

An Enabling Interpretation of the 1951 Refugee Convention: Determination of Refugee Status in Light of the Convention on the Rights of Persons with Disabilities (CRPD)

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Interpretation of the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol has evolved to take into account the standards of human rights protection embedded in international human rights treaties.¹ The theoretical underpinnings of this development were provided by Hathaway's seminal work in this field, which proposed understanding 'persecution' as a sustained violation of human rights under the International Bill of Rights, comprised of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR).²

Nonetheless, Hathaway subsequently accepted that other international human rights treaties which are widely accepted by States members to the Refugee Convention may be used to interpret what constitutes persecution.³ This raises the novel question of whether the 2006 Convention on the Rights of Persons with Disabilities (CRPD),⁴ a recent addition to the body of United Nations treaties on human rights, can help us to understand the scope of the refugee concept in the case of persons with disabilities. Specifically, it creates an opening for considering whether or how the CRPD's specific set of human rights standards, i.e. disability rights, impacts on our interpretation of the refugee concept in refugee law.

The CRPD is certainly the human rights treaty most apt to provide an authoritative insight into how refugee law should apply to persons with disabilities. With 151 Parties to the CRPD in total, only 12 States out of the 144 States parties to the 1951 Refugee Convention⁵ are not also parties to the CRPD.⁶ Against this context, the first section of this chapter turns to examine the framework of disability rights created by the CRPD. It does so not only according to the principles that the CRPD expresses and the letter of its provisions, but also in light of the manner in which they have been interpreted by its newly-created monitoring body, the CRPD Committee, in the few General Comments and decisions on individual complaints that it has issued thus far.

The relative novelty of the CRPD also means that no cohesive analysis yet exists to explain its implications for refugee law. The subsequent sections of this chapter represent an attempt to begin to address these questions directly. To do so, they contrast two distinct approaches to conceptualising the human rights of persons with disabilities in the context of international protection. The second section explores the manner in which disability has been addressed

¹ Michelle Foster, *International Refugee Law and Socio-Economic Rights* (CUP 2007) 27.

² James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104.

³ James Hathaway, 'The Relationship between Human Rights and Refugee Law: What Refugee Judges Can Contribute' in *The Realities of Refugee Determination on the Eve of a New Millennium: the Role of the Judiciary* (International Association of Refugee Law Judges 1999) 87.

⁴ UNGA Res 106 (2007) GAOR 61st Session Supp 49.

⁵ UNHRC, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' <<http://www.unhcr.org/3b73b0d63.html>> accessed 28 December 2014.

⁶ OHCHR, 'Ratification Status for CRPD' <http://.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en> accessed 28 December 2014. These are: Belarus, Botswana, Equatorial Guinea, Gambia, Holy See, Lichtenstein, Saint Kitts and Nevis, Sao Tome and Principe, Somalia, Tajikistan, Tanzania, and Timor Leste.

within existing broader human rights frameworks by the case law of regional courts in Europe, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in expulsion cases. This approach is then deliberately contrasted with the approach adopted in the leading New Zealand decision of *AC (Egypt)* that addresses such issues directly within the framework of refugee law.⁷ That decision forms the basis for the attempt by this chapter to identify, in light of the CRPD, an ‘enabling’ interpretation of the Refugee Convention for persons with disabilities.

1. CRPD human rights standards

For the benefit of persons with disability, the CRPD develops a set of human rights standards that differ substantially in their rationale to those articulated in general terms by the ICCPR or ICESCR. Specifically, it provides a set of disability-sensitive adaptations of these general human rights standards. In order to give proper context to the discussion that follows, this section provides an overview of the ‘social model of disability’ as the conceptual basis of the CRPD, as well as the main legal principles expressed by the CRPD, and the work of the CRPD Committee in interpreting the reach of the treaty’s legal provisions.

1.1 Conceptual basis of the CRPD: the social model of disability

Conceptually, the crucial point of departure is that the CRPD is predicated upon a ‘social’ model of disability rather than a ‘medical’ model. The CRPD thus signals a paradigm shift from a medical to a social understanding of disability.⁸ It is important to elaborate briefly on these models and their main features in order to appropriately situate the CRPD in terms of the broader principles that it expresses in legal form.

The social model of disability asserts that disability is a social construct, which occurs in the interaction of an individual impairment with extraneous, social factors.⁹ This is in contrast to the medical model of disability, which situates disability as a limitation that exists within the individual. Even though some impairments may be linked with illness, the social model is very clear that these two concepts should not be conflated. On the contrary, disability is not the expression of illness; society marginalises, disempowers and excludes persons with impairments and it is these negative social attitudes and barriers that render the individual disabled. Removing those barriers is necessary in order to ensure the inclusion and equal participation of persons with disability in social, economic and political life.

As the basis for a disability rights regime, the social model of disability implies a need for equality and freedom. In social theory, Turner¹⁰ and Shakespeare and Watson¹¹ have developed this idea on the basis of an egalitarian approach to impairment. They claim that there ‘is no qualitative difference between disabled people and non-disabled people, because we are all

⁷ [2011] NZIPT 800015.

⁸ Don MacKay, ‘The United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law and Commerce* 323.

⁹ Similarly, Art. 1 of the CRPD states that: ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

¹⁰ Bryan S. Turner, ‘Disability and the Sociology of the Body’, in Gary Albrecht et al. (eds.), *The Handbook of Disability Studies* (Sage 2001) 252.

¹¹ Tom Shakespeare and Nicholas Watson, ‘The social model of disability: an outdated ideology?’ (2002) 2 *Research in Social Science and Disability* 9.

impaired'.¹² However, this approach has been criticised as biological reductionism since arguing that the common denominator of equal humanity is that everyone is impaired, 'fails to recognise that disabled bodies embody potential and possibility...'.¹³ Consequently, it seems better that both accounts of the human condition should inform this egalitarian approach. People with disabilities are equal because we are all 'bursting with possibilities and capabilities'¹⁴, even though we are all impaired.¹⁵

Dhanda argues that inherent in the rights of persons with disability is a claim for support that exists simultaneously with the confirming and asserting of their autonomy.¹⁶ This claim for support is based on our common human denominator of impairment. Because we all are, or will be, impaired in one way or another, we have an obligation to provide support in order to address the difficulties that impairment causes. However, this support must also be provided in way that respects and fosters the potential of persons with disability, asserts their freedom and allows their lives to flourish.

This line of argument suggests that the human rights protection of persons with disability should not depend on scarcity of resources and their allocation, or on positive obligations, which may or may not be considered enforceable. On the collective level, the absence or ineffectiveness of general policy measures to provide adequate support to persons with disability in order to achieve full and equal inclusion in society is a mark of unequal distribution of resources. On the individual level, denial of reasonable accommodation violates the core of fundamental rights for persons with disability, such as accessibility.

In this framing of the social model as an argument about equality and freedom, a final point must be made in relation to the concept of disablism. The social model of disability, which the CRPD advances, goes against deeply engrained social and legal prejudices towards disability that view persons with disability as objects of pity, or as financial burdens sapping the strength of the State. These negative attitudes have been described as disablism. As Harpur notes:

Essentially, disablism and ableism could be defined as discriminatory or abusive conduct towards people based upon their physical or cognitive abilities.¹⁷

However, disablism does not occur only at the interpersonal level. Rather, this analysis argues that State policies may also be regarded as disablist when they fail to lift the barriers that impede persons with disability from enjoying equal access to social and economic life or result in further marginalisation and exclusion for persons with disability. In particular, a budgetary allocation of resources that fails to take account of the rights of persons with disability is disablist and, as we will see, violates State obligations under Article 4 CRPD.

1.2 CRPD

¹² Ibid., 27.

¹³ Bill Hughes, 'Being Disabled: towards a critical social ontology for disability studies' (2007) 22 *Disability & Society* 682.

¹⁴ Bill Hughes, 'Wounded/Monstrous/Abject: A critique of the disabled body in the sociological imaginary' (2009) 24 *Disability & Society* 402.

¹⁵ Tom Shakespeare and Nicholas Watson, 'The social model of disability: an outdated ideology?' (2002) 2 *Research in Social Science and Disability* 27.

¹⁶ Amita Dhanda, 'Constructing a new human rights lexicon: Convention on the rights of persons with disabilities' (2008) 8 *International Journal on Human Rights* 47.

¹⁷ Paul Harpur, 'From Disability to Ability: changing the phrasing of the debate' (2012) 27 *Disability & Society* 329.

The foregoing discussion situates the rationale for adoption of the CRPD. As the most recent group rights treaty, it is inspired by the realisation that universal, general human rights standards do not provide adequate protection for persons with disability. Rather, persons with disability face specific human rights concerns that are particular to their position. The CRPD highlights this lack of protection and creates disability-specific rights that are adapted specifically to address the challenges faced by persons with disability.¹⁸

Indeed, this is a crucial feature of the rights framework that the CRPD establishes. By providing a disability-specific reformulation of human rights for persons with disability, it aims to combat the social exclusion and marginalisation of persons with disability.¹⁹ Thus, in Article 4(1)(a)(b) of the CRPD, States are placed under an obligation to adopt all appropriate legislative, administrative and other measures for the implementation of CRPD rights, as well as to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disability. Through such provision, the CRPD seeks to implement the social model of disability discussed earlier.²⁰

For the purposes of our enquiry into the relevance of the CRPD to the scope of the refugee concept, there are three additional features which require brief analysis. Firstly, the CRPD adopts an ‘integrated approach’ to the rights protected by its provisions. Typically, every right in the CRPD takes the form of a normative bundle that is comprised by (i) the right held by the individual against State interference (negative rights), (ii) associated positive obligations on the State, and (iii) disability-specific standard setting, through the inclusion of indicative and non-exhaustive measures necessary for realisation of the right. As such, the disability rights entrenched in the CRPD transcend the traditional division between civil and political rights and socio-economic rights.

Secondly, it is also a feature of the CRPD that it requires only the progressive realisation of the socio-economic aspect of the rights it protects, according to Article 4(2). Yet this does not mean that socio-economic rights for persons with disability remain mere aspirations. A typical example is the right to accessibility, protected under Article 9 CRPD. Not only is the right to accessibility the disability-specific reformulation of the right to access in international human rights law, but also it has been interpreted by the CRPD Committee as an enforceable obligation of the State to provide accessibility to persons with disability, through both accessibility standards and reasonable accommodation.²¹

Finally, there is the concept of ‘reasonable accommodation’. In Article 2, reasonable accommodation is defined as:

...necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

¹⁸ Anna Lawson, ‘The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?’ (2007) 34 *Syracuse Journal of International Law and Commerce* 583.

¹⁹ Andreas Dimopoulos, *Issues in the Human Rights Protection of Intellectually Disabled Persons* (Ashgate 2010) ch. 3.

²⁰ See section 1.1 above.

²¹ UN Committee on the Rights of Persons with Disabilities ‘General Comment No 2’ (2014) CRPD/C/GC/2 paras. 25-26.

Under Article 5(3) of the CRPD, States are placed under an obligation to provide reasonable accommodation in the case of persons with disability in order to eradicate discrimination.

Each of these four features – i.e. the social model (as a bulwark against disablism), the integrated approach, the progressive realisation and reasonable accommodation - are important for the purposes of our analysis. They provide an understanding of human rights that is particular to the context of disability and which appropriately modifies general human rights standards for persons with disability. We will need to take them into account as we proceed, in the next section, to assess the implications of the CRPD framework of human rights for determining the scope of the refugee concept under Article 1A(2) of the Refugee Convention.

1.3 CRPD Committee interpretation

First, though, it is important to examine the way in which the CRPD monitoring body - the CRPD Committee - has helped to clarify the legal content of this framework. This exercise of interpretative clarification takes place through exercise of the functions attributed to the CRPD Committee: it not only receives and examines reports from State parties concerning their protection of human rights for persons with disability,²² and issues General Comments on aspects of the CRPD,²³ but also may receive and examine petitions from individuals and groups of individuals concerning violation of these rights by any of the 85 States currently parties to the CRPD Optional Protocol.²⁴ Since entry into force of the CRPD in 2008, the Committee has been active in developing interpretations of these standards.

The two General Comments issued thus far by the CRPD Committee provide important insights. The first General Comment emphasizes the importance of the right of equal recognition before the law in Article 12 CRPD for persons with disability.²⁵ Here, the Committee observes that persons with disability must enjoy legal capacity on an equal basis with others in all areas of life.²⁶ Such legal capacity includes both the capacity to be a holder of rights and an actor under the law.²⁷ As a consequence, States must refrain from denying legal capacity and, instead, must provide access to the support that may be necessary to make decisions that have legal effect.²⁸ The Committee concludes that, without the recognition of the individual as a person before the law, the ability to assert, exercise, and enforce many Convention rights is significantly compromised.²⁹

The second General Comment addresses the key right to accessibility in Article 9 CRPD.³⁰ This it frames as the precondition for independent living, full and equal participation of persons with disability in society and unrestricted enjoyment of all their human rights and fundamental freedoms on basis of equality with the others.³¹ All new objects, infrastructure, facilities, goods,

²² Articles 35 (Reports by State Parties) and 36 of the CRPD (Consideration of Reports).

²³ UN Committee on the Rights of Persons with Disabilities Working methods of the Committee on the Rights of Persons with Disabilities (2011) CRPD/C/5/4 part III.A.

²⁴ Article 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities UNGA Res 106 (2007) GAOR 61st Session Supp 49.

²⁵ UN Committee on the Rights of Persons with Disabilities 'General Comment No 1' (2014) CRPD/C/GC/1.

²⁶ *Ibid.* para. 8.

²⁷ *Ibid.* para. 12.

²⁸ *Ibid.* para. 16.

²⁹ *Ibid.* para. 31.

³⁰ UN Committee on the Rights of Persons with Disabilities 'General Comment No 2' (2014) CRPD/C/GC/2.

³¹ *Ibid.* para. 14.

products, services have to be designed in a way that makes them fully accessible for persons with disability, in accordance with the principles of the universal design. State Parties are under an obligation to ensure their access to already existing physical environments, transportation, information and communication, services opened to the general public, but as this obligation is to be implemented gradually, State parties should set definite, fixed time frames, and allocate adequate resources for the removal of the existing barriers.³²

As noted above, the CRPD Committee receives individual complaints under the Optional Protocol to the CRPD and it has issued several decisions that shed further light on the normative content of Articles 9 and 12 of the CRPD. Concerning Article 12 CRPD, *Zsolt Bujdosó and others* involved applicants placed under guardianship and as a result automatically deleted from electoral registers by operation of Hungarian law.³³ They complained that such automatic exclusion violated Article 12 CRPD along with Article 29 CRPD, which guarantees the right to participation in political and public life.

In its decision, the Committee stressed that Article 12(2) requires States parties to recognize and uphold the legal capacity of persons with disability ‘on an equal basis with others in all aspects of life’, including political life. Moreover, it held that under Article 12(3) States parties have a positive duty to take the necessary measures to guarantee to persons with disability the actual exercise of their legal capacity. By depriving the claimants of their right to vote, based on a perceived or actual intellectual disability, the Committee found that the State party failed to comply with its obligations under Article 29, read alone and in conjunction with Article 12 CRPD. This decision serves to emphasise a fundamental tenet of Article 12, namely that lack of mental capacity cannot serve to justify restrictions on the legal capacity of persons with disability.

A different set of issues are illustrated by *Szilvia Nyusti and Péter Takács*.³⁴ Here, the applicants had severe visual impairments such that they were unable to use the ATM of their private bank without assistance.³⁵ The CRPD Committee held that lack of accessibility for persons with visual impairments to the entire network of the ATMs operated by the private bank amounted to a failure of the State to comply with its obligations under Article 9. The Committee recommended to the State party to create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones. In other words, according to the CRPD, the right to accessibility, even if it may be regarded as a socio-economic right, is enforceable and should be respected: violations of Article 9 by the private sector can be attributable to the State.

This process of interpretation and application of the CRPD is just beginning and, thus far, there is very little guidance in State Reports about other serious questions of human rights protection for persons with disability. For example, Article 16(5) places States under an obligation to put in place effective legislation to ensure that exploitation, violence and abuse against persons with disability is identified, investigated and, where appropriate, prosecuted. Yet, in relation to Article 16, the relevant questions of the Committee for the purposes of State Reports are

³² Ibid. para. 24.

³³ *Zsolt Bujdosó and five others v. Hungary* (CRPD Committee, 9 September 2013).

³⁴ *Szilvia Nyusti, Péter Takács and Tamás Fazekas v Hungary* (CRPD Committee, 16 April 2013).

³⁵ The keyboards of the ATMs were not marked with Braille fonts, and did not provide audible instructions and voice assistance for banking card operations.

phrased in general terms.³⁶ There is no reference to issues of disability hate crime in State Reports, which certainly comes under the scope of this provision.³⁷

The same caveat applies to refugees with disability, a concern which is not directly addressed in the text of the CRPD, nor in the Committee's General Comments or its examination of State reports and individual complaints. Even so, it is interesting to note that a news item was published on the CRPD site in response to the Syrian crisis, in which the CRPD Committee stressed the importance of Article 11 CRPD for the protection of persons with disability.³⁸ Moreover, the Committee urged Syria to provide greater protection to persons with disability affected by the conflict and to take all necessary measures under international humanitarian and human rights law to ensure the protection and safety of persons with disability in situations of risk, including armed conflict, as Article 11 CRPD dictates. However, even here, the CRPD Committee made no specific mention of the refugee crisis, which also affects persons with disability in Syria.

In conclusion, even though the CRPD Committee remains in its infancy, it has already consolidated several interpretative advances regarding two rights fundamental for persons with disability: accessibility and equal recognition before the law. Thus, the CRPD Committee's reasoning in its General Comment on Article 12 CRPD and in the *Zsolt Bujdosó* case showcase the fundamental importance attached to the right to legal capacity. In parallel, its General Comment on Article 9 and *Szilvia Nyusti* decision make clear that socio-economic rights, such as the right to accessibility, are enforceable under the CRPD. States should allocate resources for their implementation and, where they do not allocate sufficient resources for the (progressive) implementation of these socio-economic rights, the CRPD will be violated. Moreover, violation of these socio-economic rights by non-State actors will be attributable to the State where it has failed to discharge its positive obligations under the CRPD.

2. IHRL and expulsion: the medical case law of the ECtHR and the ECJ (the failure adequately to take account of disability rights)

Asylum and refugee protection for persons with disability have not yet been considered by the CRPD Committee directly under the framework of disability-specific rights enshrined in the CRPD, as was shown above.³⁹ At the present time, therefore, a definitive answer to the question of how disability-specific rights play into the protection of refugees and asylum-seekers with disability remains elusive. Against this backdrop, the present chapter suggests that two distinct ways of addressing the issue of disability in the asylum context have emerged.

This section illustrates the first of these approaches by reference to the jurisprudence of international human rights tribunals in Europe. It shows that, even following adoption of the CRPD, these courts have made limited interpretive use of the CRPD in expulsion cases concerning persons with disabilities or serious illnesses. Instead, these cases have been decided

³⁶ UN Committee on the Rights of Persons with Disabilities 'Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities' (2009) CRPD/C/2/3, 11.

³⁷ For instance, the UK 'Initial Report under Article 35 to the Committee on the Rights of Persons with Disabilities' (2011) CRPD/C/GBR/1 specifically mentions hate crime legislation under the remit of Article 16 of the CRPD in paras. 152-157.

³⁸ 'Persons with disabilities 'forgotten victims' of Syria's conflict' <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>> accessed 28 December 2014.

³⁹ See section 1.3 above.

under the broader ECHR framework but without taking account of the special needs of persons with disability. The restrictive approach of these European courts in this field contrasts with the more disability-sensitive approach taken to such cases by certain domestic tribunals under refugee law, which is highlighted in the following section.

2.1 ECtHR

The ECtHR seems to treat the expulsion of aliens with disabilities in line with the restrictive approach that it has developed for cases based on medical grounds. This stems from the 1997 case of *D v UK*.⁴⁰ There, the applicant had been imprisoned in the UK and was receiving treatment for HIV/AIDS. He was released from prison at terminal stage of HIV/AIDS and was facing deportation, even though his death was imminent. It was accepted that, if deported, the applicant would probably die in distressing circumstances with no palliative care in his country of origin. The ECtHR held that, in light of the very exceptional circumstances of the case, deportation would be a violation of Article 3 ECHR.

The *D v UK* ‘very exceptional circumstances’ test in such medical cases was upheld in *N v UK*,⁴¹ a similar case in which the applicant was diagnosed with advanced HIV/AIDS. The ECtHR accepted that the quality of the applicant's life and her life expectancy would be affected if she were returned to Uganda, but noted that the applicant was not at that time critically ill. However, the ECtHR found that the rapidity of the deterioration which she would suffer, and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, involved a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV/AIDS worldwide. Given that the applicant's case did not disclose very exceptional circumstances, the removal of the applicant to Uganda was considered not to give rise to a violation of Article 3 ECHR.⁴²

Crucially, an expulsion case involving an alien with a physical disability was recently determined by the ECtHR. The applicant in this case, *S.H.H. v UK*,⁴³ claimed that the return to Afghanistan, his country of origin, would be a violation of Article 3 ECHR because no provision of support for persons with disability existed there. The applicant also claimed that he was estranged from his family and would therefore not be able to count on them for support. The ECtHR's approach in rejecting this claim shows clearly where it draws the line in respect of human rights arguments based on a lack of adequate support for medical needs or disability in the country of origin.

Specifically, the ECtHR appears to draw a bright line between ECHR parties and non-parties in respect of the human rights implications of expulsion to a situation of inadequate support. Indeed, on the lack of support point, the facts of *S.H.H.* parallel those of *M.S.S. v Belgium and Greece*.⁴⁴ In the latter case, the applicant claimed that the lack of any material support by the authorities while he was an asylum-seeker in Greece amounted to a violation of Article 3 ECHR and that his return by Belgium to those conditions under the Dublin II regulations engaged the responsibility of Belgium also for this breach. These contentions were upheld by the ECtHR,

⁴⁰ *D v UK* App no. 30240/96 (ECtHR, 2 May 1997).

⁴¹ *N v UK* App no 26565/05 (ECtHR 27 May 2008).

⁴² *Ibid.* paras. 50-51.

⁴³ *S.H.H. v UK* App no 60367/10 (ECtHR, 29 January 2013).

⁴⁴ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

which found a breach of the Article 3 ECHR due to the applicant's 'vulnerability as an asylum seeker' and the humiliating conditions to which he was exposed.⁴⁵

However, in *S.H.H.*, the ECtHR specifically distinguished the legal parameters of that case from those in *M.S.S.*:

In that case [*M.S.S.*], a fellow Contracting State, Greece, was found to be in violation of Article 3 of the Convention through its own inaction and its failure to comply with its positive obligations under both European and domestic legislation to provide reception facilities to asylum seekers...By contrast, the present application [*S.H.H.*] concerns the living conditions and humanitarian situation in Afghanistan, a non-Contracting State, which has no such similar positive obligations under European legislation and cannot be held accountable under the Convention for failures to provide adequate welfare assistance to persons with disabilities.⁴⁶

For this reason, the ECtHR held that the approach adopted in *N v UK* would be more appropriate and rejected the claim in *S.H.H.* as not meeting the 'very exceptional circumstances' test.

Even so, the reasoning of the ECtHR in cases such as *N v UK* has recently come under fire in strong dissenting opinions in the decision of *S.J. v Belgium*⁴⁷ and the judgment of *Tatar v Switzerland*.⁴⁸ In *S.J.*, Judge Pinto de Albuquerque stated that *N v UK*:

...clearly distorts the reasoning behind Article 3 of the Convention, by watering down the legal force of that provision on the basis of purely speculative assumptions regarding both the future care and support that seriously ill persons will receive from the national authorities in the receiving State and the economic burden they represent for the Contracting Parties to the ECHR.⁴⁹

In his partly dissenting opinion in the separate case of *Tatar*, Judge Lemmens argued that the applicant, who had severe mental illness, should have been considered as 'vulnerable', in a sense analogous to the applicant in the *M.S.S v Greece and Belgium* case. This is an important point, to which we will return shortly, after considering the approach of the CJEU.

2.2 CJEU

Qualification for 'subsidiary protection' under Article 15 of the EU Qualification Directive is based principally on the codification of ECHR human rights standards in expulsion cases, at least for Articles 15(a) and (b).⁵⁰ However, in interpreting the application of these provisions to claims for international protection from aliens with serious illnesses or disability, the reasoning of the CJEU follows a line of argument that is as restrictive as that advanced by the ECtHR in such cases as *N v UK*.

⁴⁵ Ibid. para. 263.

⁴⁶ *S.H.H. v UK* App no 60367/10 (ECtHR, 29 January 2013) para. 90.

⁴⁷ *S.J. v Belgium* App no 70055/10 (ECtHR, 19 March 2015).

⁴⁸ *Tatar v Switzerland* App no 65692/12 (ECtHR, 14 April 2015).

⁴⁹ *S.J. v Belgium* App no 70055/10 (ECtHR, 19 March 2015) para. 7 of the dissenting opinion.

⁵⁰ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304/12.

For instance, in the case of *M'Bodj*,⁵¹ a Mauritanian national had unsuccessfully applied for asylum and leave to reside on medical grounds. At a later point, he was the victim of an assault and he applied again for leave to reside on medical grounds. Interpreting the Qualification Directive, the CJEU held that:

the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection.⁵²

On its face, this approach appears even more restrictive than that of the ECtHR, in that it does not even allow for protection to be granted on medical grounds in very exceptional cases. Rather, such cases may succeed only where the person is intentionally denied access to healthcare, suggesting that only a very narrow subset of cases will be eligible for protection.

Even so, in the *Abdida*⁵³ case, the CJEU confirmed that, under the Returns Directive,⁵⁴ national authorities should provide medical assistance for as long as an appeal against a refusal for leave to remain on medical grounds is pending. This case concerned a Nigerian national who had applied for leave to remain in Belgium on medical grounds. His application had been unsuccessful and he had appealed against that decision. At the same time, he was refused social assistance, as his appeal did not have suspensive effect. The CJEU not only held that national legislation must endow such an appeal with suspensive effect,⁵⁵ but also decided that medical assistance must be provided during the period in which the Member State is required to postpone removal of the third country national following the lodging of an appeal against a refusal for leave to remain on medical grounds.⁵⁶

2.3 A restrictive understanding of the human rights of persons with disability

The jurisprudence of the two European regional courts demonstrates a restrictive approach to interpreting the scope of human rights protection in expulsion cases based on the absence of support for persons with disability or illness in their home country. This approach, which characterises such scenarios almost exclusively in terms of relative resource scarcity, is inconsistent with the CRPD conceptualisation of human rights protection. There, the violation of CRPD rights is seen to occur when persons with disability are not provided by national authorities with the support needed to enjoy their rights, through enforceable standards, regardless of any supposed scarcity of resources.⁵⁷ Although recent dissenting opinions in some ECtHR cases give some hope that the *M.S.S.* ‘vulnerability’ rationale may apply to disability-based cases in the future, the present line of authority is disappointing in its treatment of

⁵¹ Case C-542/13 *M'Bodj v Belgium* (CJEU, 18 December 2014).

⁵² Case C-542/13 *M'Bodj v Belgium* (CJEU, 18 December 2014) para 36.

⁵³ Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* (CJEU, 18 December 2014).

⁵⁴ Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98.

⁵⁵ Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* (CJEU, 18 December 2014) para. 50.

⁵⁶ *Ibid.* para. 62.

⁵⁷ UN Committee on the Rights of Persons with Disabilities ‘General Comment No 2’ (2014) CRPD/C/GC/2 paras. 25.

disability. Can a more disability-sensitive approach be discerned in the parallel field of refugee law?

3. Refugee law and the CRPD

Refugee law offers an important precedent that is currently absent from the European human rights jurisprudence in the approach taken by a leading case in which the CRPD was used to interpret the refugee concept in an asylum claim by a person with disability.⁵⁸ This is the decision of the New Zealand Immigration and Protection Tribunal (IPT) in *AC (Egypt)*, the case of an Egyptian claimant who was discriminated against throughout his life, and sometimes even assaulted, as a result of his albinism and found by the IPT to be a refugee.⁵⁹ The present section thus uses *AC (Egypt)* to elaborate a disability-sensitive approach to interpretation of the refugee concept in Article 1A(2) of the Refugee Convention via the standards expressed in the CRPD.

3.1 Being persecuted

The IPT in *AC (Egypt)* adopted an understanding of the Article 1A(2) element of ‘persecution’ as requiring:

...an assessment of whether the appellant would suffer a sustained or systemic violation of his/her core human rights. Put another way, persecution can be seen as the infliction of serious harm, coupled with the failure of State protection.⁶⁰

This formulation directly follows the conceptualisation of persecution proposed by Hathaway, in which human rights concepts are brought centre-stage. The contention here is that, if persecution is to be assessed by reference to human rights standards, then those rights expressed in the CRPD have a role to play in framing our understanding of what constitutes ‘persecution’ in cases involving persons with disability.

Effectively, this was the position adopted in *AC (Egypt)* by the IPT, which held that the widespread ratification of the CRPD was sufficient to demonstrate its relevance in framing the nature of the rights at stake in the persecution enquiry.⁶¹ That reasoning suggests that the CRPD can be taken to provide an interpretative guide to ‘persecution’ in asylum cases involving persons with disability even where they hail from States that are not parties to the CRPD. Just as Hathaway argued that the ‘extraordinary consensus’ around (but not universal ratification of) the International Bill of Rights was sufficient for it to illustrate ‘common international standards of acceptable behaviour’,⁶² so the IPT extends this rationale to the CRPD.

In this instance, the infliction of serious harm was linked not simply to the non-discrimination provisions in the ICCPR and ICESCR and the ineffective and weakly enforced domestic legislation protecting persons with disability, but also to disability rights as encapsulated in the

⁵⁸ The very few cases relating to refugees with disabilities that predate the entry into force of the CRPD simply make use of general human rights standards to decide whether the applicants faced a well-founded fear of persecution in their countries of origin (see, for example, this case decided by the Canadian Immigration and Refugee Board in 2002, [MAI-08719](#)).

⁵⁹ [2011] NZIPT 800015.

⁶⁰ *Ibid.* para. 40.

⁶¹ *Ibid.* para. 70.

⁶² James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 106.

CRPD. In its reasoning, the IPT specifically took into account Article 27 of the CRPD, which protects the (socio-economic) right to work and employment, the core content of which the applicant was being consistently denied because of his disability.

Clearly, the refugee law reasoning of the IPT in *AC (Egypt)* is far more sensitive to construing harm in terms of the specific rights of persons with disability than is the expulsion-related human rights case law of the European international courts in cases such as *S.H.H.* While it is clear that the breaches of the appellant's rights under the CRPD formed an integral component of the overall finding of a well founded fear of being persecuted by the tribunal, the facts of *AC (Egypt)* also involved serious and persistent forms of physical harm that would routinely amount to persecution under almost any interpretation of the term. More challenging for a CRPD-based analysis of persecution will be those situations where a person with disability faces violations of their rights that are more readily characterised as deriving only from socio-economic deprivation. Nevertheless, the approach taken in *AC (Egypt)* provides a clear framework by which such a finding could be arrived at in appropriate factual circumstances.

In this regard, Dhanda usefully points out that the CRPD introduces a new human rights lexicon that is based on the concept of indivisibility of human rights⁶³ as well as the interdependence of human beings.⁶⁴ Also, inherent in the rights of persons with disability is a claim for support, while confirming and asserting their autonomy.⁶⁵ If we unpack these arguments, it becomes clear that the CRPD delineates an effective human rights protection through positive and negative duties that the State owes to the person with disability. This new human rights lexicon sits uneasily within the confines of orthodox accounts of human rights that insist on the deeply entrenched divide between civil and political rights, which are actionable, and socio-economic rights, which are not.

For these reasons, harm for persons with disability under the CRPD must be conceptualised in two ways: firstly, in terms of discrimination, understood in light of the social model of disability. Discrimination does not have to be direct and attributable to State legislation which specifically marginalises persons with disability and denies them inclusion in society. Indirect discrimination, in the case of general legislation which does not offer reasonable accommodation, has the same effect. These are instances of discrimination, which operate at the general, group level. However, any refusal of reasonable accommodation from State authorities is direct discrimination at the individual level. Needless to say, the harm in these cases must be weighed according to the specific characteristics of the individual with disability.

The second way that persons with disability are exposed to harm is through socio-economic deprivation. Again, here the social model is important to understand that the CRPD explicitly approaches disability as a human rights issue through the provision of both negative and socio-economic rights. The right to accessibility, even though traditionally conceivable as a positive obligation on the State, is, according to the CRPD Committee, central to the enjoyment of all other rights for persons with disability and is enforceable. Even though the CRPD allows for progressive realisation of socio-economic rights, it must not be forgotten in the refugee status determination context that rights such as accessibility remain enforceable. Violations of the core of this fundamental right for persons with disability will engender the violation of other human rights for persons with disability.

⁶³ Amita Dhanda, 'Constructing a new human rights lexicon: Convention on the rights of persons with disabilities' (2008) 8 *International Journal on Human Rights* 48.

⁶⁴ *Ibid.* 50.

⁶⁵ *Ibid.* 48.

The effect of both types of harm can be conceptualised as persecution, and this is particularly true in the case of the right to accessibility. As mentioned in the General Comment on Article 9 of the CRPD, denial of reasonable accommodation, even if it goes beyond general accessibility standards, is a violation of Article 9.⁶⁶ Given the fundamental importance of the right to accessibility for the exercise of every other right under the CRPD, denial of reasonable accommodation, even on the grounds of scarcity of resources, must be conceptualised as persecution. As mentioned, the CRPD Committee's General Comment on Article 9 CRPD makes it clear that arguments about scarce resources cannot defeat the obligation upon a State party to ensure accessibility:

In accordance with the Convention, States parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is *unconditional*, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity.⁶⁷

This makes it clear that a refusal by the national authorities of an asylum seeker's country of origin to make such reasonable accommodation for her specific impairment and that takes account of her 'dignity, autonomy and choices of the individual' will violate the core of the right to accessibility under Article 9 of the CRPD. The refusal of the national authorities to make this reasonable accommodation renders the person disabled, and violates their core human rights in a manner tantamount to 'persecution' for the purposes of refugee law.

Moreover, an integral part of the CRPD's rationale is that its constituent rights should tackle socio-economic deprivation. Article 4(2) of the CRPD places an obligation on member States to allocate resources for the progressive realisation of socio-economic rights. As such, the legal test under the CRPD is simply whether the provision of support by national authorities for the human right in question is adequate to meet the needs of the persons with disability. Whilst a scarcity of resources may influence the form of reasonable accommodation made by the authorities, it is irrelevant if no reasonable accommodation has been made. Similarly, a denial of support need not be done intentionally on discriminatory grounds. Rather, the mere fact of the national authorities' failure to make reasonable accommodation violates the rights of the person with disability concerned and will constitute 'persecution'.

This enabling interpretation of the Refugee Convention contrasts sharply with the restrictive approach of the European courts to human rights cases involved expulsion of persons with disability or illness. Via the CRPD, and the Committee's General Comment on Article 9, we readily appreciate how crucial the issue of accessibility is for the enjoyment of all human rights by persons with disability. Where the core of the right to accessibility is violated, this unleashes a wave of hindrances to the enjoyment of other rights, such as the right for respect of private life. The person with disability is harmed in a way which a non-disabled person cannot be harmed. Of course, the argument about harm alone does not suffice to found a claim under the Refugee Convention and it is to these other aspects that we now turn.

⁶⁶ UN Committee on the Rights of Persons with Disabilities 'General Comment No 2' (2014) CRPD/C/GC/2 para. 26.

⁶⁷ *Ibid.* para. 25.

3.2 Well-founded fear

The main issue under this heading arises in jurisdictions that maintain that the element of ‘well-founded fear’ includes a subjective as well as an objective component. Such an approach, which is not universally accepted,⁶⁸ may cause problems for asylum applicants with disabilities, especially in the context of intellectual disability. On the one hand, persons with intellectual disability may be subject to aggravated feelings of fear, i.e. fearing situations and conditions that would not cause fear in other persons. Crock has argued for an ‘egg-shell skull’ rule approach to such refugee claims, such that:

...asylum seekers whose disabilities make them particularly vulnerable to harm would have those vulnerabilities taken into account when their protection needs were assessed’.⁶⁹

On the other hand, cognitive impairments may render some persons with disability unable to comprehend fear. On this point, Crock cites with approval the practice of Canadian courts to infer subjective fear from the objective circumstances of the case if the asylum applicant has a mental disability which hinders her full appreciation of harm.⁷⁰ As regards the objective component of fear of persecution, this will be assessed on a disability-sensitive approach by reference to those rights protected by the CRPD.

3.3. Disability as ‘membership of a particular social group’

The social model of disability conceptualises disability as a social construct, which emerges through negative interactions with society. The prejudice against disability can best be conceptualised as disablism: the view that persons with disability are inferior to non-disabled persons. Persons with disability have the immutable characteristic of their impairments and they stand out from the rest of society as a distinct social group. This is the case even when they do not have visible impairments because they are commonly the victims of discrimination and the target of disablist attitudes and prejudice.

In the case of *AC (Egypt)*, the IPT accepted that persons with disability constitute members of a ‘particular social group’ because:

...the characterisation of disability in the CRPD as having both a physical and social component lends support to the notion that disability status can, in principle, be considered a social group in societies where persons with a disability are treated as a distinct group.⁷¹

Here, the use of human rights standards expressed by the CRPD to determine membership of a particular social group for the purposes of Article 1A(2) of the Refugee Convention is notable.

⁶⁸ See e.g. *R v Secretary of State for the Home Department; Ex parte Sivakumaran* [1988] 1 AC 958 at 992-993. As Hathaway and Foster write, ‘The substantive consideration of subjective fear as part of the ‘well-founded’ inquiry is inconsistent with established protection principles, and is otherwise out of keeping with the goals of refugee law. James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 110.

⁶⁹ Mary Crock, Christine Ernst and Ron McCallum, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24 *International Journal of Refugee Law* 744.

⁷⁰ *Ibid.* 743.

⁷¹ [2011] NZIPT 800015 para. 103.

Moreover, it coheres with the growing tendency in the wider field of human rights law to acknowledge discrimination on the basis of disability.⁷²

3.4 Nexus requirement

The concept of ‘disablism’ - against which the CRPD serves as a bulwark - is key to understanding how the nexus element of the Article 1A(2) refugee definition (‘for reasons of’) should apply in the case of persons with disability. A disablist attitude can be inferred directly from a failure by the national authorities to make reasonable accommodation for the impairment of a person with disability, thereby violating her rights under the CRPD. This approach dispenses with the need to show intention on the part of the persecutor, an approach that finds resonance more generally in treatment of the nexus question by refugee law.

Rather, the social model of disability shows the necessary link between discrimination and harm through the simple fact that the person with impairment has become disabled. This predicament approach was applied directly in *AC (Egypt)* to explain the nexus requirement for refugees with disability:

The appellant’s predicament is a function of his physical appearance which clearly identifies him as an albino and of his status as a disabled person.⁷³

The very fact of the applicant’s disability in this case is sufficient to show precisely how his country of origin excludes him from mainstream society, marginalises and disempowers him on the basis of his presumed inferiority to non-disabled persons.

4. Conclusions

This chapter attempts to answer to the question of who is a refugee with disability by developing a disability-sensitive approach to refugee status determination. In doing so, it has suggested that there are currently two contrasting approaches to the determination of such cases by reference to human rights principles. The first, a narrow interpretation of general human rights standards in expulsion cases, is evident in the jurisprudence of European international tribunals. The second, a disability-sensitivity approach, can be seen in efforts to determine refugee cases under the Refugee Convention by reference to the human rights standards of the CRPD

The chapter follows this second approach to argue that interpretation of the Refugee Convention definition for claimants with disability has to be made in the light of the principles of the CRPD. Other concepts linked to disability rights, such as disablism, may also be used to shed light on the particular elements of the Article 1A(2) refugee definition in claims from persons with disability. An enabling interpretation of the Refugee Convention draws attention to important disability-specific issues and ensures that refugee status is determined in a manner sensitive to the needs of persons with disability.

⁷² For example, in the recent case of *Glor v Switzerland* (App no 13444/04, 30 April 2009), the ECtHR established that disability counts within ‘other status’ for the purposes of anti-discrimination under Article 14 ECHR.

⁷³ [2011] NZIPT 800015 para. 110.

Key words

CRPD – disability – disablism – socio-economic deprivation – refugee status determination

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List of Abbreviations

CJEU – Court of Justice of the European Union

CRPD – Convention on the Rights of Persons with Disabilities

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

UDHR – Universal Declaration of Human Rights