the Court applying the living instrument principle was in a 1978 case on the corporal punishment of juveniles[154]. Ever since, this concept has been continually cited by the Court in cases where the ECHR was insufficiently protective of human rights by modern international law standards[155]. The previous chapters have argued, however, that the ECHR's interpretation has not evolved at an appropriate pace given the current climate of international law, and especially in light of the CRPD.

The ECHR's outdatedness can of course be attributed to its age, being a more than 70-year-old document today. Delia Ferri concedes that "the lack of reference to disability in the ECHR is […] 'justified by the temporal and historical context in which the Convention was drafted', and links back to the 'mere welfare and paternalistic approach' which was predominant at that time"[156]. Obviously, times have changed since 1950; and Article 5, being particularly outdated, requires a renewed interpretation now more than ever.

Scholars argue, however, that the living instrument principle has not been applied adequately to Article 5, and should have more of an impact in Article 5 case law than is currently happening. Oliver Lewis points out that "In *Winterwerp*, the Court said that the phrase "unsound mind" is "continually evolving as research in psychiatry progresses, an increasing flexibility in treatment

---

[153] European Court of Human Rights, 'The Convention as a Living Instrument at 70' [2020] Judicial Seminar 2020 <https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2020_eng> accessed 5 May 2024.
[154] Ibid.
[155] Ibid.
[156] Delia Ferri (n 122).

is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread"[157]. Although this statement takes a medical rather than human rights-based perspective, it foreshadows the CRPD's position that "disability is an evolving concept"[158]. At the time, this affirmation by the Court showed promise for the future of Article 5 interpretation; but as was noted in the cases, progress soon slowed. Lewis and Campbell also argue that the Court has taken the living instrument stance on "other areas of discrimination such as LGB rights, immigration, reproductive rights and trans rights"[159] but not in cases of mental disability. Lewis and Campbell are in favour of an amendment or Additional Protocol to the ECHR that would eliminate Article 5(1)(e) in particular, though they admit that the European Court "has no power to delete Article 5(1)(e)"[160]. In light of this, the Court should be taking a more progressive and consistent stance on all types of discrimination in the cases adjudicated.

How can this really be accomplished, though? Several strategies will be discussed below.

*Precedence of the Convention on the Rights of Persons with Disabilities*

Some scholars suggest that the CRPD should take precedence over the ECHR, in relevant cases, by the Court in making its ruling. For example, in an Article 5 case where the applicant had been reliably proven to be of unsound mind, and the Court might therefore find their detention lawful under the ECHR, the Court would be obliged to take the CRPD into account (being a relevant international convention) and actually find the detention unlawful by CRPD standards. There are a few compelling arguments for why this should be the procedure adopted by the European Court.

Though "the rules on how to reconcile conflicting obligations in international law are not particularly well developed and those that do exist are residual in nature"[161], there are

---

[157] Oliver Lewis, 'Council of Europe' [2018] The UN Convention on The Rights of Persons with Disabilities in practice. A Comparative Analysis of the Role of Courts 89.
[158] Ibid.
[159] Oliver Lewis and Ann Campbell (n 130).
[160] Ibid.
[161] Philip Fennell, 'Conflicting or complementary obligations?: The UN disability rights convention, the European Convention on Human Rights and English law' [2012] (6) European Human Rights Law Review <https://uk.westlaw.com/WestlawUK/Journals/Publications/European-Human-Rights-Law-

nevertheless some indicators in international law for how conflicting treaties should be treated in courts. The most major one is the Vienna Convention on the Law of Treaties (VCLT), a 1969 international agreement that established guidelines for how treaties should be drafted, defined, and interpreted. Article 30(3) VCLT states that "in the case of treaties 'relating to the same subject matter', 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'[162]. This is based on the human rights principle that the treaty with the highest level of protection should be upheld, and more modern treaties are assumed to have a higher level of protection of human rights than earlier ones. The ECHR predates the CRPD by 58 years, and therefore should only be applied insofar as it is compatible with the CRPD, according to the Vienna Convention. Do both the CRPD and the ECHR fall within the scope of the European Court, though? Fiala-Butora argues that "as a newer treaty, [the CRPD] should take precedence over the ECHR, because States Parties to the ECHR are also parties to the CRPD"[163]. Therefore, in cases that involve a State Party to both Conventions, the Court should consider the CRPD to override the ECHR in the places where they contradict, and judge the State based on CRPD standards.

Phillip Fennell also points out that the ECHR contains a provision about its alignment with other treaties, while the CRPD does not. Article 53 ECHR states: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which is a Party."[164] The CRPD establishes fundamental human rights related to disability; the implication of this is that the interpretation of the ECHR should not in any way derogating from the rights set out in the CRPD, while Council of Europe Member States are party to it. If the Court overrules a CRPD right, they would be in violation of Article 53 ECHR. On the other hand, there is "nothing in the CRPD which refers to the relationship between that treaty and the existing obligations of states parties"[165] and therefore nothing to imply that the ECHR should overrule the CRPD under any circumstances.

---

Review?comp=wluk&__lrTS=20240507135529058&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 5 May 2024.

[162] János Fiala-Butora (n 37).

[163] Ibid.

[164] European Convention on Human Rights, 1950.

[165] Philip Fennell (n 147).

Finally, Fiala-Butora also makes the point that "when interpreting the ECHR, the European Court has a long tradition of taking into account other international treaties which provide specific rules in certain areas. It is therefore a legitimate question to ask what caused the eventual divergence between the position of the European Court on involuntary mental health treatment and that of the CRPD Committee"[166]. If the Court has a history of respecting the rules set out in other international treaties, why not the CRPD? This can perhaps be attributed to the glaring contradictions between the two, or that the CRPD is so obviously more progressive than the ECHR in general. This being said, inconsistent practices undermine the legitimacy of such an institution; the Court would do well to apply all relevant international treaties in the same way. This would also help state parties to both Conventions more clearly understand what their obligations are, and develop national legislation accordingly.

The CRPD Committee's interpretations in particular have been largely disregarded by the Court. However, the European Court has a judicial function, and the CRPD Committee does not; no UN treaty body does. Should the Court's rulings supersede the Committee's, then, being more legally binding? Not necessarily; the Court may include soft law or general principles of international law when coming to its decisions. The interpretations of the Committee should not be forgone altogether because of their softer legal status.

Based on all of the above, it might seem obvious that the Court should be overruling the ECHR with the CRPD, where relevant. The ECHR is outdated; the CRPD is a newer and more protective treaty, and should therefore take precedence. However, one must keep in mind that it is the role of the European Court to interpret the ECHR specifically. All of the cases brought before the Court are alleged violations of the ECHR; it is the Court's job to determine if there has been an ECHR violation or not. The role of the Court is not to interpret the CRPD at all; that belongs to the CRPD Committee. Why, then, should the Court take the CRPD so aggressively into account, overruling its very own Convention, if that is beyond the scope of its role? This may be slightly too strong of a stance to take, given what the European Court is expected to do. The following section will describe some other strategies for a more harmonious application of the two Conventions, where

[166] János Fiala-Butora (n 37).

the Court can take inspiration from the CRPD, but not necessarily disregard the ECHR completely.

*Progressive realisation of the Convention on the Rights of Persons with Disabilities*

As was mentioned in the previous chapter, the Court takes cues from the ECHR State parties when coming to its decision. Lewis and Campbell stated that this custom prevents growth from the Court and the States themselves in preventing and decreasing psychiatric confinement. As was also discussed, some Member States still employ quite outdated practices when it comes to mental health treatment. When the Court consistently defers to the expertise of the State, the CRPD is continually ignored and its progressive realisation seems further and further away.

This can be resolved if the Court develops its own criteria for justifying detention under Article 5, instead of placing such high importance on domestic legislations. The Court was initially doing this with *Winterwerp* – establishing a set of conditions for Article 5 to be lawful – but then, as was seen in the cases, precious little progress has been made since. *Winterwerp* was 45 years ago; as human rights law became more protective, the Court's conditions should have become more restrictive. Yet we still seem to be mostly stuck in 1979.

Not only should the Court not rely quite so heavily on domestic laws, but medical expertise could also be questioned. It is standard for the Court to take medical assessments at face value and accept a given diagnosis for an applicant; but, as was demonstrated in the cases discussed, assessment are often carried out in a haphazard manner or by an inappropriate medical professional indicating a conflict of interest. Misdiagnosis happens shocking frequently in medicine[167]; it could be worthwhile for the Court to seek out a second opinion to double check the initial diagnosis, or to allow the applicant to seek out and submit their own second opinion on their mental state.

In essence, the European Court should take inspiration from the CRPD (including its underlying principles) to implement stronger safeguards, not only in its own judgments, but in the Member States. The CRPD essentially argues for the non-existence of compulsion in psychiatric

[167] Lisa O'Mary, 'Misdiagnosis Seriously Harms 795,000 People Annually: Study' WebMD <https://www.webmd.com/a-to-z-guides/news/20230719/misdiagnosis-seriously-harms-people-annually-study> accessed 5 May 2024.

treatment; we may not be there yet in Europe as a society, but case law could develop towards that kind of future. To create a world where psychiatric compulsion no longer exists, the European Court would need to alter its judgments in a few cases where there is proof of a true mental disorder, and ask for a higher burden on medical professionals to justify confinement. This might include more frequent and thorough re-assessments and an extremely through and immediate initial assessment, which was often missing from the cases studied in Chapter 3. Another important condition for Member States in justifying confinement could be exhausting every other possible alternative.

There are a myriad of treatments for mental health disorders that do not involve confinement or compulsion (compulsion including things like forced medication, being strapped down, etc.) of any kind. The reason compulsion is still such a popular treatment in countries like Romania is a "lack of alternative community-based mental health and social care services for persons with mental disabilities"[168]. Psychiatric hospitals and social care home placements are very frequent because there are no other practical living situations available for those who need extra assistance. These leads to overcrowding of psychiatric hospitals which leads to a decreased quality of care and an increase in human rights violations.

The Court demands that the mental disorder be of a high enough severity to *warrant* compulsory confinement – but what does that mean? The lack of specificity leads one to speculate – is it to do with how much a person constitutes a potential danger to society? How much assistance a person needs to go about regular life? Is it to do with legal capacity? The Court should take a stricter stance on what *warrants* confinement – without causing further stigmatisation of those suffering from mental disability (like the assumption that this population is inherently dangerous). Involuntary confinement could be reserved only for emergency cases, and continued only as long as the emergency persists. For example, where there is an imminent threat on a person's life, involuntary confinement might be allowed by the Court; but as soon as the immediate threat seems to have passed, the confinement would no longer be considered lawful.

---

[168] Ioana Iliescu, 'Trapped between the ECHR and the UN CRPD: how both the non-implementation and the implementation of ECtHR judgments concerning mental disability risk prolonging an invisible human rights crisis' [2023] European Implementation Network <https://www.einnetwork.org/blog-five/2023/5/4/trapped-between-the-echr-and-the-un-crpd-prolonging-an-invisible-human-rights-crisis> accessed 5 May 2024.

Fiala-Butora offers a variety of strategies for reducing unnecessary hospitalisation, as per the CRPD. He suggests that hospitalisation, or psychiatric treatment in general, could be provided only with consent. Since the ECHR does not *require* that involuntary confinement be available, it only permits its occurrence, the requirement of consent "would comply with both instruments"[169]. Fiala-Butora also recommends that the Court take "certain elements of the CRPD seriously"[170], like the underpinning doctrines of the social model of disability, which will be discussed more thoroughly below; the recognition of capacity; the use of alternative treatments; and the concept of human dignity[171]. These are all key principles to be kept in mind when the Court is making rulings on Article 5 psychiatric cases. In particular, Fiala-Butora argues that the social environment of the applicant is not taken into account in Article 5 cases – "the Court is not considering this issue as carefully as it could"[172] – as in some cases, the solution may not be to segregate the person from society completely, but to adjust their current environment in a way that can accommodate their needs. Fiala-Butora concludes by saying:

> *"These developments would lead to reducing involuntary hospitalisation instead of eliminating it. This does not reach the CRPD Committee's position of prohibiting the practice. Nevertheless, they would decrease the discrepancy between the two instruments, and also create a better starting position for considering the abandonment of involuntary hospitalisation in practice."*[173]

Again, the purpose of these changes is the *progressive realisation* of the CRPD – that is, moving towards an eventual full elimination of involuntary hospitalisation. The Court could implement stricter and stricter conditions for warranting compulsion such that the practice is reduced further and further. This is a far more realistic approach than the one suggested above (disregarding the ECHR completely in favour of the CRPD in cases that reflect their contradictions) – the Court can still interpret the ECHR as its primary instrument, but add more protectiveness through its case law.

---

[169] János Fiala-Butora (n 37).
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.

*Incorporation of the Social Model of Disability*

Reducing and eventually eliminating compulsory confinement seems like a worthwhile goal under the human rights approach – it reflects human dignity and emphasises the importance of consent. There are, however, a variety of reasons why people are confined involuntarily. For example, there are times when confinement is a direct result of an immediate threat to a person's life or physical well-being. Also very often, psychiatric confinement is prescribed for those who have committed a criminal offence.

Psychiatric confinement as an alternative to imprisonment occurred in several of the cases discussed in this paper. Multiple applicants, having committed a crime, were determined to have a mental disorder and to have committed the act as a result. Instead of being sentenced to prison, the applicants were admitted to a psychiatric hospital so that they could also be assessed and treated for the mental disorder. Some may argue that in these cases, involuntary confinement is necessary – the person is a perceived danger to society and must therefore be segregated. It follows that this segregation should take place in a medical facility where treatment is also possible.

The problem with this practice, though, is that it implies that psychiatric facilities are, like prisons, a space to separate criminals from the rest of society in order the keep the public safe. I would argue that this is not the intended purpose of hospitals. Hospitals are meant to be a place of treatment, rehabilitation, and healing; they are not meant to separate certain groups of society from others. After all, those suffering from purely physical ailments are typically permitted to refuse hospital treatment and may be released from care, as long as they are aware of the risks associated with refusing treatment. Why, then, do we continue to treat psychiatric hospitals like prisons? It reinforces the idea that psychiatric treatment is a form of punishment when it should actually be something much more positive.

There is also a concerning lack of standardisation for when those convicted of a criminal offence are confined to psychiatric hospitals as opposed to standard prisons. A 2009 study of psychiatric care in European prison systems revealed that "referral to prison hospitals, medical prison wards, forensic hospitals, or general psychiatric hospital are used in various combinations depending on

different national legal regulations and on the availability of services or other regional circumstances"[174]. It is therefore left somewhat up to chance whether a person with a mental disorder will be kept in prison or in a treatment facility – two people who have committed the same crime, and who are experiencing the same mental disorder, might be incarcerated in different places based purely on their country's resources.

Either way, those with a criminal conviction and a mental disorder are still in need of medical care. The rationale for sending people to psychiatric facilities instead of prison is likely the worry that they will not receive adequate treatment in prison. After all, this was certainly the case in *Rooman v Belgium*.

This is a larger issue. The Council of Europe's Committee for the Prevention of Torture monitors the experience of prisoners across all Member States, and has continually found that "healthcare for prisoners falls short of what is required"[175]. Other studies have found that across the EU, "at every stage of the prisoner's journey, there are gaps in throughcare, allowing prisoners' health problems to go […] untreated, which in many cases leads to […] recidivism and the 'revolving door' into prison"[176]. According to a report published by the World Health Organization in 2023, 1 out of 3 prisoners in Europe suffers from a mental health disorder, and there is an accompanying lack of mental health services in these prisons, leading to elevated rates of suicide[177].

Mental disorders, like in the cases discussed, are frequently a cause or a contributing factor to the crime in the first place. If the disorder goes untreated, there is an increased likelihood that the person will re-offend; and thus the cycle continues. There is a clear need for prison reform across Europe, as this appears to be a persistent problem, not only in psychiatric care but in all medical treatment of prisoners. This is an issue that should be addressed, not necessarily by the Court, but

---

[174] Harald Dressing and Hans-Joachim Salize, 'Pathways to psychiatric care in European prison systems' [2009] 27(5) Behavioural Sciences and the Law <https://onlinelibrary.wiley.com/doi/10.1002/bsl.893> accessed 8 May 2024.
[175] Henriette Roscam Abbing, 'Prisoners Right to Healthcare, a European Perspective' [2013] European Journal of Health Law <https://brill.com/view/journals/ejhl/20/1/article-p5_2.xml> accessed 7 May 2024.
[176] Morag MacDonald et al., 'Inequalities in healthcare for prisoners in Europe: a review' [2012] 9(4) Diversity and Equality in Health and Care <https://www.proquest.com/docview/2670217678?pq-origsite=gscholar&fromopenview=true&sourcetype=Scholarly%20Journals> accessed 7 May 2024.
[177] World Health Organization, 'One-third of people in prison in Europe suffer from mental health disorders' [2023] <https://www.who.int/europe/news/item/15-02-2023-one-third-of-people-in-prison-in-europe-suffer-from-mental-health-disorders> accessed 8 May 2024.

by the Council of Europe as a whole since non-access to medical treatment can be considered a human rights violation under the ECHR (prohibition of torture).

It is evident that there is a distinct possibility that offenders with mental disorders will not receive the psychiatric care they require if they are sent to prison; but this should not be a reason to use psychiatric hospitals as prisons instead. If the person is deemed not criminally responsible for their actions due to their mental state, they should not be confined in the first place; if the person is judged to be criminally responsible, they should receive appropriate care in the appropriate setting.

Prison reform across Europe would correspond with the social model of disability, an approach that has been gaining popularity over the past years and became even more prominent with the creation of the CRPD. The social model frames "disability not as a 'problem' within the individual that needs to be 'fixed', but rather in terms of how law, government and social practice marginalize people with disabilities"[178]. Essentially, the goal of the approach is to create a world where everyone is able to achieve the same things regardless of disability – or in other words, in a fully accommodating world, disability would no longer exist. This can be progressively achieved through the restructuring of existing policies, procedures, and systems – like the current prison setup that is so lacking in accommodations for those requiring specific medical care. The social model of disability can be employed by the Court taking into account the social environment of each applicant, and by the larger Council of Europe implementing prison reform, to progressively achieve the objectives of the CRPD.

## 4c. Concluding Thoughts

This paper has examined how the European Court of Human Rights has managed contradictions between the CRPD and ECHR in cases of involuntary psychiatric confinement, and what could be done to manage these contradictions more effectively. The most significant contradiction between the two Conventions has been established to be that the CRPD expressly prohibits deprivation of liberty on the basis of disability, while the ECHR permits it. Once the CRPD came

[178] Peter Bartlett, 'Beyond the Liberal Subject: Challenges in Interpreting the CRPD, and the CRPD's Challenges to Human Rights' [forthcoming].

into effect, how did the Court reconcile this issue in its case law interpreting the ECHR, specifically in Article 5 cases?

In the overview of selected European Court cases since the entry into force of the CRPD, no discernable strategy was found in the Court's application of the CRPD. There was no consistency for when the Court mentioned the CRPD – even if cases where another party cited it, the Court still sometimes did not consider it a relevant international instrument – and in its final rulings, the Court largely ignored the CRPD altogether. This has been attributed to the fact that, if the Court did take the CRPD into account, it would be forced to overrule ECHR Article 5.

Strategies were then discussed for how the Court should be making its judgment in cases where the ECHR and CRPD are directly relevant. Though it has been suggested that the Court disregard the ECHR altogether where the CRPD is more protective, this was determined to be slightly unrealistic given the role of the Court itself. What the Court should do, rather, is take inspiration from the underlying doctrines in the CRPD and develop its own more protective conditions for involuntary confinement – building on the original *Winterwerp* criteria. With time, the Court should be putting a higher and higher burden on States to prove that the detention of a person with a mental disorder is justified. The idea is to gradually reduce the frequency of involuntary confinement, progressing towards a world where it no longer exists, in conformity with the CRPD. To facilitate this, systematic reforms should be implemented, ensuring that different treatments are available as alternatives to confinement. This might include less restrictive living situations, medicinal treatments given only with consent, and the availability of appropriate treatment in all settings – including prisons.

Is this realistic? Obviously, the reduction of confinement requires a large influx of resources into the creation of alternate treatment avenues and restructuring mental health systems. But one could easily argue that resources are not being optimised in mental health treatment right now. In the Romanian study, psychiatric hospitals were found to be overcrowded and appropriate care was therefore sorely lacking[179]. Cramming patients into a too-small space and preventing them

[179] Ioana Iliescu, 'Trapped between the ECHR and the UN CRPD: how both the non-implementation and the implementation of ECtHR judgments concerning mental disability risk prolonging an invisible human rights crisis' [2023] European Implementation Network <https://www.einnetwork.org/blog-five/2023/5/4/trapped-between-the-echr-and-the-un-crpd-prolonging-an-invisible-human-rights-crisis> accessed 5 May 2024.

from escaping is surely not the best use of any medical professional's time. Fewer detainees would allow for less time and money spent on supervising those on the inside and could allow for more time and money to go towards treating people on the outside. After all, medical treatment is less consuming when the person does not need to be watched, fed, and cleaned up after 24 hours a day.

Changing national systems does require specific plans for programming and implementation on the part of governments. Governments will likely be unwilling to make these changes without much incentive; after all, though the CRPD has been in force for 16 years, forced psychiatric confinement is alive and well across Europe. This is where the Court comes in – by becoming stricter on justifying confinement, States will be forced to implement other programs for treatment. The Court has the power to incentivise Member States to make advancements in the field of mental health.

The CRPD might be ahead of its time, but it paints a very attractive picture of the future. Consent is becoming an increasingly valued concept in some areas of society; it would be wonderful to see equal attention drawn to it in the mental health community. With steps like these from the European Court, we could move towards a Europe that treats all persons with disabilities with the utmost humanity, dignity, and respect.

# References

## Primary Sources

### European Court of Human Rights Cases


Atudorei v Romania 50131/08 [2014] ECHR

Blokhin v Russia 47152/06 [2016] ECHR

Červenka v The Czech Republic 62507/12 [2016] ECHR

D.D. v Lithuania 13469/06 [2012] ECHR

Glor v Switzerland 13444/04 [2009] ECHR

Gorobet v Moldova 30951/10 [2011] ECHR

Hiller v Austria 1967/14 [2016] ECHR

HL v UK 45508/99 [2004] ECHR

Ilnseher v Germany 10211/12 [2018] ECHR

Johnson v UK 22520/93 [1997] ECHR

Kuttner v Austria 7997/08 [2015] ECHR

Lashin v Russia 33117/02 [2013] ECHR

L.M. v Slovenia 32863/05 [2014] ECHR

M.B. v Poland 60157/15 [2021] ECHR

Mihailovs v Latvia 35939/10 [2013] ECHR

M.S. v Croatia (no. 2) 75450/12 [2015] ECHR

N v Romania 59152/08 [2017] ECHR

P.W. v Austria 10425/19 [2022] ECHR

Rooman v Belgium 18052/11 [2019] ECHR

Ruiz Rivera v Switzerland 8300/06 [2014] ECHR

Stanev v Bulgaria 36760/06 [2012] ECHR

Winterwerp v The Netherlands 6301/73 [1979] ECHR


### Committee for the Rights of Persons with Disabilities Cases


Noble v Australia CRPD/C/16/D/7/2012


### United Nations Statutes


Convention on the Rights of Persons with Disabilities, 2008

International Covenant on Economic, Social and Cultural Rights, 1966

## Council of Europe Statutes

European Convention on Human Rights, 1950

## Secondary Sources

### Books and Journal Articles

Bartlett P, ‘’A Mental Disorder of a Kind or Degree Warranting Confinement’: Examining Justifications for Psychiatric Detention’, [2012] 16(6) International Journal of Human Rights 831-844

Bartlett P, ‘Beyond the Liberal Subject: Challenges in Interpreting the CRPD, and the CRPD’s Challenges to Human Rights’ [forthcoming]

Bartlett P, O Lewis and O Thorold, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers 2007)

Chambers M et al., ‘The experiences of detained mental health service users: issues of dignity in care’ [2014] BMC Medical Ethics <https://bmcmedethics.biomedcentral.com/articles/10.1186/1472-6939-15-50#:~:text=The%20service%20users%20considered%20their,more%20talking%20therapies%20and%20therapeutic> accessed 1 May 2024

Dressing H and H Salize, ‘Pathways to psychiatric care in European prison systems’ [2009] 27(5) Behavioural Sciences and the Law <https://onlinelibrary.wiley.com/doi/10.1002/bsl.893> accessed 8 May 2024

Favalli S, ‘The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: ‘from Zero to Hero’’ [2018] 18 Human Rights Law Review <https://academic.oup.com/hrlr/article-abstract/18/3/517/5098124?redirectedFrom=fulltext> accessed 3 May 2024

Fennell P, ‘Conflicting or complementary obligations?: The UN disability rights convention, the European Convention on Human Rights and English law’ [2012] (6) European Human Rights Law Review <https://uk.westlaw.com/WestlawUK/Journals/Publications/European-Human-Rights-Law-Review?comp=wluk&__lrTS=20240507135529058&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 5 May 2024

Ferri D, ‘The European Court of Human Rights and the 'Human Rights Model of Disability'. [2019] 261 Convergence, Fragmentation and Future Perspectives <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011395> accessed 2 May 2024

Fiala-Butora J, ‘The influence of the convention on the rights of persons with disabilities on the European court of human rights in the area of mental health law: Divergence and unexplored potential’ [2024] (94) International Journal of Law and Psychiatry <https://www.sciencedirect.com/science/article/pii/S0160252724000141#:~:text=Despite%20the%20two%20treaty%20bodies,relevance%20of%20capacity%2C%20and%20the> accessed 22 April 2024

Gooding P, ‘A New Era for Mental Health Law and Policy’ (Cambridge University Press, 2017, Melbourne)

Gözler Çamur E, ‘Civil and Political Rights vs. Social and Economic Rights: A Brief Overview’ [2017] 6(1) Journal of Bitlis Eren University Institute of Social Sciences <https://dergipark.org.tr/tr/download/article-file/318915> accessed 1 May 2024

Iliescu I, ‘Trapped between the ECHR and the UN CRPD: how both the non-implementation and the implementation of ECtHR judgments concerning mental disability risk prolonging an invisible human rights crisis’ [2023] European Implementation Network <https://www.einnetwork.org/blog-five/2023/5/4/trapped-between-the-echr-and-the-un-crpd-prolonging-an-invisible-human-rights-crisis> accessed 5 May 2024

Krupchanka D and P Winkler, ‘State of mental healthcare systems in Eastern Europe: do we really understand what is going on?’ [2016] 13(4) BJPsych International <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5619493/> accessed 1 May 2024

Lewis O, ‘Council of Europe’ [2018] The UN Convention on The Rights of Persons with Disabilities in practice. A Comparative Analysis of the Role of Courts 89.

Lewis O and A Campbell, ‘Violence and abuse against people with disabilities: A comparison of the approaches of the European Court of Human Rights and the United Nations Committee on the Rights of Persons with Disabilities’ [2017] 53 International Journal of Law and Psychiatry <https://www.sciencedirect.com/science/article/pii/S0160252717300316> accessed 3 May 2024

MacDonald M et al., ‘Inequalities in healthcare for prisoners in Europe: a review’ [2012] 9(4) Diversity and Equality in Health and Care <https://www.proquest.com/docview/2670217678?pq-origsite=gscholar&fromopenview=true&sourcetype=Scholarly%20Journals> accessed 7 May 2024

Maier J, ‘Addiction is a Disability, and it Matters’ [2021] 14 Neuroethics 467-477

Minkowitz T, ‘The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions’ [2007] 34 Syracuse Journal of International Law and Commerce <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481512> accessed 1 May 2024

Nelson L, ‘Stanev v. Bulgaria: The Grand Chamber’s Cautionary Approach to Expanding Protection of the Rights of Persons with Psycho-Social Disabilities’ (*Strasbourg Observers*, 29 February 2012) <https://strasbourgobservers.com/2012/02/29/stanev-v-bulgaria-the-grand-chambers-cautionary-approach-to-expanding-protection-of-the-rights-of-persons-with-psycho-social-disabilities/> accessed 22 March 2024

Nilsson A, ‘Objective and reasonable? Scrutinising compulsory mental health interventions from a non-discrimination perspective’ [2014] 14(3) Human Rights Law Review <https://academic.oup.com/hrlr/article-abstract/14/3/459/644294> accessed 1 May 2024

Niveau G, Jantzi C and Godet T, ‘Psychiatric Commitment: Sixty Years Under the Scrutiny of the European Court of Human Rights’ [2021] Front Psychiatry <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8129177/> accessed 18 May 2024

Reid K et al., ‘A Practitioner's Guide to the European Convention on Human Rights’ (5th edition: Sweet & Maxwell, 2023)

Rirattanapong T, ‘The disability rights movement in the EU and Europe’ [2022] Chulalongkorn University Theses and Dissertations <https://digital.car.chula.ac.th/chulaetd/8104/> accessed 8 May 2024

Roscam Abbing H, ‘Prisoners Right to Healthcare, a European Perspective’ [2013] European Journal of Health Law <https://brill.com/view/journals/ejhl/20/1/article-p5_2.xml> accessed 7 May 2024

Ruck Keene A, ‘Deprivation of liberty – appropriate places and appropriate treatment’ (*Mental Capacity Law and Policy*, 11 June 2019) < https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-appropriate-places-and-appropriate-treatment/> accessed 19 March 2024

Szwed M, ‘The notion of ‘a person of unsound mind’ under Article 5 § 1(e) of the European Convention on Human Rights’ [2020] 38(4) Netherlands Quarterly of Human Rights <https://doi.org/10.1177/0924051920968480> accessed 26 February 2024

## Websites, Blogs, and Other Sources

Amnesty International, ‘What is the European Convention on Human Rights (ECHR)?’ (*Amnesty International UK*, 17 August 2023) <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 26 February 2024

Angelini Pharma, ‘The incidence of mental disorders in European countries’ [2024] (Rome) <https://www.angelinipharma.com/our-responsibility/headway-a-new-roadmap-in-mental-health/the-incidence-of-mental-disorders-in-european-countries/> accessed 8 May 2024

Barrett D, ‘‘Drug Addicts’ and the ECHR’ (*EJIL: Talk!* 3 September 2018) <https://www.ejiltalk.org/drug-addicts-and-the-echr/> accessed 26 February 2024

Broderick A, Lecture at the Global Campus of Human Rights (Venice, 17 October 2023).

‘Case of Johnson v. the United Kingdom’ [2007] 1(4) The International Journal of Human Rights <https://www.tandfonline.com/doi/abs/10.1080/13642989708406697> accessed 20 April 2024

Committee on the Rights of Persons with Disabilities, ‘General comment No. 1. Article 12: Equal recognition before the law’ [2014]

Council of Europe, ‘A Convention to protect your rights and liberties’ (*Council of Europe* 2024) <https://www.coe.int/en/web/human-rights-convention#:~:text=A%20Convention%20to%20protect%20your%20rights%20and%20liberties&text=It%20was%20adopted%20in%201950,Council%20of%20Europe%20member%20states> accessed 26 February 2024

Department of Health, ‘Mental Capacity Act 2005. Deprivation of liberty safeguards in England’ [2008] <https://www.bfwh.nhs.uk/wp-content/uploads/2015/11/Mental-Capacity-Act-2005-Deprivation-of-liberty-safeguards-in-England.pdf> accessed 9 May 2024

European Council, ‘Mental health’ [2024] Council of the European Union <https://www.consilium.europa.eu/en/policies/mental-health/#:~:text=The%20state%20of%20mental%20health%20in%20the%20EU,-Before%20the%20COVID&text=Anxiety%20disorders%20affected%20an%20estimated,in%20the%20previous%2012%20month> accessed 5 May 2024

European Court of Human Rights, ‘70 years of the European Convention on Human Rights’ (*European Court of Human Rights*) <https://www.echr.coe.int/70-year-of-the-european-convention-on-human-rights> accessed 26 February 2024

European Court of Human Rights, ‘Guide on Article 5 of the European Convention on Human Rights’ (31 August 2022)

European Court of Human Rights, ‘The Convention as a Living Instrument at 70’ [2020] Judicial Seminar 2020 <https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2020_eng> accessed 5 May 2024

European Court of Human Rights, ‘Q&A – Exhaustion of Domestic Remedies’ [2023] <https://www.echr.coe.int/documents/d/echr/Press_Q_A_Exhaustion_domestic_remedies_ENG#:~:text=Exhausting%20domestic%20remedies%20is%20one,Ordinarily%2C%20it%20is%20rejected.> accessed 14 May 2024

European Parliament, ‘Briefing: Mental health in the EU’ [2023] European Parliamentary Research Service <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751416/EPRS_BRI(2023)751416_EN.pdf> accessed 8 May 2024

European Union Agency for Fundamental Rights, ‘Involuntary placement and involuntary treatment of persons with mental health problems’ (Luxembourg: Publications Office of the European Union, 2012)

Equality and Human Rights Commission, ‘Disability discrimination’ [2020] <https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/disability-discrimination#:~:text=The%20Equality%20Act%202010%20says,known%20as%20discrimination%20by%20association)> accessed 8 May 2024

NI Direct, ‘Mental health and disability discrimination’ (NI Direct Government Services) <https://www.nidirect.gov.uk/articles/mental-health-and-disability-discrimination#:~:text=If%20your%20mental%20illness%20has,protected%20under%20disability%20discrimination%20law> accessed 28 February 2024

Nu, ‘Guest blog: promoting the inclusion of LGBTIQ+ people with disabilities’ [2023] Social Development Direct <https://www.sddirect.org.uk/blog-article/guest-blog-promoting-inclusion-lgbtiq-people-disabilities> accessed 8 May 2024

O'Mary L, 'Misdiagnosis Seriously Harms 795,000 People Annually: Study' WebMD <https://www.webmd.com/a-to-z-guides/news/20230719/misdiagnosis-seriously-harms-people-annually-study> accessed 5 May 2024

'The ECHR and mental health law' [2021] Mental Health Law Online <https://www.mentalhealthlaw.co.uk/The_ECHR_and_mental_health_law> accessed 19 April 2024

'Who are the judges of the European Court of Human Rights?' (*UK in a Changing Europe*, 23 Feb 2024) <https://ukandeu.ac.uk/the-facts/who-are-the-judges-of-the-european-court-of-human-rights/> accessed 17 May 2024

World Health Organization, 'One-third of people in prison in Europe suffer from mental health disorders' [2023] <https://www.who.int/europe/news/item/15-02-2023-one-third-of-people-in-prison-in-europe-suffer-from-mental-health-disorders> accessed 8 May 2024