

Where Disability and Displacement Intersect: Asylum Seekers with Disabilities

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Discussion paper prepared for the Vulnerable Persons Working Group
International Association of Refugee Law Judges World Conference
Bled, Slovenia, 7-9 September 2011

Introduction

The World Health Organization estimates that 2.9 per cent of the world's population is severely disabled and a further 12.4 per cent has moderate long-term disability.¹ In 2010, the number of refugees, displaced persons and other persons of concern to UNHCR was an estimated 36.5 million.² Taken together, these statistics suggest that the number of displaced persons living with a disability ranks in the millions. Despite the scale of this phenomenon, relatively little scholarly attention has been paid to the particular issues and challenges facing persons with disabilities who are seeking refugee status. Persons with disabilities living in situations of conflict and humanitarian disaster must surely rank among the world's most vulnerable persons. For these people the experience of forced migration is compounded by multiple and diverse challenges that flow from physical, mental, intellectual or sensory impairments.

Refugees with disabilities stand at the intersection of two major legal instruments: the Convention relating to the Status of Refugees ('the Refugee Convention') and the Convention on the Rights of Persons with Disabilities ('the CRPD').³ While the Refugee Convention has been in existence for six decades – predating all of the major international human rights instruments – the CRPD is a relative newcomer, having entered into force in May 2008. The CRPD represents a significant paradigmatic shift in the understanding of persons with disabilities. Forged in the crucible of an influential global disability rights movement, the Convention adopts an explicitly rights-oriented approach to disability. It rejects what is known as the 'social welfare' model of disability – which views persons with disabilities as 'objects of charity, medical treatment and social protection'. Rather, it conceptualises persons with

¹ World Health Organization, *The Global Burden of Disease: 2004 Update* (Geneva: WHO, 2008), p. 34.

² United Nations High Commissioner for Refugees ('UNHCR'), *Statistical Yearbook 2009* (Geneva: UNHCR, October 2010), p. 7. UNHCR defines "persons of concern" as including refugees; asylum-seekers; internally displaced persons (IDPs) protected/assisted by UNHCR; stateless persons; returned refugees; returned IDPs; and others of concern.

³ *Convention Relating to the Status of Refugees* ('Refugee Convention'), opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954); *Convention on the Rights of Persons with Disabilities* ('CRPD'), opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

disabilities as rights-bearers, who can ‘claim those rights as active members of society’.⁴ The CRPD also signals a shift towards acceptance of the ‘social’ model of disability (dropping the reference to welfare or to medical condition). This approach acknowledges that a person’s disability is created more by *society* than by physical impairment as such. Disability arises from societal structures that unnecessarily isolate persons with physical, mental, intellectual or sensory impairments and exclude them from full participation.⁵ The social model of disability developed as a reaction against the medical model of disability, which views a person’s impairment as the problem and focuses on ‘treating’ that impairment.⁶ The influence of the social model is manifested in article 1 of the CRPD, which 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. (emphasis added)

This discussion paper has been prepared as a springboard for discussion of the various respects in which disability can affect an asylum claim. It is divided into three parts. Part I considers the threshold question of whether the obligations enshrined in the CRPD are owed in respect of refugees – and thus whether they are relevant to refugee status determination. The second Part examines issues surrounding the determination of refugee status at a procedural level, teasing out the implications the CRPD might have for decision makers charged with adjudicating asylum claims. Part III turns to the Refugee Convention to consider how disability can impact a person’s ability to qualify for protection under that instrument, and suggests how the principles of the CRPD might be brought to bear in the substantive determination of asylum claims.

I. Does the CPRD apply to refugees?

In 2010, the Executive Committee of UNHCR (‘ExCom’) began drafting a Conclusion on refugees with disabilities. One of the first questions that States Parties to the Refugee Convention raised was whether the CRPD, which had come into force two years earlier, applied to refugees. Some States Parties asserted that the obligations owed by States under the CRPD are owed only to nationals. They argued that economic and social conditions in their countries made it difficult to support the needs of nationals with disabilities, let alone those of refugees and asylum seekers arriving sometimes in great numbers.

⁴ Statement by Louise Arbour, UN High Commission for Human Rights, on the Ad Hoc Committee’s adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006, cited in Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1, p. 3.

⁵ Union of the Physically Impaired against Segregation (1974-75), *Policy Statement*, para. 1, available at <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/UPIAS.pdf> (accessed 12 August 2011). See also Tom Shakespeare, ‘The Social Model of Disability’ in Lennard J. Davis (ed.), *The Disability Studies Reader* (New York and Abingdon: Routledge, 3rd ed., 2010), pp. 266-273.

⁶ Rosemary Kayess and Phillip French, ‘Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1, pp. 5-6.

Whatever political support this argument may have garnered domestically, its doctrinal foundations were (and are) shaky. Human rights are, by definition, for everyone. Natural rights theory – the forerunner to modern conceptions of human rights⁷ – is premised on the assumption that a person is endowed with certain rights simply because he or she is human.⁸ The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948, proclaims that ‘all human beings are born... in equal dignity and rights’.⁹ Two decades later, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised the ‘inherent dignity and... the equal and inalienable rights of all members of the human family’.¹⁰ The very philosophical basis of human rights law, therefore, cannot sustain a finding that human rights apply only to certain people within a State’s jurisdiction.

The argument that the CRPD does not apply to refugees also sits uncomfortably with the established jurisprudence of human rights treaty bodies. The recently formed Committee on the Rights of Persons with Disabilities is yet to make a formal statement on the application of the CRPD to refugees.¹¹ However, other treaty bodies have determined that human rights obligations are owed regardless of whether an individual is a citizen of a State. The Human Rights Committee’s General Comment No. 31 states that ‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons’.¹² This confirmed General Comment No. 15, which stated that ‘the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness’.¹³ Similarly, the Committee against Torture has commented that obligations under the Convention against Torture are owed in respect of ‘any person, citizen or non-citizen without discrimination’.¹⁴

⁷ Jerome Shestack, ‘Philosophic Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 201, p. 204; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003), p. 58.

⁸ Suri Ratnapala, *Jurisprudence* (Cambridge: Cambridge University Press, 2009), p. 121.

⁹ Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 1.

¹⁰ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 3 January 1976), preamble; International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), preamble.

¹¹ However, when the Committee saw the ExCom Conclusion on Refugees and Disability there was no dissent from members on the universal reach of the CRPD: the Committee expressly congratulated UNHCR on its Conclusion. See Paragraph 16 of the decisions adopted by the CRPD Committee at its Fourth Session 4 October 2010.

¹² Human Rights Committee, *General Comment No. 31*, UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

¹³ Human Rights Committee, *General Comment No. 31*, 27th session, 11 April 1986, para. 1. See also UN Human Rights Committee, *Miha v Equatorial Guinea*, UN doc. CCPR/C/51/D414/1990, 10 August 1994, para. 5.1.

¹⁴ Committee against Torture, *General Comment No. 2*, CAT/C/GC/2, 24 January 2008, para. 7.

Well-established principles of treaty interpretation also support the view that the CRPD applies to refugees. Under article 29 of the Vienna Convention on the Law of Treaties, absent a contrary intention, a treaty is binding upon each State Party in respect of its entire territory. There is nothing in the text of the CRPD to suggest an intention that the CRPD should apply only to nationals. On the contrary, the CRPD is premised on the principle of universality. The purpose of the CRPD, stated in article 1, is to ‘promote, protect and ensure the full and equal enjoyment of *all* human rights and fundamental freedoms by *all* persons with disabilities’ (emphasis added).¹⁵ This view is echoed in the Preamble, which recalls the ‘inherent dignity and worth and the equal and inalienable rights of *all* members of the human family’, and recognises that ‘*everyone* is entitled to all the rights and freedoms set forth [in the Universal Declaration of Human Rights], without distinction of any kind’.¹⁶ Article 4 requires States Parties to ‘take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’. Under Article 5, States Parties ‘recognise 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’. In fact, the CRPD implicitly envisions circumstances in which States may owe obligations to persons other than their own nationals. The preamble refers to the observance of human rights during armed conflict and foreign occupation.¹⁷ Similarly, article 11 obliges States Parties to protect ‘persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’, situations which often involve cross-border population flows.

The ExCom Conclusion of October 2010 does not state expressly that the CRPD applies to refugees. However, it can be argued that it does so implicitly, by referencing the Convention and by avoiding any text confining the reach of the conclusion. The ExCom Conclusion recalls ‘the recognition by the Convention on the Rights of Persons with Disabilities of the inherent dignity and equality of persons with disabilities’.¹⁸ It also incorporates key principles of the CRPD including non-discrimination,¹⁹ inclusion and participation,²⁰ accessibility,²¹ and equality of opportunity.²² Accordingly, there would appear to be little basis for the view that the CRPD does not apply to refugees. As the number of States Parties to the

¹⁵ CRPD, art 1.

¹⁶ CRPD, preamble, paras. (a) and (b).

¹⁷ CRPD, preamble, para. (u).

¹⁸ UNHCR, *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR* (‘ExCom Conclusion’), ExCom Conclusion No. 110 (LXI), 12 October 2010, available at: <http://www.unhcr.org/4cbeb1a99.html>.

¹⁹ ExCom Conclusion, para. (a); CRPD, art 3(b).

²⁰ ExCom Conclusion, paras. (d)-(e); CRPD, art 3(c)

²¹ ExCom Conclusion, paras. (f), (h) and (j); CRPD, art 3(f).

²² ExCom Conclusion, paras. (k) and (l); CRPD, art 3(e).

CRPD continues to increase,²³ States will have to begin considering how they can ensure that their refugee status determination procedures comply with their obligations under the CRPD.

In the parts that follow, we examine in turn the implications that the CRPD has for the procedures followed by decision makers engaged in the process of assessing an asylum claim. It will be seen that the Convention demands that some accommodation be made for persons with disability who seek protection as refugees. The final section examines the substantive issues relating to the interpretation of the Refugee Convention.

II. Accommodating persons with disabilities in the asylum process

(i) Identifying persons with disabilities

Perhaps the first and most important obligation facing the adjudicator charged with processing a refugee claim is to identify disability in a person presenting as an asylum seeker. The CRPD does not provide an exhaustive definition of disability, which its preamble describes as ‘an evolving concept’.²⁴ Article 1 defines persons with disabilities to include, at the very least, persons with a range of long-term impairments (physical, sensory, intellectual or mental). The starting point in identifying asylum seekers, therefore, is that the definition of disability is not closed and should be conceived of broadly. Disability can manifest itself in many forms and cannot be confined to a few established categories. As the World Health Organization (WHO) observes in its 2011 World Report on Disability:

The disability experience resulting from the interaction of health conditions, personal factors, and environmental factors varies greatly. Persons with disabilities are diverse and heterogeneous, while stereotypical views of disability emphasise wheelchair users and a few other ‘classic’ groups such as blind people and deaf people.²⁵

Procedures for identifying persons with disabilities must be sufficiently flexible to accommodate this diversity. The International Association of Refugee Law Judges (IARLJ) has produced Judicial Guidelines on Procedures with Respect to Vulnerable Persons, which provide useful guidance in this regard. They state that applicants or their representatives should be given the opportunity to make submissions as to the nature of their disability and its impact on the procedural and/or substantive aspects

²³ As of 12 August 2011 there were 103 States Parties to the Convention.

²⁴ As Marianne Schulze explains, article 1 does not provide a ‘definition’ in the proper sense of the word. The drafters of the Convention made the deliberate decision not to include a closed definition of disability, partly because of the concern that such a definition would become outdated and exclude persons in need of protection: Marianne Schulze, ‘Article 1: Purpose’ in *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (New York: Handicap International, 3rd ed., 2010), pp. 34-39.

²⁵ World Health Organization, *World Report on Disability* (Geneva: WHO Press, 2011), p. 7.

of their claim.²⁶ They further recommend that efforts be made to identify disability as early in the proceedings as possible, but that adjudicators be prepared for the possibility of disabilities being identified later in the proceedings.²⁷ This is particularly important in light of the fact that not all persons with disabilities identify as having a disability.

(ii) *Environmental factors and the need for reasonable accommodation*

A striking feature of the CRPD definition is the distinction that it draws between impairment and disability. Disability arises not from impairment alone, but from the interaction between impairment and various societal barriers. The World Report on Disability explains this in the following terms:

Disability is the umbrella term for impairments, activity limitations and participation restrictions, referring to the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environmental and personal factors).²⁸

The International Classification of Functioning, Disability and Health – the WHO's framework for measuring health and disability – emphasises the significance of environmental factors in creating and perpetuating disability. These environmental factors include: products and technology; the natural and built environment; support and relationship; attitudes; and services, systems, and policies.²⁹ Such environmental factors can ground a substantive claim to refugee status (see Part III, below). Environmental factors associated with the refugee status determination process *itself* can have a disabling effect. It is therefore critical that adjudicators are attuned to the procedural difficulties that persons with disabilities might encounter in putting forward a claim.

The obligation to provide 'reasonable accommodation' to persons with disabilities is a cornerstone of international disability law and a key feature of the CRPD.³⁰ The CRPD defines reasonable accommodation as 'necessary and appropriate modification and adjustments', where needed, 'to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.³¹ The obligation to make accommodations is not absolute: accommodations must be 'reasonable' and need not be made where to do so would impose 'a disproportionate or undue

²⁶ International Association of Refugee Law Judges, *Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability*, Guidance Note 9, September 2008, para. 14.

²⁷ International Association of Refugee Law Judges, *Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability*, Guidance Note 9, September 2008, para. 13.

²⁸ World Health Organization, *World Report on Disability* (Geneva: WHO Press, 2011), p. 4.

²⁹ World Health Organization, *World Report on Disability* (Geneva: WHO Press, 2011), p. 5.

³⁰ CRPD, arts 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).

³¹ CRPD, art 2.

burden'.³² In many jurisdictions, domestic law already imposes an obligation upon adjudicators to provide reasonable accommodations. For example, under Australia's *Disability Discrimination Act 1992* (Cth), a failure to make 'reasonable adjustments' for persons with disabilities can constitute indirect discrimination.³³ An adjustment is considered reasonable unless making the adjustment would impose an 'unjustifiable hardship' on the person making it.³⁴ In the remainder of this Part, we provide some examples of the procedural difficulties that can be experienced by persons with disabilities, and the reasonable accommodations that can help to mitigate them.

(iii) *Credibility*

One of the key challenges associated with putting forward a refugee claim is the need to show that a claimant is credible, that is, that his or her testimony ought to be accepted.³⁵ The difficulties posed by the need to present a credible claim are well-documented.³⁶ Asylum seekers often experience serious technical and psychological difficulties in submitting their case.³⁷ These difficulties emerge from, among other things, the fact that they are in an alien environment (with an unfamiliar language and culture); the effect of trauma on their capacity to recall events; the fact that asylum seekers are often unrepresented by legal counsel; and their limited access to documentary or other evidence to support their claim.³⁸ Michael Kagan observes that 'being deemed credible may be the single biggest substantive hurdle before applicants beginning the refugee status determination process'.³⁹

These difficulties, which can affect all types of asylum seekers, are often compounded for asylum seekers with disabilities. A disability may make them appear incoherent, inconsistent, defensive or

³² CRPD, art 2.

³³ *Disability Discrimination Act 1992* (Cth) s 6(2).

³⁴ *Disability Discrimination Act 1992* (Cth) s 4(1). 'Unjustifiable hardship' is defined under s 11 of the Act.

³⁵ This is the definition of credibility applied by Michael Kagan in 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367, pp. 370-71.

³⁶ See, for example, Steve Norman, 'Assessing the Credibility of Refugee Applicants: A Judicial Perspective' (2007) 19(2) *International Journal of Refugee Law* 273, p. 282.

³⁷ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ('UNHCR Handbook'), UN Doc HCR/IP/4/Eng/REV.1 (revised ed, 1992), para. 190.

³⁸ Deborah Anker, *Law of Asylum in the United States* (Boston: Refugee Law Center, 3rd ed., 1999), p. 153, cited in Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367, p. 374.

³⁹ Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Georgetown Immigration Law Journal* 367, p. 368.

uncommunicative. It may make it difficult for a person to understand questions and to answer them intelligibly. A study conducted into another vulnerable group of asylum seekers – unaccompanied and separated children – found that processing poses special challenges for such persons

because of the emphasis that it places on applicants telling the truth; and the association it makes between lying and lack of credibility. The “screening” interview is recorded and any later changes in an applicant’s story can be used to question an applicant’s credibility.⁴⁰

Despite these difficulties, courts have been reluctant to make specific allowances for asylum seekers with disabilities. For example, the Chief Justice of the High Court of Australia observed that:

Many people who appear before administrative tribunals ... suffer from psychological disorders or psychiatric illness. That may affect their capacity to do justice to their case. Fairness does not ordinarily require the court or tribunal to undertake a psychiatric or psychological assessment to investigate the extent to which the person in question may be at a disadvantage.⁴¹

It is true that the rights of persons with disabilities must be balanced against the need to ensure that judicial decision-making is consistent and that judicial resources are used efficiently. However, the principle of reasonable accommodation would suggest that adjustments should be made for persons who encounter heightened difficulties in presenting their claims. Special examination techniques might be appropriate.⁴² The UNHCR Handbook suggests that expert medical advice be obtained ‘to assess the applicant’s ability to fulfil the requirements normally expected of an applicant in presenting his case’.⁴³ Courts and tribunals might rely less on an asylum seeker’s individual testimony and more on the evidence of friends, relatives and other close acquaintances.⁴⁴ They might also show a greater willingness to draw inferences from the surrounding circumstances than they otherwise would, thereby reducing the burden on the asylum seeker to make out a positive case.⁴⁵

In assessing the claims of asylum seekers who do not have disabilities, courts have already demonstrated a willingness to accommodate some level of inconsistency in the evidence asylum seekers present.⁴⁶ The Federal Court of Australia, for instance, has recognised that asylum seekers may experience particular

⁴⁰ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Sydney: Themis Press, 2006), p. 85.

⁴¹ *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, para. 19 (Gleeson CJ).

⁴² UNHCR Handbook, para. 207.

⁴³ UNHCR Handbook, para. 208.

⁴⁴ UNHCR Handbook, para. 210.

⁴⁵ UNHCR Handbook, para. 210.

⁴⁶ See, for example, *Abebe v Commonwealth* (1999) 197 CLR 510, p. 577 (Gummow and Hayne JJ).

‘problems of communication and mistrust’ in their relations with public officials,⁴⁷ and that decision-makers should ‘exercise great caution before drawing inferences from perceived inconsistencies’.⁴⁸ There is no reason why this logic cannot be extended to make additional accommodations for asylum seekers with disabilities.

(iii) *Other procedural challenges*

The list of challenges that persons with disabilities might experience is not closed. It includes, for example:

- Difficulties in understanding questions and instructions (eg. where an asylum seeker has limited cognitive ability);
- Difficulties in communicating (eg. where an asylum seeker has limited speech, is deaf or is severely hard of hearing); and
- Behavioural difficulties, difficulties in delivering a coherent and consistent testimony, and/or difficulties in recalling and recounting events (eg. where an asylum seeker has a psychosocial disability).⁴⁹

In light of these challenges, it is vital that courts and tribunals make reasonable procedural accommodations for persons with disabilities so that their experience of disability is not compounded, and so that they can participate fully and effectively in the refugee status determination process. Very little research has yet been undertaken into the procedural difficulties faced by asylum seekers with disabilities or the adjustments that ought to be made in response. Until such research is available, some guidance can be drawn from the comparative field of children seeking asylum. Children, like persons with disabilities, fall into the category of vulnerable persons. A detailed study of separated and unaccompanied children seeking asylum in Australia identified major flaws in the process of assessing such children’s claims, from the primary decision-making stage right through to the stages of merits and judicial review.⁵⁰ Many of the report’s recommendations are relevant to persons with disabilities, although their relevance will obviously vary depending on the nature of the disability in a given case. The report recommended, among other things, that:

⁴⁷ *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1998] 86 FCR 547, p. 557 (O’Connor, Branson & Marshall JJ).

⁴⁸ *Thevendram v Minister for Immigration and Multicultural Affairs* [2000] FCA 1910, para. 42 (Lee J).

⁴⁹ Adapted from International Association of Refugee Law Judges, *Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability*, Guidance Note 9, September 2008, para. 17.

⁵⁰ See Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), chapters 9-11.

- Special procedures be instituted to identify unaccompanied and separated children and to determine their age;⁵¹
- All officials involved in assessing the refugee claims of unaccompanied and separated children be trained in international guidance and practice, child development, interview considerations and the legal analysis to be applied to such claims;⁵²
- Interpreters be chosen carefully so as to ensure their linguistic and social compatibility with the applicant;⁵³
- Interviews be undertaken by persons specially trained in refugee and children's issues, and in appropriate techniques for eliciting information from traumatised and frightened children;⁵⁴
- Adjudicators be provided with training in child development, child psychology and cross-cultural understanding specific to children;⁵⁵
- Children be permitted to have support persons involved in any appeal process;⁵⁶
- In the examination of the factual elements of a child's claim, particular regard be given to circumstances such as the child's stage of development, his or her special vulnerability, and the possibility that he or she has limited knowledge of conditions in the country of origin.⁵⁷

It is not difficult to see how many of the recommendations above would be equally applicable to certain cases involving persons with disabilities. In fact, parallels can be seen between the recommendations

⁵¹ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 230.

⁵² Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 236.

⁵³ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 236.

⁵⁴ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), pp. 236-37.

⁵⁵ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 238.

⁵⁶ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 239.

⁵⁷ Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Annandale: Themis Press, 2006), p. 239.

above and those set out in the IALRJ guidelines on procedures relating to vulnerable persons. The procedural accommodations proposed by the guidelines include:

- accommodations for the immediate physical needs of claimant;
- ensuring that information is provided in an accessible format (eg. in Braille or audio form for persons who are blind);
- special procedures to ensure that claimants understand the nature and importance of the refugee status determination procedure;
- participation of a support person;
- the use of videoconferencing facilities, where appropriate, to obviate the need for claimants to be physically present at hearings;
- the use of specialist interpreters where required (eg. interpreters who can communicate in the relevant sign language);
- variations in the order and manner of questioning to ensure that claimants fully understand and can participate fully in the proceedings; and
- inclusion and exclusion of non-parties from the hearing room as appropriate.⁵⁸

III. What challenges do persons with disabilities face in meeting the definition of a refugee?

The Refugee Convention applies only to persons who meet the definition of a refugee under Article 1A(2) of the Refugee Convention. The limited reach of this definition is well-documented:⁵⁹ indeed it has spawned a body of law and literature that finds little parallel in international affairs. Many displaced persons – including those with disabilities – fall short of the definition for technical reasons, for example, because the persecution that they fear is not by reason of one of the five grounds set out in art 1A (race, religion, nationality, membership of a particular social group or political opinion). UNHCR has responded to this reality by widening its mandate to encompass persons who have been forcibly displaced

⁵⁸ See International Association of Refugee Law Judges, *Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability*, Guidance Note 9, September 2008, para. 19.

⁵⁹ See Jerzy Sztucki, ‘Who is a refugee? The Convention definition: universal or obsolete?’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 55-81.

but do not strictly meet the definition of a refugee.⁶⁰ Nonetheless, for persons applying for resettlement or seeking asylum, their ability to meet the article 1A definition remains critical.

Several elements of the definition can prove particularly challenging for a person with a disability who is seeking asylum. Disability may affect a person's ability to demonstrate a 'well-founded fear' of persecution. In addition, where a person seeks asylum for a reason relating specifically to his or her disability, two particular difficulties arise: first, the need to prove that the conduct directed at the person amounts to 'persecution', not merely discrimination; and second, the need to show that the persecution arises by reason of one of the five Convention grounds set out above. These are not the only challenges that asylum seekers with disabilities encounter, but they are among those that arise most commonly. In the paragraphs below, we examine them in greater detail.

(i) *Well-founded fear*

Article 1(A)(2) of the Refugee Convention requires that a refugee's fear of persecution be 'well-founded'. The term 'well-founded fear' imports both a subjective element and an objective one: asylum seekers must actually fear persecution, and that fear must be reasonable.⁶¹ Each of these elements may pose problems for some asylum seekers with disabilities, including those whose refugee claims are not substantively related to their disability.

(a) Subjective fear

The need to demonstrate subjective fear can present a problem for persons with mental or intellectual disabilities who, despite being in situations of danger, do not subjectively experience fear. Some persons with disabilities lack the psychological or cognitive ability to fear situations that are objectively dangerous.⁶² In theory, if the 'subjective fear' requirement is applied too strictly, 'all persons who are incompetent will, by reason of that incompetence, be unable to qualify as Convention refugees'.⁶³ In assessing the subjective fear of applicants with disabilities, courts and tribunals can draw upon the approach that is taken to child asylum seekers. The High Court of Australia has held that, in dealing with children who are not mature enough to fear persecution, it is sufficient for their parents to hold a subjective fear on their behalf.⁶⁴ There seems little reason for not extending this logic to psychologically or cognitively impaired adults. Canadian Courts have gone further, recognising that where a refugee applicant is incompetent by virtue of age or disability it may be appropriate to infer a subjective fear from

⁶⁰ UNHCR identifies "persons of concern" as including: refugees; asylum-seekers; internally displaced persons (IDPs) protected/assisted by UNHCR; stateless persons; returned refugees; returned IDPs; and others of concern: UNHCR, *Statistical Yearbook 2009* (Geneva, October 2010), p. 7.

⁶¹ UNHCR Handbook, paras. 38-41.

⁶² Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (Sydney: Federation Press, 2011), p. 383.

⁶³ *Canada (Minister of Citizenship v Immigration) v Patel* [2008] FC 747, para. 28 (Lagacé DJ).

⁶⁴ *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, p. 297 (Gleeson CJ, Gaudron J, Gummow and Hayne JJ).

the available evidence.⁶⁵ The strength of this approach is that the existence of fear does not depend upon the applicant being accompanied by a family member (or another third party) who fears for them.

(b) Objective fear

While some persons with disabilities may be incapable of comprehending fear, others may hold fears that are aggravated by their mental or intellectual disability. In other words, they may intensely fear situations that would not necessarily induce such fear in other persons. The UNHCR Handbook recognises that, although fear must be reasonable, ‘exaggerated fear... may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified’.⁶⁶ Taking this approach, it may be appropriate that asylum seekers with disabilities – together with other vulnerable persons, such as children – be assessed according to the ‘egg-shell skull rule’.⁶⁷ Under this rule of tort law, a plaintiff can claim damages for any injury caused by a tortious act, even where the injury is unusually pronounced because of a pre-existing susceptibility or condition.⁶⁸ Applied to refugee claims, this would mean that asylum seekers whose disabilities make them particularly vulnerable to harm would have those vulnerabilities taken into account when their protection needs are assessed.

This approach is not yet widespread. Research into the comparable field of unaccompanied and separated children suggests that, in practice, most decision-makers apply the well-founded fear requirement to children in the same way they apply it to adults.⁶⁹ Some courts have expressly serious reservations about the idea that heightened subjective fears can lower the standard of objective fear required. A judge of the Federal Court of Australia has stressed that ‘fear on the part of a claimant does not turn non-persecution into persecution’.⁷⁰ One Australian Federal Magistrate has gone further, stating that:

If the harassment that the applicant suffered... was not sufficiently serious to constitute persecution that finding cannot be changed because of the more serious affects that it had on the applicant than it might have had on another person.⁷¹

It remains to be seen whether the entry into force of the CRPD will make courts and tribunals more willing to make appropriate allowances for persons with intellectual and mental disabilities. Arguably, such allowances are consistent with a State’s obligation to make reasonable accommodations for persons with disabilities, including asylum applicants.

⁶⁵ *Canada (Minister of Citizenship v Immigration) v Patel* [2008] FC 747, paras. 29 and 38 (Lagacé DJ). See also *Yusuf v Canada (Minister of Employment and Immigration)* [1992] 1 FC 629, p. 632 (Hugessen JA).

⁶⁶ UNHCR Handbook, para. 41.

⁶⁷ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration* (Sydney: Federation Press, 2011), p. 383.

⁶⁸ *Dulieu v White & Sons* [1901] 2 KB 669, 679 (Kennedy J); *R v Blaue* [1975] 1 WLR 1411, 1415 (Lawton LJ).

⁶⁹ See Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US – A Comparative Study* (Sydney: Themis Press, 2007), ch 7.

⁷⁰ *Prahastono v Minister for Immigration, Multicultural and Indigenous Affairs* (1997) 77 FCR 260, p. 271 (Hill J).

⁷¹ *SZALZ v Minister for Immigration and Indigenous Affairs* [2004] FMCA 275, para. 8 (Raphael FM).

(ii) 'Persecution'

The Refugee Convention requires that a refugee have a well-founded fear of 'persecution'. As UNHCR notes in its *Handbook on Procedures and Criteria for Determining Refugee Status* ('the UNHCR Handbook'), there is no universally accepted definition of persecution.⁷² The US Court of Appeal has defined persecution as 'the infliction of suffering or harm... in a way regarded as offensive'.⁷³ The High Court of Australia has described persecution as a 'serious punishment or penalty', 'significant detriment or disadvantage' or 'selective harassment',⁷⁴ directed at persons either as individuals or members of a group.⁷⁵ In New Zealand, tribunals have applied Hathaway's definition:⁷⁶ 'the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection'.⁷⁷ In some instances, the definition of persecution has been altered by intervention of the legislature. In Australia, section 91R of the *Migration Act 1958* (Cth) limits persecution to circumstances involving 'serious harm' to the applicant and 'systematic and discriminatory conduct', and requires that the 'essential and significant reason' for the conduct be one of the five Convention grounds.⁷⁸

The first challenge that flows from the definition of persecution is the requirement that the conduct feared reach a certain level of seriousness. According to the UNHCR Handbook, a threat to life or freedom invariably amounts to persecution.⁷⁹ However, outside these categories, precisely what conduct will amount to persecution is unclear. A preliminary survey of cases concerning asylum seekers with disabilities indicates that many claims fail because they do not meet this threshold. Commonly, conduct is found to amount to discrimination but not persecution. For example, the Canadian Immigration and Refugee Board rejected the claim of a visually impaired Chilean woman who was discriminated against for having a guide dog (and, the Board found, likely to continue to be discriminated against).⁸⁰ This case illustrates the difficulty of ascertaining where the boundary between discrimination and persecution lies. The conduct complained of had serious implications for the individual concerned, affecting her ability to be self-sufficient and move freely in the community. In other contexts not involving disability, limits on freedom of movement and physical mobility might be considered serious human rights violations. Courts and tribunals should bear in mind the fact that acts which might, for some persons, be 'merely'

⁷² UNHCR Handbook, para. 51.

⁷³ *Kovac v Immigration and Naturalization Service*, 407 F 2d 102, 107 (9th Cir, 1969).

⁷⁴ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, p. 388 (Mason CJ).

⁷⁵ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, p. 430 (McHugh J).

⁷⁶ *Refugee Appeal No 2039* [1996] New Zealand Refugee Status Appeals Authority (Unreported, Chairperson Haines and Member Gutnick, 12 February 1996); *Refugee Appeal No 74665/03* [2005] NZAR 60.

⁷⁷ James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 104-108.

⁷⁸ *Migration Act 1958* (Cth) s 91R(1)(a)-(c).

⁷⁹ UNHCR Handbook, para. 51.

⁸⁰ *Decision VA0-03441 (In Camera)* [2001] Immigration and Refugee Board of Canada (Unreported, Member Hitchcock, 16 July 2001). On discriminatory conduct not amounting to persecution, see also: *Sofinet v Immigration and Naturalization Service*, 196 F 3d 642, 749 (7th Cir, 1999); *Bereza v Immigration and Naturalization Service*, 115 F 3d 468, 475 (7th Cir, 1997).

discriminatory might, for persons with disabilities, amount to persecution. This is consistent with the UNHCR Handbook, which states that discrimination can amount to persecution where it produces ‘consequences of a substantially prejudicial nature’.⁸¹ According to the UNHCR Handbook, such consequences include serious restrictions on the right to earn a living or serious restrictions on access to normally available educational facilities.⁸² Conceivably, discrimination against persons with disabilities that prevented them from working, or from attending school or university, could amount to persecution.

Further, measures which do not of themselves amount to persecution may amount to persecution when they are considered cumulatively.⁸³ Thus, discrimination against a person with a disability in multiple realms – such as work, employment, education and health – can amount to persecution by virtue of the cumulative of the discriminatory measures. The Canadian Immigration and Refugee Board, in upholding the claim of a national of Burkina Faso, found that:

The repeated and persistent injury and annoyance suffered by the disabled persons of Burkina Faso, based on the evidence brought by the claimant and his independent witness, greatly undermine the fundamental rights of disabled persons, in particular their right to work to support themselves, thus potentially jeopardizing their survival in a country where medical care is not free of charge and where there is no system of state protection for those persons and they rely solely on the aid of their family or charities to survive.⁸⁴

Although the abovementioned case pre-dates the CRPD, it is likely that the CRPD will play an increasingly influential role in the determination of asylum claims by persons with disabilities. As stated above, the CRPD requires States Parties to provide ‘reasonable accommodation’ to persons with disabilities.⁸⁵ In 2007, the New Zealand Refugee Status Appeals Authority denied refugee status to a Bolivian amputee whose city did not have sufficient mobility aids for disabled people.⁸⁶ One of the questions that would be raised by such a case, were it to be considered in light of the CRPD, is whether a State’s failure to provide reasonable accommodation can amount to persecution.

There is no reason why, in theory, denial of appropriate modification and adjustments cannot amount to persecution. The more contentious question is whether there will have been a denial of reasonable accommodation in a given case. Under the terms of article 2, States are only obliged to make

⁸¹ UNHCR Handbook, para. 54.

⁸² UNHCR Handbook, para. 54.

⁸³ UNHCR Handbook, para. 53.

⁸⁴ *Decision MA1-08719 (In Camera)* [2002] Immigration and Refugee Board of Canada (Unreported, Member Venne, 16 April 2002).

⁸⁵ CRPD, arts 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).

⁸⁶ *Refugee Appeal No. 76015* [2007] Refugee Status Appeals Authority (Unreported, 14 November 2007, Member Dingle), [40].

accommodations that do not impose ‘a disproportionate or undue burden’ on the State.⁸⁷ As Kayess and French point out, this qualification effectively creates ‘a two element test that may allow the obligation to be evaded at the lower of either threshold’.⁸⁸ There is, as of yet, little guidance as to the meaning that should attach to the words ‘disproportionate or undue’. Decision-makers will probably afford States a considerable margin of appreciation in interpreting these terms. In addition, in assessing what is ‘reasonable’ they may also have regard to a State’s resources, which will affect the level of accommodation that a State can practicably provide.

Nonetheless, the starting point for any analysis should be that the 103 States Parties to the CRPD have an obligation under international human rights law to provide reasonable accommodation to persons with disabilities. The UNHCR Handbook states that ‘serious violations of human rights’ constitute persecution within the meaning of the Refugee Convention.⁸⁹ Failure to provide reasonable accommodation could, depending on the gravity of the breach, amount to a serious human rights violation. As such, it could qualify as ‘persecution’ within the meaning of the Refugee Convention.

Further, in assessing whether accommodation is reasonable, courts and tribunals should look beyond a State’s *notional* willingness to protect persons with disabilities – expressed, for example, through official policy – in order to assess whether effective accommodations are made in practice. This is an approach that has already been taken in cases involving disability (albeit not in the specific context of reasonable accommodation). In a case concerning a Polish child with a disability, the Canadian Immigration and Refugee Board found that:

What is on paper in Poland is not what occurs in actual practice... Although the government has begun to take steps to protect the rights of children in Poland, the documentary indicates that the protective measures are not effectively in place.⁹⁰

(iii) *Persecution for a Convention reason*

Another challenge facing asylum seekers with disabilities is the need to establish a nexus between the persecution and one of the five Convention grounds. In the case of *X v Canada*,⁹¹ the Immigration and Refugee Board upheld the claim of a disabled Polish boy who had been abused by his parents. The Board had little trouble in identifying the boy as being a member of a ‘particular social group’. It reasoned that, since the relevant disability was an ‘innate or unchangeable characteristic’, the boy fell within the first of

⁸⁷ CRPD, art 2.

⁸⁸ Rosemary Kayess and Phillip French, ‘Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1, p. 27.

⁸⁹ UNHCR Handbook, para. 38.

⁹⁰ *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB).

⁹¹ *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB).

the three categories of particular social group set out in *Attorney-General v Ward*.⁹² The abuse was held to have occurred by reason of the boy's membership of a particular social group comprising disabled minors.⁹³ Whether disability is properly viewed as an 'innate or unchangeable characteristic' is an issue that is open to debate. The social model would suggest that it is the impairment, not the disability, that is properly characterised as immutable. Setting this question aside, it would seem that disability would generally classify as an innate or unchangeable characteristic. The CRPD defines persons with disabilities as including those who have impairments that are 'long-term'.⁹⁴ Although it does not foreclose the possibility of persons with short-term impairments being considered persons with disabilities, its emphasis is on long-term impairments which would, under refugee law, generally be considered immutable.

In many cases, the principal difficulty lies not in showing that a person is a member of a particular social group, but that the persecutory conduct arises by reason of the person's membership of that group. An illustration of this difficulty is the case of a Jordanian girl whose case was rejected by the Refugee Review Tribunal of Australia. The Tribunal accepted that disability services in Jordan were 'poor', 'limited', 'negligent' and discriminatory, and that these deficiencies had 'had a profound effect on the quality of life of all the members of the family' concerned.⁹⁵ However, it found that the inadequacy of services for children with disabilities was not attributable to one of the Convention grounds, but was instead the product of limited government resources.

This case illustrates the broader point that the harm experienced by persons with disabilities is often the result of omission by the State (for example, a failure to provide reasonable accommodation) rather than a series of positive acts. It is often difficult to identify the motivation behind an omission and, given the expenses that are often associated with providing disability support services, it is tempting to attribute all failures to act to a lack of governmental resources. However, it is important that courts and tribunals investigate thoroughly the question of whether the omission arises from something more than mere resource limitations. If it is grounded in a deliberate and wilful disregard for the rights of persons with disabilities, it may constitute persecution by reason of a person's membership of a particular social group comprising persons with disabilities (or persons with a particular type of disability). If in a given society is steeped in negative attitudes towards persons with disabilities, an adjudicator should inquire into whether those attitudes underlie government action (or inaction).⁹⁶ It should also be borne in mind that, in

⁹² *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689, pp. 739 and 744.

⁹³ The Board in *X v Canada* did not expressly define the particular social group of which the boy was found to be a member. We infer that the group was comprised of 'disabled minors' from the fact that the application was framed in these terms.

⁹⁴ CRPD, art 1.

⁹⁵ 0907687 [2010] RRTA 45, paras. 87-91 and 93 (Member Leehy).

⁹⁶ This line of reasoning was followed by the Australian Refugee Review Tribunal (RRT) in 071972350 [2008] RRTA 220. Member Mojsin found that mentally disabled persons in India 'are marginalised with regard to access to

some jurisdictions, it is not necessary for an applicant to show that the *State* is motivated by a Convention reason, provided that: (a) the harm is perpetrated by non-State actors who themselves act for a Convention reason; and (b) the State is, for whatever reason, unable or unwilling to offer effective protection.⁹⁷

III. Conclusion

It is beyond the scope of this discussion paper to survey comprehensively the many challenges that asylum seekers with disabilities face in claiming refugee status. Our aim has been to identify some salient examples of the challenges inherent in the status determination process. For some asylum seekers, the Convention definition presents intractable problems. Such persons may need to seek alternative forms of protection, such as international human rights law or domestic complementary protection provisions.⁹⁸ In many respects, however, the Convention definition of a refugee is sufficiently broad to accommodate the needs of asylum seekers with disabilities.

The CRPD has now been in force for over three years. It has over 100 States Parties, having been ratified at a rate faster than any human rights treaty other than the Convention on the Rights of the Child. As disability law begins to emerge as an influential branch of international human rights law, the core principles of the CRPD should begin to permeate all aspects of government and judicial decision-making, including refugee status determination. Key provisions of the Convention – such as the obligation to provide reasonable accommodation – should guide decision-makers as they endeavour to ensure that the rights of asylum seekers with disabilities are upheld.

services, employment and education opportunities and civic rights’, but dismissed the claim on the basis that the authorities did not condone the negative social attitudes responsible.

⁹⁷ See, for example, *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184, pp. 196-197 (Merkel J).

⁹⁸ See Jane McAdam, ‘The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection’ (Research Paper No. 125, UNHCR Policy Development and Evaluation Service, 2006), pp. 6-9.