

# Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities

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## Abstract

This article addresses a relatively new area of interest for refugee scholars: the effect on refugee law and policy of the UN Convention on the Rights of Persons with Disabilities. The article explains the paradigm shifts that this Convention represents for persons with disabilities who find themselves displaced by war or persecution. It focuses on the two broad areas of most concern to refugee advocates and adjudicators working with persons with disabilities seeking protection as refugees: status determination processes and the interpretation of the definition of refugee. It considers the threshold legal question of whether the obligations enshrined in the Disabilities Convention are owed in respect of refugees – and thus whether they are relevant to refugee status determinations. The issues surrounding the determination of refugee status at a procedural level are examined, outlining the implications that the Disabilities Convention has for decision makers charged with adjudicating asylum claims. Finally, the article looks at the Refugee Convention to consider how disability can affect a person's ability to qualify for protection under that instrument.

## 1. A new paradigm for refugees with disabilities?

The entry into force in 2008 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol<sup>1</sup> has led to unprecedented interest in the treatment, experience and rights of individuals who, in many countries, have suffered (and continue to suffer)

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<sup>1</sup> Convention on the Rights of Persons with Disabilities (CRPD), opened for signature 30 Mar 2007, 2515 UNTS 3 (entered into force 3 May 2008); Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature 30 Mar 2007, (2007) 46 ILM 443 (entered into force 3 May 2008). The texts of both instruments are available online: <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>>.

neglect, abuse and discrimination in all forms.<sup>2</sup> This article examines some of the implications of this ground breaking instrument for persons with disabilities who find themselves in situations of special and often acute disadvantage: persons displaced by humanitarian conflict who seek protection as refugees. These are people who suffer triple disadvantage. They are outside of their country of origin. They are stripped of the protections of a state of citizenship or habitual residence, living in fear of persecution if returned to the country from which they have fled. Finally, they are hampered by physical, mental, intellectual or sensory impairments that hinder their full and effective participation in society.<sup>3</sup> Persons with disabilities living in situations of conflict and humanitarian disaster must surely rank among the world's most vulnerable persons, their experience of forced migration compounded by the multiple and diverse challenges that flow from impairment.

The most recent and reliable research on the global incidence of disability suggests that 2.9 per cent of the world's population is severely disabled, while a further 12.4 per cent has moderate long-term disability.<sup>4</sup> In 2010, the number of refugees, displaced persons and other persons of concern to the Office of the UN High Commissioner for Refugees (UNHCR) was estimated at 33.9 million.<sup>5</sup> Taken together, these statistics suggest that the number of refugees and 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 seek protection as refugees. The fact that there are as yet no reliable statistics on the incidence of disabilities amongst refugees and asylum seekers is a measure of the neglect (to date) of this area of displacement and forced migration studies.

Refugees with disabilities stand at the intersection of two major legal instruments, one very old in the scheme of human rights protection, the other very new. The Convention relating to the Status of Refugees

<sup>2</sup> On the Convention generally, see Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (Handicap International 2010, 3rd edn); Oddný Mjöll and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009); Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1; and Arlene S Kanter, 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 Syracuse Journal of International Law & Commerce 287. See also World Health Organization (WHO) and World Bank, *World Report on Disability* (WHO Press 2011).

<sup>3</sup> See CRPD, above n 1, art 1.

<sup>4</sup> WHO, 'The Global Burden of Disease: 2004 Update' (WHO 2008), 34. See also WHO and World Bank, above n 2, ch 2.

<sup>5</sup> UNHCR, 'UNHCR Statistical Online Population Database', data extracted 7 Oct 2011, <[www.unhcr.org/statistics/populationdatabase](http://www.unhcr.org/statistics/populationdatabase)>. 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.

(the Refugee Convention)<sup>6</sup> has been in existence for six decades – predating all the major international human rights instruments. Having entered into force only in May 2008, the CRPD is the newcomer in the community of human rights treaties. It represents a significant paradigm shift in the understanding of persons with disabilities as rights bearers. Forged in the crucible of an influential global disability rights movement, the CRPD rejects what is known as the ‘social welfare’ approach to disability, which views persons with disabilities as ‘objects of charity, medical treatment and social protection’.<sup>7</sup> Rather, it conceptualises persons with disabilities as rights-bearers, who can ‘claim those rights as active members of society’.<sup>8</sup> The CRPD signals a shift towards acceptance of the ‘social’ model of disability. This model acknowledges that a person’s disability is created more by *society* than by inherent physical impairment. Disability arises from societal structures that unnecessarily isolate persons with physical, mental, intellectual or sensory impairments and exclude them from full participation in a community.<sup>9</sup> 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.<sup>10</sup> The influence of the social model is manifested in the second sentence of 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).

As an agency of the United Nations, UNHCR has acknowledged that the CRPD has implications for virtually every aspect of its policy and field operations – from the collection of statistical information; the conduct of refugee status determinations; and the selection of refugees for resettlement; through to the treatment of refugees in camps and urban situations. In July 2011, UNHCR released a revised edition of its Resettlement Handbook that, among other things, moved away from the medical model and aligned UNHCR policies more closely with the CRPD.<sup>11</sup> Most importantly, it eliminated a policy that had been spelt out in the previous edition

<sup>6</sup> Convention Relating to the Status of Refugees (Refugee Convention), opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 Apr 1954).

<sup>7</sup> 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 Dec 2006, cited in Kayess and French, above n 2, 3.

<sup>8</sup> *ibid.*

<sup>9</sup> Union of the Physically Impaired against Segregation (1974–5), Policy Statement, para 1, available at <<http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/UPIAS.pdf>> accessed 12 Aug 2011. See also Tom Shakespeare, ‘The Social Model of Disability’ in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge 2010, 3rd edn), 266–73.

<sup>10</sup> Kayess and French, above n 2, 5–6.

<sup>11</sup> UNHCR, ‘Resettlement Handbook’ (UNHCR 2011), available at <<http://www.unhcr.org/46f7c0ee2.html>> accessed 7 Oct 2011.

of the Handbook. This was such an egregious manifestation of the ‘medical’ approach to disability that it is worth quoting in full. The now superseded Handbook read:

Disabled refugees who are well adjusted to their disability and are functioning at a satisfactory level *are generally not to be considered for resettlement* ... Conditions which can be properly addressed through the provision of such things as hearing aids or prosthetics should be treated in the country of refuge whenever possible. Only when such disabilities are untreatable locally, and when they seriously threaten a person’s safety or quality of life, should resettlement be explored.<sup>12</sup> (emphasis added)

The unhappy (and perhaps unfair) inference to be drawn from this paragraph is that refugees with disabilities who could not show an immediate medical need of some kind were not only demoted from the list of persons eligible for resettlement: they were removed altogether from consideration.

In this article it is not possible to canvas every aspect of the intersection between the CRPD and the Refugee Convention and Protocol. As lawyers, the authors aim to open the discussion by analysing the two broad areas of most concern to refugee advocates and adjudicators: status determination processes and the interpretation of the definition of refugee. Before embarking upon this analysis, in part 2 the article considers the threshold legal question of whether the obligations enshrined in the CRPD are owed in respect of refugees – and thus whether they are relevant to refugee status determinations. Part 3 looks at the Refugee Convention to consider how disability can affect 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. Part 4 turns to the issues surrounding the determination of refugee status at a procedural level, examining the implications the CRPD has for decision makers charged with adjudicating asylum claims. As will be seen, there is considerable potential for the principles underpinning the CRPD – principles such as non-discrimination, participation, accessibility and respect for the inherent dignity of all persons – to vastly improve policy approaches for refugees with disabilities. Such potential is, for the most part, yet to be realised. Nonetheless, the progress made to date by intergovernmental organisations and other key actors in the field provides some cause for cautious optimism.

## 2. Does the CPRD apply to refugees?

In 2010, the Executive Committee of UNHCR (ExCom) acknowledged the advent of the CRPD by issuing a Conclusion on refugees with

<sup>12</sup> See UNHCR, ‘Resettlement Handbook’ (UNHCR 2004), ch 4.4.4.

disabilities.<sup>13</sup> One of the first questions that states parties to the Refugee Convention raised during the drafting process was whether the CRPD applies to refugees. Some asserted that the obligations owed by states under the CRPD are owed only to nationals. On a practical level, they argued, economic and social conditions in their countries make it difficult to support the needs of nationals with disabilities, let alone those of refugees and asylum seekers arriving sometimes in great numbers. Underlying this position was the view that refugees and asylum seekers are to be accorded human rights protections gratuitously rather than as a matter of right. Whatever political support the argument may have garnered domestically, ExCom recognized ultimately that the doctrinal foundations of such a position are shaky. Human rights are, by definition, for everyone. Natural rights theory – the forerunner to modern conceptions of human rights<sup>14</sup> – is premised on the assumption that a person is endowed with certain rights simply because he or she is human.<sup>15</sup> The Universal Declaration of Human Rights 1948 proclaims that ‘all human beings are born ... in equal dignity and rights’.<sup>16</sup> Two decades later, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) recognized the ‘inherent dignity and ... the equal and inalienable rights of all members of the human family’.<sup>17</sup> The 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.<sup>18</sup> 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

<sup>13</sup> See UNHCR Executive Committee (ExCom), ‘Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR’, Conclusion No 110 (LXI), 12 Oct 2010, available at: <<http://www.unhcr.org/4cbeb1a99.html>> accessed 15 Oct 2011.

<sup>14</sup> Jerome Shestack, ‘Philosophic Foundations of Human Rights’ (1998) 20 HRQ 201, 204; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2003), 58.

<sup>15</sup> Suri Ratnapala, *Jurisprudence* (CUP 2009), 121.

<sup>16</sup> Universal Declaration of Human Rights, GA res 217A (III), UNGAOR 3rd sess, 183rd plen mtg, UN doc A/810 (10 Dec 1948), art 1.

<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR), opened for signature 19 Dec 1966, 999 UNTS 171 (entered into force 3 Jan 1976), preamble; International Covenant on Economic, Social and Cultural Rights, opened for signature 19 Dec 1966, 993 UNTS 3 (entered into force 3 Jan 1976), preamble.

<sup>18</sup> 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 para 16 of the decisions adopted by the CRPD Committee at its Fourth Session, 4 Oct 2010.

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’.<sup>19</sup> 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’.<sup>20</sup> 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’.<sup>21</sup>

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.<sup>22</sup> 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 the opening sentence of 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).<sup>23</sup> 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 recognizes that ‘*everyone* is entitled to all the rights and freedoms set forth [in the Universal Declaration of Human Rights], without distinction of any kind’.<sup>24</sup> 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 ‘recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’.

In fact, when considering the text of the CRPD itself, it is clear that it implicitly envisions that states parties can owe obligations to persons other than their own nationals. This is evident from article 11, a novel provision not found in any of the other major international human rights instruments.<sup>25</sup> Article 11 obliges states parties to:

take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary

<sup>19</sup> Human Rights Committee, ‘General Comment No 31’, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10.

<sup>20</sup> *ibid*, para 5.1.

<sup>21</sup> Committee against Torture, ‘General Comment No 2’, UN doc CAT/C/GC/2, 24 Jan 2008, para 7.

<sup>22</sup> Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 Jan 1980), art 29.

<sup>23</sup> CRPD, above n 1, art 1.

<sup>24</sup> *ibid*, preamble paras (a) and (b).

<sup>25</sup> Schulze, above n 2, 83.

measures to protect persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Situations of risk – including the three examples mentioned – all too often force people from their homes, sparking mass cross-border population flows. These situations, therefore, are often ones in which states will be required to accommodate large populations of non-citizens within their territories. The fact that the CRPD makes express reference to these situations, without drawing any distinction between citizens and non-citizens, supports the view that the drafters of the CRPD evinced no intention to confine its protections to citizens alone.

Like its parent instrument, the Optional Protocol to the CRPD draws no distinction between citizens and non-citizens. On the contrary, in determining whether an individual can bring a complaint before the Committee on the Rights of Persons with Disabilities, the relevant question is not whether the individual is a citizen of that state, but whether he or she was *subject to the state's jurisdiction* in respect of the circumstances giving rise to the complaint. Article 1(1) relevantly provides:

A State Party to the present Protocol recognizes the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

This lends further strength to the view that citizenship is not a valid criterion for determining whether or not a person is entitled to enjoy the protections afforded by the CRPD.

UNHCR's 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 CRPD 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'.<sup>26</sup> It also incorporates key principles of the CRPD including non-discrimination,<sup>27</sup> inclusion and participation,<sup>28</sup> accessibility,<sup>29</sup> and equality of opportunity.<sup>30</sup> Accordingly, there would appear to be little basis in the Conclusion for the view that the CRPD does not apply to refugees.

Efforts to apply the protections of the CRPD to refugees will in all likelihood continue to meet with political resistance. This is particularly so in

<sup>26</sup> ExCom, above n 13, preamble.

<sup>27</sup> ExCom, *ibid*, para (a); CRPD, above n 1, art 3(b).

<sup>28</sup> ExCom, *ibid*, paras (d)–(e); CRPD, *ibid*, art 3(c).

<sup>29</sup> ExCom, *ibid*, paras (f), (h) and (j); CRPD, *ibid*, art 3(f).

<sup>30</sup> ExCom, *ibid*, paras (k) and (l); CRPD, *ibid*, art 3(e).

a climate such as the present, where asylum seekers are seen as a burden on already overstretched economies, and border control mechanisms are being tightened to stem the inflow of forced migrants.<sup>31</sup> Nonetheless, the rapid growth in the number of states parties to the CRPD,<sup>32</sup> combined with an appreciation of the fact that states owe human rights obligations to refugees as well as to their own citizens, means that consideration will inevitably have to be given to the impact of the CRPD on the obligations owed under the Refugee Convention. The following section examines some of the substantive issues relating to the interpretation of the Refugee Convention that arise in cases concerning persons with disabilities. Thereafter, the extent to which refugee status determination procedures are affected by obligations imposed by the CRPD is explored. It will be seen that the Convention demands that some accommodation be made for persons with disabilities who seek protection as refugees.

### 3. Disability and the definition of refugee

The Refugee Convention applies only to persons who meet the definition of refugee under article 1A(2) of that instrument as modified by the 1969 Protocol. The limited reach of this definition is well-documented: indeed it has spawned a body of law and literature that finds little parallel in international affairs.<sup>33</sup> 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 article 1A(2) (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 but do not strictly meet the definition of a refugee.<sup>34</sup> Nonetheless, for persons applying for resettlement or seeking asylum, their ability to meet the article 1A definition remains critical.

The key elements of the Convention definition of refugee can prove challenging for a person with a disability who is seeking asylum. At the most basic level, cognitive impairments can affect a person's ability to demonstrate fear or to articulate a claim of any kind. In this instance,

<sup>31</sup> A recent example of an approach to refugees as a 'border control' problem has been the Italian government's practice of intercepting boatloads of asylum seekers en route from Libya and summarily returning them to Tripoli. The European Court of Human Rights has declared the practice to be a breach of the *non-refoulement* principle: *Case of Hirsi Jamaa and Others v Italy*, Application no 27765/09, Judgment delivered 23 Feb 2012, paras 134–8.

<sup>32</sup> As of 1 Apr 2012 there were 111 states parties to the CRPD.

<sup>33</sup> 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* (CUP 1999), 55–81.

<sup>34</sup> UNHCR definition of 'persons of concern', above n 5, UNHCR, 'Statistical Yearbook 2009' (UNHCR Oct 2010), 7.



there can be resonances with the inability or unwillingness of children to express fear or even to appreciate the dangers they might be facing. As explored further below, some problems can be overcome by focusing on the objective element of (an imputed) fear, examining what can be known of the harms that an individual might face. Greater challenges lie in meeting the requirements that harms feared amount to persecution (on the one hand) and that the persecution is feared on one of the five Convention grounds.

### 3.1 Well-founded fear

Article 1A(2) of the Refugee Convention requires that a refugee's fear of persecution be 'well-founded'. The term 'well-founded fear' imports both subjective and objective elements: asylum seekers must actually fear persecution, and that fear must be reasonable.<sup>35</sup> In fact, each of these elements can pose problems for asylum seekers with disabilities, including those whose refugee claims are not substantively related to their disability.

The need to demonstrate subjective fear can present a problem for persons with mental or intellectual disabilities who lack the psychological or cognitive ability to appreciate (and fear) situations that are objectively dangerous.<sup>36</sup> 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'.<sup>37</sup> In assessing the subjective fear of applicants with disabilities, courts and tribunals can draw upon the approach that is frequently taken to child asylum seekers. For example, 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.<sup>38</sup> 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 the available evidence.<sup>39</sup> 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.

<sup>35</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', UN doc HCR/IP/4/Eng/REV.1 (1992, rev edn), paras 38–41.

<sup>36</sup> Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press 2011), 383.

<sup>37</sup> *Canada (Minister of Citizenship v Immigration) v Patel* [2008] FC 747, para 28 (Lagacé DJ).

<sup>38</sup> *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 297 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>39</sup> *Canada (Minister of Citizenship v Immigration) v Patel*, above n 37, paras 29 and 38 (Lagacé DJ). See also *Yusuf v Canada (Minister of Employment and Immigration)* [1992] 1 FC 629, 632 (Hugessen JA).

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 recognizes 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’.<sup>40</sup> While one might accept the finding of the Australian court that extreme *subjective* fear on the part of a claimant cannot convert non-persecutory actions into persecution for the purposes of the Convention,<sup>41</sup> it should not follow that the Convention requires a ‘one size fits all’ approach to persecution.

On the contrary, it may be appropriate for asylum seekers with disabilities – together with other vulnerable persons, such as children or aged persons – to be assessed according to an ‘egg-shell skull’ rule.<sup>42</sup> 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.<sup>43</sup> 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 were assessed. The merits of this approach are implicitly recognized in the recently revised UNHCR Resettlement Handbook, which states that:

When assessing whether a particular treatment or measures amount to persecution, decision makers consider it/them in light of the opinions, feelings and psychological make-up of the applicant. The same act may affect people differently depending on their previous history, profile and vulnerability. In each case, decision makers must determine in light of all the specific individual circumstances whether or not the threshold of persecution is reached.<sup>44</sup>

An exemplary decision is that of the Refugee Status Appeals Tribunal of New Zealand in a case involving multiple refugee claims, including that of a Roma woman and her son.<sup>45</sup> The woman presented with symptoms consistent with post traumatic stress and mood disorder.<sup>46</sup> The tribunal

<sup>40</sup> UNHCR, above n 35, para 41.

<sup>41</sup> See *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260, 271. See the discussion in Crock and Berg, above n 36, 383.

<sup>42</sup> This is a term taken from the law of torts in the common law tradition. It operates so as to take into account the condition of a victim of harm as well as the nature of the harm inflicted. See Crock and Berg, above n 36, 383.

<sup>43</sup> *Dulieu v White & Sons* [1901] 2 KB 669, 679 (Kennedy J); *R v Blaue* [1975] 1 WLR 1411, 1415 (Lawton LJ).

<sup>44</sup> UNHCR, above n 11, 84.

<sup>45</sup> *Refugee Appeal No 76380*, Refugee Status Appeals Authority, 30 June 2010, available at <<http://www.unhcr.org/refworld/pdfid/4c6a4e2c2.pdf>> accessed 11 Oct 2011. The case is also discussed below: see the text accompanying n 128 and following.

<sup>46</sup> *ibid*, para 132.

found that, although in ordinary circumstances discrimination against Roma persons in the Czech Republic would not amount to serious harm, the threshold was met in the woman's case because of her fragile psychological state.<sup>47</sup> In respect of her son, the tribunal found that discrimination against Roma children was in his case exacerbated by his significant hearing impairment and the inferior education that was given to hearing impaired children, who were schooled alongside children with intellectual disabilities, outside the mainstream educational system.<sup>48</sup> The tribunal found that there was a real chance that returning to the Czech Republic would 'affect not just [the son's] education but his development as a person'.<sup>49</sup> Moreover, the child's existing anxiety would be compounded were he to be separated from his mother.

In considering how a disability can affect what amounts to 'serious harm', decision makers can draw upon jurisprudence from the comparative field of international human rights law. In *Hamilton v Jamaica*, the Human Rights Committee considered a complaint by a prisoner incarcerated in Jamaica. The prisoner, who was paralysed from the waist down, was unable to move from his cell unless he was carried by other inmates, and his slop bucket would be removed from his cell only when he could afford to pay inmates to remove it for him.<sup>50</sup> The Committee found that such conditions violated the author's right to be treated with humanity and with respect for the inherent dignity of the human person.<sup>51</sup>

Decision makers should, at the very least, give *consideration* to the impact of disability on a person's experience of harm. In an English case concerning a refugee diagnosed with paranoid schizophrenia, a learning disability and a very low IQ, Justice Irwin of the High Court ordered that the decision to deport the refugee be considered. His Honour reasoned that a number of factors relating to the refugee's disability had not been adequately considered, observing that:

[I]n normal circumstances there would be no question as to the propriety of removing a young man who had committed offences such as these ... However, there is here a very serious combination of factors – serious mental illness; a total lack of family support in his country of origin; his total dependence on organized and regular medical care ...; the poverty, corruption and mental health care in Angola, and in particular his very low IQ.<sup>52</sup>

<sup>47</sup> *ibid.*, para 134.

<sup>48</sup> *ibid.*, paras 56, 152.

<sup>49</sup> *ibid.*, para 154.

<sup>50</sup> Human Rights Committee, *Zephinah Hamilton v Jamaica*, 18 July 1999, UN doc CCPR/C/66/D/616/1995, para 3.1.

<sup>51</sup> *ibid.*, para 3.2.

<sup>52</sup> Cited in *MJ (Angola) v Secretary of State for the Home Department* [2010] EWCA Civ 557, para 9 (Dyson LJ), available at <<http://www.unhcr.org/refworld/pdfid/4bff87592.pdf>> accessed 11 Oct 2011.

However, there has in practice been a tendency in refugee jurisprudence to regard persecutory harms in rather monolithic terms, with little regard to the vulnerabilities of the victim. Research into the comparable field of unaccompanied and separated children suggests that, in practice, some decision makers have applied the well-founded fear requirement to children in the same way they apply it to adults.<sup>53</sup> Some courts have expressed 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’.<sup>54</sup> 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.<sup>55</sup>

The principle of reasonable accommodation in the CRPD should operate to make courts and tribunals more willing to make appropriate allowances for persons with disabilities. Where a person with an intellectual or mental disability is expressing a pathological (and objectively unjustified) fear, a sensitive approach needs to be taken to the application of the Convention definition. It is another matter, however, to say that no account should be taken of vulnerability in determining the nature and impact of the harms feared.

### 3.2 ‘Persecution’

Any consideration of ‘well-founded fear’ imputes consideration of what will amount to ‘persecution’. The term ‘persecution’ is not defined in the Refugee Convention. As noted in the UNHCR Handbook, there is no universally accepted definition of the term,<sup>56</sup> and its interpretation varies across jurisdictions. The United States Court of Appeal has defined persecution as ‘the infliction of suffering or harm ... in a way regarded as offensive’.<sup>57</sup> The High Court of Australia has described persecution as a ‘serious punishment or penalty’, ‘significant detriment or disadvantage’ or ‘selective harassment’,<sup>58</sup> directed at persons either as individuals or members of a group.<sup>59</sup> In New Zealand, tribunals have favoured Professor Hathaway’s taxonomy of persecution that is drawn from the hierarchy

<sup>53</sup> See Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press 2007), ch 7.

<sup>54</sup> *Prahastono v Minister for Immigration, Multicultural and Indigenous Affairs* (1997) 77 FCR 260, 271 (Hill J).

<sup>55</sup> *SZALZ v Minister for Immigration and Indigenous Affairs* [2004] FMCA 275, [8] (Raphael FM).

<sup>56</sup> UNHCR, above n 35, para 51.

<sup>57</sup> *Kovac v Immigration and Naturalization Service*, 407 F 2d 102, 107 (9th Cir, 1969).

<sup>58</sup> *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 388 (Mason CJ).

<sup>59</sup> *ibid*, 430 (McHugh J).

of harms referenced in the key international human rights instruments.<sup>60</sup> They have referred to ‘the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection’.<sup>61</sup>

In some instances, lawmaking bodies have imposed additional limits on what qualifies as persecution. 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.<sup>62</sup> At the European level, article 9 of the European Council’s Qualification Directive limits the definition of persecution to acts that are:

- (a) ... sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) ... an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).<sup>63</sup>

It is useful to reflect at this point on the different ways in which persons might experience persecution. In regard to the five refugee grounds, persons with disabilities can be refugees for exactly the same reasons as persons who have no impairment. Like all other classes of vulnerable asylum seekers, however, persecution can be particular to persons with disabilities in two respects. First, there may be some forms of harm that are particular to persons with disabilities. For example, persons with disabilities (both intellectual and physical) are often targeted for sexual exploitation,<sup>64</sup> they are more likely to experience involuntary detention and incarceration and they also have a heightened exposure to torture or inhuman and degrading treatment in institutions and in the private sphere.<sup>65</sup> Second, as noted

<sup>60</sup> See James Hathaway, *The Law of Refugee Status* (Butterworths 1991), 104–8.

<sup>61</sup> *Refugee Appeal No 2039* [1996] New Zealand Refugee Status Appeals Authority (Unreported, Chairperson Haines and Member Gutnick, 12 Feb 1996); *Refugee Appeal No 74665/03* [2005] NZAR 60.

<sup>62</sup> Migration Act 1958 (Cth) s 91R(1)(a)–(c).

<sup>63</sup> Council Directive 2004/83/EC of 29 Apr 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, Official Journal L 304, 30/09/2004, 0012-0023, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>> accessed 7 Oct 2011.

<sup>64</sup> See, eg, Handicap International and Save the Children, ‘Out of the Shadows: Sexual Violence against Children with Disabilities’ (Save the Children 2011), available at <<http://www.handicap-international.fr/fileadmin/documents/publications/OutFromTheShadows.pdf>> accessed 16 Oct 2011.

<sup>65</sup> UN General Assembly, ‘Torture and other cruel, inhuman or degrading treatment or punishment’, Note by the Secretary-General, 28 July 2008, UN doc A/63/175, available at <<http://daccess-ods.un.org/TMP/4743439.html>> accessed 7 Oct 2011; Theresia Degener 2007, ‘Recommendations to the Special Rapporteur on Torture and treaty bodies in protecting persons with disabilities from torture and ill treatment’, available at <[www2.ohchr.org/english/issues/disability/docs/torture/AnnexVI.doc](http://www2.ohchr.org/english/issues/disability/docs/torture/AnnexVI.doc)> accessed 7 Oct 2011.

earlier, persons with disabilities may suffer disproportionate harm when faced with actions that would not amount to persecution when inflicted on persons who had no impairment. In these cases, the reasonable accommodation principle should operate to transform harms into persecution when targeted at persons with disabilities.

A preliminary survey of cases concerning asylum seekers with disabilities indicates that many claims fail because, although they involve conduct amounting to discrimination, the threshold of 'persecution' is not met. 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. (The Board found that the woman was likely to continue to suffer discrimination, but that such conduct would not be persecution).<sup>66</sup> This case illustrates the difficulty of ascertaining the boundary between discrimination and persecution. 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 that might, for some persons, be 'merely' 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'.<sup>67</sup> Such consequences include serious restrictions on the right to earn a living or serious restrictions on access to normally available educational facilities.<sup>68</sup> Conceivably, discrimination against persons with disabilities that prevent 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.<sup>69</sup> Thus, discrimination against a person with a disability in multiple realms – such as employment, education and health – can amount to persecution by virtue of the cumulative effect 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

<sup>66</sup> *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).

<sup>67</sup> UNHCR, above n 35, para 54.

<sup>68</sup> *ibid*, para 54.

<sup>69</sup> *ibid*, para 53.

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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup> 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 accommodations that do not impose 'a disproportionate or undue burden' on the state.<sup>73</sup> 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'.<sup>74</sup> 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 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 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.<sup>75</sup> 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.

<sup>70</sup> *Decision MA1-08719 (In Camera)* [2002] Immigration and Refugee Board of Canada (Unreported, Member Venne, 16 Apr 2002).

<sup>71</sup> CRPD, above n 1, arts 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).

<sup>72</sup> *Refugee Appeal No 76015* [2007] Refugee Status Appeals Authority (Unreported, 14 Nov 2007, Member Dingle), para 40.

<sup>73</sup> CRPD, above n 1, art 2.

<sup>74</sup> Kayess and French, above n 2, 27.

<sup>75</sup> UNHCR, above n 35, para 38.

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 evidence indicates that the protective measures are not effectively in place.<sup>76</sup>

### 3.3 Persecution for a Convention reason: the five refugee grounds

Another challenge facing asylum seekers with disabilities is the need to establish that persecution occurs for one of the five Convention grounds. In the case of persons with disabilities, the most widely applicable Convention ground would seem to be membership of a particular social group. While South Africa has gone so far as to acknowledge persons with disabilities as constituting a social group,<sup>77</sup> this approach is unusual. There is no universally accepted definition of what constitutes a 'particular social group'. UNHCR proposes that a particular social group be defined as 'a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society'.<sup>78</sup>

In common law jurisdictions, two approaches have emerged. The first is what UNHCR terms the 'protected characteristics' or 'immutability' approach, which examines whether a group is united by an immutable characteristic, or one fundamental to human dignity.<sup>79</sup> This is the approach that has been favoured by UNHCR and by experts convened to discuss this issue.<sup>80</sup>

<sup>76</sup> *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB), Case No TA005472.

<sup>77</sup> See Refugees Act 1998 (South Africa), Ch1, s 1(xxi) which states: "'social group" includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste'.

<sup>78</sup> UNHCR, 'Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/02, para 11.

<sup>79</sup> *ibid*, para 6.

<sup>80</sup> See T Alexander Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in Erica Feller *et al* (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), 310. See also Michelle Foster, 'The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to "Membership of a Particular Social Group"', Apr 2012, UNHCR Refworld, available at: <<http://www.unhcr.org/refworld/docid/4f7d94722.html>>.



It is not difficult to see how many refugees with disabilities would fall into this category. In the case of *X v Canada*,<sup>81</sup> the Canadian 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 the three categories of particular social group set out in *Attorney-General v Ward*.<sup>82</sup> The abuse was held to have occurred by reason of the boy’s membership of a particular social group comprising disabled minors.<sup>83</sup> 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.<sup>84</sup> 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’.<sup>85</sup> 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 that would, under refugee law, generally be considered immutable. This fact has been acknowledged by a number of courts and tribunals around the world. Examples documented by Foster include the Immigration and Protection Tribunal of New Zealand recognising albinism as an immutable characteristic;<sup>86</sup> the Federal Court of Canada recognising physical disabilities including visual impairment and congenital deafness;<sup>87</sup> and the US Circuit Courts of Appeal recognising that many disabilities are immutable, even if they are not ‘inherent’ or ‘innate’.<sup>88</sup> This approach has extended to recognising that persons with conditions associated with HIV/AIDS can also constitute a particular social group.<sup>89</sup> Indeed, Foster

<sup>81</sup> *X v Canada*, above n 76.

<sup>82</sup> *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 739 and 744.

<sup>83</sup> The Board in *X v Canada* did not expressly define the particular social group of which the boy was found to be a member. It can be inferred that the group was comprised of ‘disabled minors’ from the fact that the application was framed in these terms.

<sup>84</sup> On how this issue plays out for persons with albinism, see Stacy Larson, ‘Magic, Mutilation and Murder: A Case for Granting Asylum to Tanzanian Nationals with Albinism’ (2011) 2 *Pace International Law Review Online Companion*, available at <<http://digitalcommons.pace.edu/pil-online/24/>>. See also Foster, above n 80 at 62.

<sup>85</sup> CRPD, above n 1, art 1.

<sup>86</sup> See *AC (Egypt)* [2011] NZIPT 800015 (25 Nov 2011). See Foster, above n 80 at 62.

<sup>87</sup> See Foster, *ibid*; and *Ampong v Canada (Minister for Citizenship and Immigration)* (2010) FC 35, 87 ImmLR (3d) 279, [43]; and cases cited in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007), 318–20.

<sup>88</sup> See Foster, *ibid*, discussing *Tchoukhrova v Gonzales*, 404 F 3d 1181, 1189 (9th Cir, 2005); and *Kholiavskiy v Mukasey* 540 F 3d 555, 573 (7th Cir, 2008).

<sup>89</sup> See Foster, *ibid*, at 63, discussing *Karouni*, 399 F 3d 1163, 1171 (9th Cir, 2005); and cases discussed in her monograph, Foster, above n 87 at 322–3.

makes the simple but compelling point that the entry into force of the CRPD has had the effect of establishing disability as a protected status under international law.<sup>90</sup>

A second approach that has been prominent in common law jurisdictions has been what UNHCR calls the ‘social perception’ approach, which examines whether a group shares a common characteristic that makes them a cognisable group or sets them apart from society at large.<sup>91</sup> An example of this approach is that taken by Justice McHugh of the High Court of Australia in *Applicant A*, where he stated that what distinguishes members of a particular group ‘is a common attribute and a social perception that they stand apart’.<sup>92</sup> The social perception approach presents challenges for those persons whose disabilities are not visible or are not recognized by society as amounting to disabilities. It may be for this reason that it has enjoyed less favour.<sup>93</sup>

In many cases, however, 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 RRT. 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.<sup>94</sup> However, it found that the inadequacy of services for children with disabilities was not grounded in a Convention reason but was instead the product of governmental resource limitations. Similarly, the RRT rejected the claim of a Mongolian asylum seeker who would not be able to access adequate medical treatment in Mongolia, on the basis that the lack of treatment was not attributable to a Convention ground.<sup>95</sup>

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

<sup>90</sup> See Foster, *ibid.*

<sup>91</sup> UNHCR, above n 78, para 7.

<sup>92</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 265–6 (McHugh J).

<sup>93</sup> Clara Straimer, ‘Between Protection and Assistance: Is there refuge for asylum seekers with disabilities in Europe?’ (2011) 26 *Disability & Society* 537, 541. Kirby J later distanced himself from the approach taken by McHugh J in *Applicant A* (*ibid.*). See Michelle Foster, ‘Refugee Law’ in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (Thomson Reuters 2009), 691. Compare also the later decision in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, the Australian High Court favoured an objective test, eschewing the need for a particular society to identify a person as belonging to a social group. See the discussion in Crock and Berg, above n 36 at 384.

<sup>94</sup> 0907687 [2010] RRTA 45, paras 87–91, 93.

<sup>95</sup> 1002307 [2010] RRTA 532, para 44.

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 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).<sup>96</sup> It should also be borne in mind that 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.<sup>97</sup>

## 4. Accommodating persons with disabilities in the asylum process

### 4.1 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'.<sup>98</sup> 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

<sup>96</sup> 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 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.

<sup>97</sup> See, eg, *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184, 196–7 (Merkel J).

<sup>98</sup> As Marianne Schulze explains, art 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: Schulze, above n 2, 34–9.

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.<sup>99</sup>

Procedures for identifying persons with disabilities must be sufficiently flexible to accommodate this diversity. The obligation upon states to make 'reasonable accommodation' for persons with disabilities stands at the very heart of the CRPD – and of international disability law.<sup>100</sup> It is also a corollary of the requirement, drawn from principles of treaty law, that states parties to the CRPD observe their treaty obligations in good faith.<sup>101</sup> Hence, it is a base requirement of the CRPD that applicants or their representatives be given the opportunity to make submissions as to the nature of their disability and its impact on the procedural and/or substantive aspects of their claim. Efforts should be made to identify disability as early in the proceedings as possible, but adjudicators must also be prepared for the possibility of disability being identified later in the proceedings. This is particularly important in light of the fact that not all persons with disabilities identify as having a disability. Although perhaps an obvious point to make from an advocate's perspective, it is an issue that nevertheless can be controversial for decision makers. This is most particularly the case where an applicant is suffering from a psycho-social impairment that may have been exacerbated – or even caused – by their treatment at the hands of state authorities.<sup>102</sup>

For UNHCR officers working in the field, the identification of persons with disabilities within a population of forced migrants is of critical importance for the design and delivery of services – in the processing of protection claims; the management of refugee camps; and in the selection of refugees for resettlement. At present, statistical information on the level of disability among populations of displaced persons is lacking. UNHCR currently puts the number of forcibly displaced persons with disabilities at between 2.3 and 3.3 million, which represents between 7 and 10 per cent of forcibly displaced people.<sup>103</sup> However, there is little empirical data against which to test these estimates. There is clearly a need for research into the incidence and nature of disability within populations of forcibly

<sup>99</sup> WHO and World Bank, above n 2, 7.

<sup>100</sup> CRPD, above n 1, arts 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i). See the discussion above, part 3.2. On reasonable accommodation generally, see Janet E. Lord and Rebecca Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in Marcia H. Rioux, Lee Ann Basser and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff 2011), 273–307.

<sup>101</sup> VCLT, above n 22, art 26.

<sup>102</sup> See, eg, *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, discussed at n 120 below.

<sup>103</sup> UNHCR, 'People with Disabilities', <<http://www.unhcr.org/pages/4a0c310c6.html>> accessed 12 Oct 2011.

displaced persons. Only on the basis of more detailed data can UNHCR policy and practice be appropriately tailored to meet the requirements of persons with disabilities.

#### **4.2 Environmental factors and the need for reasonable accommodation**

A striking feature of the way that the CRPD defines disability is the distinction drawn between impairment and disability: the one does not necessarily imply the other. 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).<sup>104</sup>

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.<sup>105</sup> Such environmental factors can ground a substantive claim to refugee status (see part 3, above). In addition, environmental factors associated with the refugee status determination process itself can have a disabling effect. For this reason, it is critical that adjudicators are attuned to the procedural difficulties that persons with disabilities might encounter in putting forward a claim.

As noted, the obligation to provide 'reasonable accommodation' to persons with disabilities is a cornerstone of the CRPD.<sup>106</sup> 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'.<sup>107</sup> 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 burden'.<sup>108</sup> In some 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

<sup>104</sup> WHO and World Bank, above n 2, 4.

<sup>105</sup> *ibid.*, 5.

<sup>106</sup> CRPD, above n 1, arts 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).

<sup>107</sup> CRPD, *ibid.*, art 2.

<sup>108</sup> CRPD, *ibid.*, art 2.

discrimination.<sup>109</sup> An adjustment is considered reasonable unless making the adjustment would impose an ‘unjustifiable hardship’ on the person making it.<sup>110</sup>

Without serious research into the incidence of disability, and the nature of disabilities suffered by persons seeking asylum, it is not possible to make categorical statements about the barriers presented by status determination procedures. In what follows, some preliminary observations are made about the types of difficulties that one might expect to be experienced by persons with disabilities – and the reasonable accommodations that might help to mitigate them.

### 4.3 Credibility

One of the key challenges associated with putting forward a refugee claim is the need to show that an asylum seeker is credible, that is, that his or her testimony ought to be accepted.<sup>111</sup> The difficulties posed by the need to present a credible claim are well-documented.<sup>112</sup> Asylum seekers often experience serious technical and psychological difficulties in submitting their case.<sup>113</sup> 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.<sup>114</sup> Kagan observes that ‘being deemed credible may be the single biggest substantive hurdle before applicants beginning the refugee status determination process’.<sup>115</sup>

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

<sup>109</sup> Disability Discrimination Act 1992 (Cth) s 6(2).

<sup>110</sup> *ibid*, s 4(1). ‘Unjustifiable hardship’ is defined in s 11 of the Act.

<sup>111</sup> 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, 370–1.

<sup>112</sup> See, eg, Steve Norman, ‘Assessing the Credibility of Refugee Applicants: A Judicial Perspective’ (2007) 19 *IJRL* 273, 282.

<sup>113</sup> UNHCR, above n 35, para 190.

<sup>114</sup> Deborah Anker, *Law of Asylum in the United States* (Refugee Law Center 1999, 3rd edn), 153, cited in Kagan, above n 111, 374.

<sup>115</sup> Kagan, *ibid*, 368.

recorded and any later changes in an applicant's story can be used to question an applicant's credibility.<sup>116</sup>

Despite these difficulties, courts have been reluctant to make specific allowances for asylum seekers with disabilities. Under contemporary Australian jurisprudence, an adverse credibility finding made against a person with a diagnosed mental disability will not be set aside unless the impairment renders the person entirely unfit to attend a tribunal hearing and to answer questions.<sup>117</sup> In a recent decision of the Full Federal Court, Keane CJ observed that 'evidence that the respondent's psychological difficulties might explain an unconvincing performance during the hearing is hardly apt to establish his unfitness to give evidence and present arguments'.<sup>118</sup> The Full Court stressed that the Refugee Review Tribunal (RRT) is under no obligation to inquire into an applicant's psychological state. In the case at hand, the applicant 'had the opportunity to adduce ... evidence as to his psychological state and its impact on his demeanour, memory and consistency'.<sup>119</sup> The following comments by the former Chief Justice of the High Court of Australia reflect the approach that prevailed in 2004:

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.<sup>120</sup>

This approach presents obvious difficulties and for this reason has met with vigorous opposition from medical practitioners.<sup>121</sup> The problem for adjudicators is that persons with disabilities may not identify as having a disability, particularly where their impairment is not physical or sensory. Even if they have identified themselves as having a disability of some kind, they will not necessarily be able to provide a comprehensive account of how that disability affects their ability to present a credible case. Indeed, there is something deeply counter-intuitive in asking a person to provide a coherent, thorough and consistent account of why they cannot present a coherent, thorough and consistent claim. Finally, persons with disabilities may not raise evidence of their disability unless a tribunal alerts them to the benefit of doing so, particularly if, due to the negative cultural

<sup>116</sup> Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Themis Press 2006), 85.

<sup>117</sup> *Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369, [30] (Tracey J). See also *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575, [22] (Keane CJ).

<sup>118</sup> *SZNVW*, *ibid*, [19] (Keane CJ).

<sup>119</sup> *ibid*, [36] (Keane CJ).

<sup>120</sup> *SGLB*, above n 102, [19] (Gleeson CJ).

<sup>121</sup> See, eg, Rachel Tribe, 'Mental health of refugees and asylum-seekers' (2002) 8 *Advances in Psychiatric Treatment* 240–7.

attitudes that often surround disability, they are accustomed to hiding their symptoms.

Now that the CRPD has been in force for some years, the time has come for decision makers to begin drawing upon the principles of the CRPD in adjudicating cases that involve disability. 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, this does not mean that the principles of international disability law should be ignored altogether. In particular, the principle of reasonable accommodation demands that adjustments be made for persons who encounter heightened difficulties in presenting their claims. Special examination techniques might be appropriate for persons with disabilities, as they are for other vulnerable groups, such as women and children.<sup>122</sup> UNHCR's 'Handbook on Procedures and Criteria for Determining Refugee Status' (the UNHCR Handbook) suggests that expert medical advice should be obtained 'to assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case'.<sup>123</sup> Courts and tribunals might rely less on an asylum seeker's personal testimony and more on the evidence of friends, relatives and other close acquaintances.<sup>124</sup> They might also show a greater willingness to draw inferences from the circumstances surrounding a claim than they otherwise would, thereby reducing the burden on the asylum seeker to make out a positive case.<sup>125</sup> At the very least, adjudicators should demonstrate an awareness of the extensive medical literature on the psychological challenges affecting asylum seekers who have experienced torture and trauma.<sup>126</sup> This should extend to an appreciation of the effects of long term immigration detention on such people.<sup>127</sup>

One illustration of how such allowances might appropriately be made is a 2010 decision of the Refugee Status Appeals Authority of New Zealand.<sup>128</sup> The tribunal accepted the evidence of a clinical psychologist that the mother presented with symptoms of post-traumatic stress and

<sup>122</sup> UNHCR, above n 35, para 207.

<sup>123</sup> *ibid*, para 208.

<sup>124</sup> *ibid*, para 210.

<sup>125</sup> *ibid*.

<sup>126</sup> See, eg, Edith Montgomery, 'Long-term effects of organized violence on young Middle Eastern refugees' mental health' (2008) 67 *Social Science & Medicine* 1596–603; Tribe, above n 121; Angela Burnett and Michael Peel, 'Asylum seekers and refugees in Britain: Health needs of asylum seekers and refugees' (2001) 322 *British Medical Journal* 544–7.

<sup>127</sup> See, eg, Sarah Mares and Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues' (2004) 28 *Australian and New Zealand Journal of Public Health* 520–6; and Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 44 *Transcultural Psychiatry* 359–93.

<sup>128</sup> *Refugee Appeal No 76380*, above n 45.



mood disorder.<sup>129</sup> Despite inconsistencies in the applicant's account, it found her to be a credible witness.<sup>130</sup> The tribunal found that her 'apparently idiosyncratic delivery' was attributable to 'her limited education and the traumatic personal background which she has experienced', and 'her limited ability to articulate her account, given her stress disorder'.<sup>131</sup> Further, the tribunal found that the discrepancy between the applicant's written and oral evidence was explained by the fact that, because she was illiterate, she did not prepare her written application herself – and family members, in presenting her written evidence, had embellished her story.<sup>132</sup> Had the tribunal not probed for an explanation for the inconsistency, it might merely have assumed that it discredited her claim. The case is a striking example of a decision maker giving due weight to an applicant's disability and the impact that it may have on how she presents her claim.

The European Council's Asylum Procedures Directive makes some provision for an applicant's particular circumstances to be considered in an assessment of credibility. Under Article 13(3)(a), states must ensure that interviewers are 'sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability'.<sup>133</sup> However, the Directive does not expressly identify disability as a form of vulnerability. Moreover, there is no formal mechanism for systematically identifying and evaluating the impact of an applicant's personal circumstances, and so a person's disability (and attendant vulnerability) may well go undetected.<sup>134</sup>

Other courts, in assessing the claims of asylum seekers who do not have disabilities, have already demonstrated a willingness to accommodate some level of inconsistency in the evidence asylum seekers present. In other words, decision makers have been prepared to accept that refugees can and will 'lie' about their true circumstances – for a whole range of reasons.<sup>135</sup> For example, the Federal Court of Australia has recognized that asylum seekers may experience particular 'problems of communication and mistrust' in their relations with public officials.<sup>136</sup> It has ruled that decision makers should 'exercise great caution before drawing inferences

<sup>129</sup> *ibid.*, para 132.

<sup>130</sup> *ibid.*, para 78.

<sup>131</sup> *ibid.*, para 81.

<sup>132</sup> *ibid.*, para 78.

<sup>133</sup> Council Directive 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326, 13/12/2005, 13–14, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>> accessed 7 Oct 2011.

<sup>134</sup> Straimer, above n 93, 543.

<sup>135</sup> See, eg, *Abebe v Commonwealth* (1999) 197 CLR 510, 577 (Gummow and Hayne JJ).

<sup>136</sup> *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1998] 86 FCR 547, 557 (O'Connor, Branson & Marshall JJ).

from perceived inconsistencies'.<sup>137</sup> There is no reason why this logic cannot be extended to support additional accommodations for asylum seekers with disabilities.

#### 4.4 Other procedural challenges

The range of challenges that persons with disabilities can experience is broad. Examples include: difficulties in understanding questions and instructions (for example, where an asylum seeker has limited cognitive ability); difficulties in communicating (for example, 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 (for example, where an asylum seeker has a psychosocial disability).<sup>138</sup>

In all of these cases, it is vital that adjudicators 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. Again, 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. In the absence of such research, it may be possible to draw some lessons from the comparative field of children seeking asylum. Children, like persons with disabilities, present as vulnerable persons in the asylum process. Of course, the experience of children is clearly distinct from that of persons with disabilities. Given the sheer breadth of ways in which disability presents itself, caution is warranted in drawing too many analogies between these two groups. Nonetheless, given the paucity of research into the experience of refugees with disabilities, it may be useful to identify parallels between the two fields with a view to identifying the types of problems that vulnerable persons are likely to encounter as they navigate the asylum process.

Studies of separated and unaccompanied children seeking asylum in the United States, the United Kingdom and Australia identified major flaws in the process of assessing such children's claims in each of these countries, from the primary decision making stage through to the stages of merits and judicial review.<sup>139</sup> Many of the recommendations made by researchers in this study are relevant to persons with disabilities, although their relevance will obviously vary depending on the nature of the disability

<sup>137</sup> *Thevendram v Minister for Immigration and Multicultural Affairs* [2000] FCA 1910, para 42 (Lee J).

<sup>138</sup> Adapted from International Association of Refugee Law Judges, 'Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability', Guidance Note 9, Sept 2008, para 17.

<sup>139</sup> See Bhabha and Crock, above n 53, ch 5. See also Crock, above n 116, chs 9–11.

in a given case. The comparative 'Seeking Asylum Alone' report recommended, among other things, that:

- Special procedures be instituted to identify unaccompanied and separated children and to determine their age;<sup>140</sup>
- 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;<sup>141</sup>
- Interpreters be chosen carefully so as to ensure their linguistic and social compatibility with the applicant;<sup>142</sup>
- 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;<sup>143</sup>
- Adjudicators be provided with training in child development, child psychology and cross-cultural understanding specific to children;<sup>144</sup>
- Children be permitted to have support persons involved in any appeal process;<sup>145</sup>
- 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.<sup>146</sup>

Many of the recommendations made in relation to the processing of asylum claims made by children can provide guidance in cases involving persons with disabilities. As a bare minimum, decision makers wishing to comply with the tenets of the CRPD need to accommodate the physical needs of asylum seekers with disabilities, whether these entail providing access to premises, or arranging a hearing so as to make both the physical setting and the process accessible. The provision of information in an accessible format, whether in Braille or electronic format or other assistive modalities for persons with auditory or cognitive disabilities, should also be a base requirement. Decision makers need to communicate the elements of the determinative process, in terms of the criteria that must be met and the manner of the inquiries being made. In some instances it may not be possible to communicate this material to the claimant without ensuring that the claimant has a support person to assist him or her in presenting the claim. In many cases it will be appropriate to grant persons with disabilities additional time to prepare their claim.<sup>147</sup> For persons who

<sup>140</sup> Bhabha and Crock, *ibid.*, 193–4; Crock, *ibid.*, 230.

<sup>141</sup> Bhabha and Crock, *ibid.*, 203; Crock, *ibid.*, 236.

<sup>142</sup> *ibid.*

<sup>143</sup> Bhabha and Crock, *ibid.*, 203–4; Crock, *ibid.*, 236–7.

<sup>144</sup> Bhabha and Crock, *ibid.*; Crock, *ibid.*, 238.

<sup>145</sup> Bhabha and Crock, *ibid.*, 199–201; Crock, *ibid.*, 239.

<sup>146</sup> Bhabha and Crock, *ibid.*, 204; Crock, *ibid.*

<sup>147</sup> Straimer, *above n* 93, 542.

are deaf or hearing impaired, reasonable accommodation may require the provision of interpreters proficient in sign language.

The availability of modern technologies such as video conferencing raises interesting issues for asylum seekers with disabilities. For some, video conferencing could operate as a positive tool to facilitate the hearing process in a sensitive and supportive environment. In other instances – for example, where an asylum seeker with a disability is being detained in a remote location – the use of such technology may operate to compound the person's sense of dislocation and alienation from the process. Similarly, in some cases a medical examination may be appropriate to assess how a person's disability might affect how they present a claim – but in others, where such an examination is contrary to the wishes of the individual concerned, it might be an undue violation of privacy.<sup>148</sup>

The central message of the CRPD is that decision makers should tailor the status determination process – as far as possible and within the constraints of prevailing circumstances – to accommodate the needs of the asylum seeker so as to ensure the person's participation in the process on an equal basis with other asylum seekers. One size should not fit all. Outside of refugee law, courts have already begun taking disability into account as a factor that can affect legal outcomes (for example, as a factor in mitigation in criminal sentencing).<sup>149</sup> It is time that adjudicators brought an awareness of and sensitivity to disability into the realm of refugee status determination.

## 5. Conclusion

Asylum seekers with disabilities face a great many difficulties in seeking the protections accorded to them by the Refugee Convention. This article has touched lightly upon only a few of the challenges inherent in the refugee status determination process. It has argued that the advent of the CRPD should operate to make all of us more alive to the particular vulnerabilities and needs of persons with disabilities who find themselves displaced

<sup>148</sup> In *MG v Germany*, the Human Rights Committee observed at para 10.1 that 'to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his or her honour and reputation'. It held that a court order compelling the medical examination of the complainant, without first seeing or hearing from the complainant in person, was a violation of arts 14(c) and 17 of the ICCPR: Human Rights Committee, *MG v Germany*, 2 Sept 2008, UN doc CCPR/C/93/D/1482/2006, para 10.2.

<sup>149</sup> See, eg, the recent decision of the High Court of Australia in *Muldock v The Queen* 244 CLR 120. The Court declared that the sentencing of a defendant to nine years' imprisonment was 'manifestly excessive' in light of (among other things) his 'mental retardation': 141 [60]. It also held that the desirability of the defendant undergoing suitable rehabilitative treatment – treatment tailored specifically to assist persons with intellectual disabilities – was capable of being a 'special circumstance' that justified the imposition of a significantly shorter non-parole period than usual: 140 [58].

by war, persecution, and civil unrest – and indeed by natural as well as human catastrophe. This article is an invitation to consider; the start of what deserves to be a long and deep conversation. It marks the beginning of a program of research that will involve research into the experiences of refugees with disabilities around the world, building on the work of the WHO and the Women's Commission referred to earlier.<sup>150</sup>

For some asylum seekers with disabilities, the definition of refugee under the Refugee Convention presents intractable problems. For example, they may come from countries where the medical treatment they urgently require is denied to them, but for reasons unrelated to the Convention grounds. Such persons may need to seek alternative forms of protection, invoking international human rights law or domestic complementary protection provisions.<sup>151</sup> This article outlines a few of the difficulties posed by the Refugee Convention, arguing however that this instrument can (and should) be interpreted in many instances so as to meet the protection needs of persons with disabilities. It is the authors' view that the 'reasonable accommodation' principle at the heart of the CRPD demands that states parties abandon a 'one size fits all' approach to the Refugee Convention. The Convention definition of a refugee and the frameworks in place to implement it have been read down to meet the protection needs of women and, more recently, children. It should take no great change in procedure to adopt a similar approach to and so accommodate the needs of asylum seekers with disabilities.

The CRPD has been in force since 2008. By October 2012, 125 state parties had signed and ratified the instrument, with ratifications occurring at a rate faster than any other human rights treaty.<sup>152</sup> 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 CRPD – starting with 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. Notable progress has been made on this front, not least through the revision of UNHCR policy concerning the resettlement of refugees with disabilities. These revisions are notable for the conscious effort that

<sup>150</sup> See WHO and World Bank, above n 2; Women's Refugee Commission, 'Disabilities among Refugees and Conflict-Affected Populations' (Women's Refugee Commission 2008), available at: <[http://womensrefugeecommission.org/reports/doc\\_download/609-disabilities-among-refugees-and-conflict-affected-populations](http://womensrefugeecommission.org/reports/doc_download/609-disabilities-among-refugees-and-conflict-affected-populations)> accessed 16 Oct 2011.

<sup>151</sup> 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), 6–9.

<sup>152</sup> Based on information obtained from the lists of ratifications in the UN Treaty Series: <<http://treaties.un.org/pages/UNTSONline.aspx?id=1>>. See above n 32.

has been made to replace a 'medical model' approach to refugees with disabilities with the social model approach favoured by the CRPD.<sup>153</sup>

Both asylum seekers with disabilities and refugees with disabilities in camp and urban settings face real challenges in finding durable solutions to their displacement. Some challenges arise from directly discriminatory measures, such as immigration laws that expressly discriminate against persons with medical needs. Most, however, are more subtle. If the rights of refugees with disabilities are to be realised fully, it is necessary for the laws, policies and procedures that affect such persons to be reviewed systematically in order to ensure that they comply with the standards enshrined in the CRPD.

When it comes to refugees with disabilities, it is clear that much work remains to be done. Not enough is known about the incidence and nature of disability amongst populations of displaced persons. Statistical information is at best poor and at worst non-existent. Programs developed by and for persons with disabilities in refugee camps are also few and far between. Much is needed to build capacity and to encourage persons with disabilities to become agents in determining their future. It is to be hoped that the goodwill and energy generated by the CRPD will flow through to touch the lives of these most vulnerable and disadvantaged of refugees.

<sup>153</sup> See the earlier discussion of the shift in UNHCR policy, above n 12 and following (text and note).