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Advancing Disability Rights-Based Refugee and Asylum Claims

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INTRODUCTION

Persons with disabilities are among the most marginalized groups in the world and they experience heightened rates of human rights abuses. Languishing at the “vanishing point” of international law, this population has long struggled to access international protections,¹ including asylum and non-refoulement.² In many ways, the Refugee Convention³ hinders asylum claims for persons with disabilities by failing to envision a range of identity-based harms that extend beyond the traditional categories of political or religious persecution. Indeed, today a whole host of marginalized groups, ranging from individuals with disabilities to LGBT persons to street children to persons displaced by climate change, struggle to find protection within mainstream refugee law. International law is slowly evolving to accommodate the refugee claims of some of these overlooked groups,⁴ notably by beginning to recognize gender and age-based persecution claims.⁵ Hence, the time is ripe for international law to better accommodate asylum claimants who claim disability-related persecution. This requires a conception of treaty practice that moves beyond a focus on the Refugee Convention’s shortcomings, which are considerable—given the Convention’s primary attention to political activists and religious/ethnic minorities persecuted by 20th century fascist regimes, leaving persons with disabilities, among the very first victims of the Nazi regime, all but invisible

1 See, e.g., William I. Pons, Janet E. Lord & Michael Ashley Stein, *Disability, Human Rights Violations, and Crimes Against Humanity*, 116 AM. J. INT’L L. 58 (2022) (arguing that egregious human rights violations targeting persons with disabilities ought to be prosecuted at a level with those perpetrated against other groups such as women and children).

2 Throughout this article, we use the terms “refugee,” “asylum claimant” and “immigrant.” We define “asylum claimant” as a person who has fled their country of origin and is currently in the process of seeking protection from persecution and serious human rights abuses in another country and prefer that term over “asylum-seeker” on the basis that the latter term is regarded as pejorative and reinforces victimhood as opposed to agency. Subsequently, we define “refugee” as a successful asylum claimant—a person who has formally received designated protection status in a country other than their State of origin, and who has received the legal right to reside in that country. For this article’s purpose of analyzing the inclusion of persons with disabilities within the international asylum framework, we consider the terms “asylum claimant” and “refugee” to be largely interchangeable. Lastly, we use the separate term “immigrant” to denote any individual who is now residing on a long-term basis in a State that is not their country of origin, either as a refugee or as a migrant.

3 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

4 See Volker Türk & Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 3, 40-45 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) (describing evolving human rights protections of various marginalized groups).

5 See MATHILDE CRÉPIN, PERSECUTION, INTERNATIONAL REFUGEE LAW AND REFUGEES: A FEMINIST APPROACH (2021); GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE (Efrat Arbel, Catherine Dauvergne & Jenni Milnak eds., 2014); JASON M. POBJOY, THE CHILD IN INTERNATIONAL REFUGEE LAW (2017); JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE (2014).

during the Refugee Convention negotiations.⁶ The focus is instead on the possibilities that can be actualized through a treaty practice wherein a disability rights narrative generates value and commitment to change. A disability rights treaty practice addresses both procedural and substantive barriers inhibiting asylum claims by persons with disabilities: Procedural barriers limit the accessibility of the asylum process at every step for persons with disabilities and substantively, the rules governing asylum do not always recognize the harms that individuals with disabilities experience as persecution.

The Convention on the Rights of Persons with Disabilities (CRPD)⁷ has the potential to actualize persons with disabilities' asylum claims. Nearing universal ratification, the CRPD provides a framework for acknowledging persecution claims rooted specifically in disability.⁸ It does so by contextualizing disability within the human rights lexicon and by illustrating how various human rights abuses that would not routinely amount to persecution against non-disabled individuals can rise to a level sufficient to demonstrate persecution when performed against individuals with disabilities. In addition, the CRPD brings within its ambit international humanitarian law and other protections to create a basis for addressing the concerns of asylum claimants and refugees from the global disability community.⁹

The application of asylum law to the experience of persons with disabilities fleeing persecution viewed through a disability rights lens is largely absent in existing practice, especially in terms of disability-specific guidance to decision-makers, though scholarship is emerging.¹⁰ The

6 See, e.g., ANDREAS ZIMMERMAN, FELIX MACHTS & JONAS DÖRSCHNER, *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* (2011). On the persecution of persons with disabilities during Nazi era terror, see Janet E. Lord, *Disabilities, People with*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* (Dinah L. Shelton ed., 2004).

7 United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD].

8 *Id.*; For an updated status of CRPD signatures and ratifications, see *Status of Treaties, Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4 (last visited Mar. 20, 2022).

9 CRPD, *supra* note 7, at art. 11. For an exhaustive analysis of the CRPD's content, see *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

10 See, e.g., Stephanie A. Motz, *THE REFUGEE STATUS OF PERSONS WITH DISABILITIES* (2021); Mary Crock, Christine Ernst & Ron McCallum, *Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities*, 24 INT'L J. REFUGEE L. 735 (2012) (assessing the effect on refugee law and policy of the CRPD); Michael Ashley Stein & Janet E. Lord, *Human Rights and Humanitarian Assistance for Refugees and Internally Displaced Persons with Disabilities in Africa*, in *ASPECTS OF DISABILITY LAW IN AFRICA* 31 (Tobias Van Reenen & Ilze Grobbelaar-de Plessis eds., 2011) (analyzing refugee protection in the African context in the light of recent developments in international disability law); Andreas Dimopoulos, *An Enabling Interpretation of the Refugee Convention: Determination of Refugee Status in Light of the Convention on the Rights of Persons with Disabilities*, in *HUMAN RIGHTS AND THE REFUGEE DEFINITION:*

adoption of the CRPD and its rapid uptake by States, as well as by UN bodies and non-governmental organizations (NGOs), compels a review of asylum and refugee law. In particular it calls for an examination of how a CRPD treaty practice might spur substantive change as well as procedural reforms to advance the accessibility of asylum proceedings. What merits careful analysis is the ability of the refugee regime to accommodate claims grounded in disability-related persecution, an inquiry especially warranted given ongoing efforts at the global level to advance wide scale reforms to international law and policy relating to migration.¹¹

The theory underlying a disability-focused mapping of CRPD treaty practice onto refugee and asylum law sees the CRPD's adoption as a case study for a new ontology of treaty practice—providing a reservoir of opportunities, possibilities, and activities working constant change. Put another way, it conceptualizes a notion of what can be termed a rhizomatic treaty practice—one that, like the bamboo or ginger, has the potential to generate growth in multiple directions, creating complex and dynamic connections between principles, rules, people, processes, and institutions. This orientation is to understand human rights treaties and the CRPD as having its character “irreducibly relational and inherently organised” in action, process, and movement.¹² This is not, however, a view of treaty practice steeped in a triumphal and linear account of human rights progression. Rather, treaties can move ideas or be blocked; they can sprout in new, dynamic directions or become calcified by outmoded and path-dependent notions. Hence, among the questions begging inquiry within a rhizomatic treaty practice ideation are whether and how the CRPD and its notion of international law as a rights-protecting regime has produced lines

COMPARATIVE LEGAL PRACTICE AND THEORY 253 (Bruce Burson & David James Cantor eds., 2016) (assessing CRPD's implications for refugee law).

¹¹Among other initiatives is the U.N. Global Compact for Migration and the Global Compact for Refugees put forward by the U.N. High Commissioner for Refugees. See U.N. High Commissioner for Refugees, *Global Compact for Safe, Orderly and Regular Migration*, U.N. Doc. A/RES/73/195 (Dec. 19, 2018), <https://refugeesmigrants.un.org/migration-compact>; U.N. High Commissioner for Refugees, *Global Compact on Refugees*, U.N. Doc. A/73/12 (2018), <http://www.unhcr.org/towards-a-global-compact-on-refugees.html>.

¹²Stephen Linstead & John Mullarkey, *Time, Creativity and Culture: Introducing Bergson*, 9 CULTURE & ORG. 3 (2003). For Gilles Deleuze and Félix Guattari, “irreducible dynamisms drawing lines of flight and implying other forms of expression” offer a way of thinking that is not bogged down in the conventional order, in categorizations that assume a fixity and centering around a pre-given idea, that struggle to account for difference, movement, expression, and change. GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 237 (1987). Such a perspective of treaty practice can capture the flow, dynamism, and movement that a productive and creative treaty practice engenders. And, following Deleuze, the world of human rights treaty practice is no tree; it behaves like the rhizome. Following Bolanus and his characterization of rhizomatic, complex change: “[E]verywhere it grows horizontally, creating new roots and shoots that develop into new plants.” PAOLO A. BOLANUS, ON AFFIRMATION AND BECOMING: A DELEUZIAN INTRODUCTION TO NIETZSCHE'S ETHICS AND ONTOLOGY 59 (2005).

of flight and connectivity toward a disability refugee and asylum treaty practice.¹³

This perspective foregrounds connections between disability rights concepts, case law and jurisprudence, as well as lines of CRPD practice connecting to the UN High Commissioner for Refugees (UNHCR)¹⁴ and other institutional arrangements such as the UN Special Procedures mandate holders (typically called Special Rapporteurs)¹⁵ and the human rights treaty bodies themselves.¹⁶ Notably, the academic and practical literature tends to focus discretely on the limitations of the Refugee Convention and of specific domestic law regimes. It does not, however, consider how a dynamic treaty practice can arise out of a human rights convention such as the CRPD and generate treaty practice processes to advance interpretations of refugee law that are progressive, shift interpretation, and reterritorialize embedded lines of exclusion.¹⁷ Additionally, examining the implications of the CRPD for asylum claims makes for an especially valuable case study. Refugee and asylum law has proven stubbornly intransigent to claims not falling within the prescribed and specified grounds of the Refugee Convention as evidenced by the long-term struggle to accommodate gender persecution or persecution based on age. By contrast, the CRPD explicitly acknowledges the right of persons with disabilities to freedom of movement, the duty to accord protection to persons with disabilities in situations of risk, equal recognition before and access to the law, and the obligation of ensuring accessibility in all legal processes, often through the provision of reasonable accommodations.¹⁸ In doing so, the CRPD implicitly recognizes the possibility of seeking asylum, making a claim for refugee status, and to accessible refugee application processes and status determination, even as the CRPD itself lacks an explicit reference to these rights. Consequently, the viability of recognizing

13 A “line of flight” indicates movement and a line of escape as opposed to actual or projected itinerary. EUGENE B. YOUNG ET AL., *THE DELEUZE AND GUATTARI DICTIONARY* 183-84 (2013). In Deleuze’s philosophy, such lines of escape do not entail predetermined trajectories, but rather express processes of becoming. Creative lines of flight are inventive, dynamic and in motion; in treaty practice they are representative of actualizations of the treaty—of its substance, content, principles, rules. A treaty practice that is becoming works rhizomatically; it runs productive lines.

14 For a general overview of the UNHCR’s activities, see *About Us*, UNHCR, <https://www.unhcr.org/en-us/about-us.html> (last visited Mar. 20, 2022).

15 For a general overview of the work of these mandate holders, see *UN Charter-based Institutions Including Special Procedures*, U.N. SUSTAINABLE DEV. GRP., <https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/un-special-procedures> (last visited Mar. 20, 2022).

16 For a general overview of the treaty body system, see *Videos About the Treaty Bodies*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last visited Mar. 20, 2022).

17 The caselaw basis for such a shift is signaled in the Australia and New Zealand jurisprudence set forth *infra* Part II, and the institutional grounding is set forth *infra* Part III.

18 See CRPD, *supra* note 7, at arts. 5, 9, 11, 12, 13, 18.

disability-related asylum claims serves as a crucible for assessing the normative impact of the CRPD in realms where it stands textually silent.¹⁹

The theoretical orientation adopted here likewise contributes to the literature in two further ways. First, it draws on the philosophical orientation of Gilles Deleuze for whom process and becoming are more interesting approaches to problems than rigid and static accounts of what is or ought to be.²⁰ The treaty practice account offered, then, is not intended to represent the state of the CRPD in the refugee context or to offer up a fixed and definitive meaning (e.g., tracking more traditional expressions of treaty practice as dealing with treaty form and function); rather, it is to survey and map CRPD treaty practice tendencies—both creative ones as well as destructive ones—positing a more fluid ontology of treaty practice as a process of becoming and seeing the interesting work of treaty practitioners as mediators of interpretation, communication, and meaning-generation.²¹ Second, this proffered treaty practice ideation works to expose the potential of the CRPD to work transversally across human rights treaties as well as across often fragmented lines of human rights protection. Third, the benefits of a disability-sensitive refugee law framework extend beyond “only” persons with disabilities. A more accessible and accommodating legal scheme would make plausible the asylum and refugee claims of other groups, such as older persons and families seeking protected status. Measures associated with disability rights, such as the provision of reasonable accommodations and accessibility supports, stand to benefit a wide range of persons, including individuals with low literacy, people who speak other languages, children, and others.²²

19 Witness, for example, the current effort to develop standards reflective of the CRPD framework in the obscure context of disarmament, demobilization, and reintegration. The revision of the 2006 Integrated Disarmament, Demobilization and Reintegration Standards to include a comprehensive disability-inclusive module is precisely the kind of interaction between heterogeneous domains where something interesting, even surprising, is happening. See *Integrated Disarmament, Demobilization and Reintegration Standards*, U.N. (Apr. 2020), <https://www.unddr.org/wp-content/uploads/2022/01/IDDRS-5.80-Disability-Inclusive-DDR.pdf> (last visited Mar. 20, 2022).

20 See generally GILLES DELEUZE, *THE LOGIC OF SENSE* (Constantin V. Boundas ed., Mark Lester & Charles Stivale trans., 1999). For an analysis of the merits of a Deleuzian account of becoming and process specifically in the context of theorizing disability, see Margrit Shildrick, *Prosthetic Performativity: Deleuzian Connections and Queer Corporealities*, in *DELEUZE AND QUEER THEORY* 115 (Chrysanthe Nigianni, Merl Storr & Ian Buchanan eds., 2005) (offering an affirmative account of disability and theorizing becoming as “a process that entails both contesting the relations of power that structure every subject position and leaving behind any existing modes of identification.”). *Id.* at 129.

21 This is because Deleuzian lines of escape express processes of becoming and can be creative or destructive. See EUGENE B. YOUNG, *THE DELEUZE AND GUATTARI DICTIONARY* 184 (2013).

22 The dynamic of disability-specific accommodations having broad impact beyond the disability sphere is seen repeatedly and beyond the legal provenance, most prominently in the application of Universal Design and in the invention of adaptive devices. See, e.g., BESS WILLIAMSON, *ACCESSIBLE AMERICA: A HISTORY OF DISABILITY AND DESIGN* (2019); SARA HENDREN, *WHAT CAN A BODY DO? HOW WE MEET THE BUILT WORLD* (2020); MIRKO CHARDIN & KATIE NOVAK, *EQUITY BY*

Part I surveys the international refugee law framework, examining qualifications for refugee status and the progressive development of gender and age-sensitive interpretations of persecution, exploring how these growing claims could facilitate the expansion of a disability-inclusive refugee framework. Part II analyzes the theory and practice of disability asylum practice, focusing on remaining obstacles to achieving an inclusive refugee status inquiry and the problem of accommodating disability consistent with the CRPD. Part III then maps out possible lines of flight emanating from the CRPD framework for a more inclusive asylum and refugee law practice. It suggests how the Committee on the Rights of Persons with Disabilities (CRPD Committee),²³ the annual Conference of States Parties (COSP),²⁴ and other United Nations-based institutional arrangements might set into motion changes and developments for the refugee and asylum law framework and, within it, the accommodation of persons with disabilities. We conclude with some thoughts on how a rhizomatic theory of treaty practice, when applied through the CRPD, enables a philosophical shift in asylum and refugee law.

I. INTERNATIONAL REFUGEE FRAMEWORK

The international refugee law framework, put in place shortly after World War II as part of the foundational instruments of the modern human rights regime, has offered protection to persons fleeing persecution on a multitude of grounds not specified in the Refugee Convention.²⁵ In that sense, the Refugee Convention has demonstrated a dynamism and possibility for innovation. This Part assesses how the existing refugee regime might accommodate claims grounded in disability-related persecution and how developments in other spheres, including gender and age-related persecution, could usefully inform a robust disability asylum treaty practice. It does so by first exploring the definition of “refugee” under international law and its amenability to disability-based claims of persecution. Thereafter, it considers accommodating gender and age-related persecution claims, two domains with potentially promising approaches for persons with disabilities who are fleeing persecution.

DESIGN: DELIVERING ON THE PROMISE OF UDL (2021); AIMI HAMRAIE, BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY (2017).

²³ *Committee on the Rights of Persons with Disabilities*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (last visited Mar. 20, 2022).

²⁴ *Conference of States Parties to the Convention on the Rights of Persons with Disabilities*, U.N., <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2.html> (last visited Mar. 20, 2022).

²⁵ *See generally* JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2d ed. 2021) (linking the U.N. Refugee Convention standards to key norms in international human rights law).

A. The Refugee Convention: Defining “Refugee” and Rights Flowing from Refugee Designation

The refugee protection framework has as its antecedent the protection accorded to individuals under customary rules of international humanitarian law;²⁶ the regime of State responsibility for the protection of aliens;²⁷ and various due process and other guarantees for aliens in treaties of friendship, commerce, and navigation.²⁸ In the contemporary period, the international refugee framework connects to a vast, complex, and interconnected system of human rights protection whose relationship to refugee and asylum law should be understood as interactional, mutually constitutive, and iterative.²⁹ The lines of flight productive of creative expressions of a human rights-informed refugee practice are evident in some realms—prominently within age and gender-related claims for refugee status—but more often than not they fall short.³⁰

Under the Refugee Convention, the term “refugee” applies to “any person” provided the other elements of the definition are met.³¹ Elements critical to that definition, however, are the grounds of persecution laid out in Article I, which speak of an individual who, among other factors:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result

26 *See, e.g.*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 457-74 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (discussing refugee rights, such as displaced persons right of return, as established norms of customary international law, later codified in instruments including the Fourth Geneva Convention).

27 *See generally* Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976) (describing how deprivations of rights of aliens are unlawful both under the historic law of the responsibility of States but also under the general norm of nondiscrimination).

28 *Id.*

29 The idea of the Refugee Convention as an evolving, living treaty is readily acknowledged. As leading commentators have noted, its preamble “expressly refers to the desirability of revising and consolidating previous international agreements and of extending ‘the scope of and the protection accorded to such instruments.’” *See* Türk & Nicholson, *supra* note 4, at 37.

30 One might trace the possibilities in many different directions. Treaties adopted after the Refugee Convention suggest movement arising out of the non-discrimination clauses of the core human rights conventions. They identify areas of risk for which the Refugee Convention could be called to account, potentially. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

31 *See* Refugee Convention, *supra* note 3, at art. 1.

of such events, is unable or, owing to such fear, is unwilling to return to it.³²

Left out of that definition, at least explicitly, are well founded fears of serious harm rooted in additional types of harms that are widely understood today as constituting persecution but were ill-understood in the immediate aftermath of World War II.³³ To be sure, women, children, LGBT persons, persons with disabilities, and other groups subjected to persecution may claim refugee status on the basis of an assertion of persecution by falling within the category of “social group,”³⁴ but the evidence shows that fitting claims into the “social group” bracket is often unattainable.³⁵ The identities referenced in the refugee regime can indeed be rigid, static, and ill-attuned to difference. The omission of disability as one of the Refugee Convention’s protected grounds of persecution is, accordingly, problematic for disability-related claims in an identity-centric regime.³⁶

Of additional consequence to the protection of refugees with disabilities, the Refugee Convention sets out the rights to which individuals are entitled once they have been recognized as refugees.³⁷ The Refugee Convention only references disability, however, in the context of a provision on labor legislation and social security, and there it simply affirms that refugees are entitled to the same social security rights as citizens of the country.³⁸ No other reference is made to rights in the context of persons with disabilities and we are thus left with a traditional notion of disability—one that is heavily laden with paternalism.³⁹ Further, it must be recognized that the ability of refugees with disabilities to realize these rights affirmed in the Refugee Convention is seriously undermined in view of the fact that the vast majority of countries in the world have under-developed disability

³² *Id.*

³³ An obvious point of reference would be the non-discrimination clauses found in international human rights conventions. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

³⁴ *See* Refugee Convention, *supra* note 3, at art. 33.

³⁵ *See generally* Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 46 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) (highlighting the challenge of giving true effect to the individualized nature of the refugee status determination inquiry, which is characterized by age, sex, cultural, religious, political, physical, mental, and other factors).

³⁶ *See, e.g.*, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 564, 572-73 (7th Cir. 2008). In this asylum case, the court initially ruled that persons with mental illness did not qualify as a distinct “social group” because mental illness was not an “immutable characteristic,” out of an individual’s control, but was treatable with psychiatry. *See id.*

³⁷ *See* Refugee Convention, *supra* note 3, at art. 12.

³⁸ *Id.* at art. 24.

³⁹ *See generally* Janet E. Lord, *Persons with Disabilities in International Humanitarian Law – Paternalism, Protectionism or Rights?*, in DISABILITY, HUMAN RIGHTS AND THE LIMITS OF HUMANITARIANISM 155 (Michael Gill & Cathy J. Schlund-Vials eds., 2014) (discussing the paternalistic rendering of persons with disabilities in international humanitarian law).

rights law and policy frameworks, the current pace of CRPD ratifications notwithstanding, and quality country of origin information regarding human rights conditions for persons with disabilities for asylum decision-makers is still woefully inadequate.⁴⁰

Disability-specific procedural and substantive barriers seriously hinder free access to the courts, including legal assistance, access to elementary education, and access to public relief and assistance in practice and yet in other domains access to justice for persons with disabilities is gaining traction.⁴¹ Of significant concern for accessing rights, the Refugee Convention provides that all refugees must be granted identity papers and travel documents that allow them to travel outside the country.⁴² Yet this right is often compromised for refugees with disabilities because they may have no birth registration and other documentation to bring with them, or because they are denied the right to obtain travel documentation on account of their disability.⁴³

Finally, and further reinforcing the barriers that persons with disabilities experience in the context of refugee law, as with instances of gender-based persecution, perpetrators of persecutory acts against persons with disabilities are often non-State actors. They may be family members,

40 Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 U. WASH. L. REV. 449 (2008); Janet E. Lord & Michael Ashley Stein, *Enabling Refugee and IDP Law and Policy: Implications of the U.N. Convention on the Rights of Persons with Disabilities*, 28 ARIZ. J. INT'L & COMP. L. 401 (2011).

41 See generally EILIONÓIR FLYNN, *DISABLED JUSTICE? ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* (2016) (analyzing the experience of people with disabilities through the justice system from an international and comparative perspective). Examples of more accessible justice processes are coming to light. A report issued by the Office of the U.N. High Commissioner for Human Rights on Article 13 of the CRPD (Access to Justice), notes the calls by the Constitutional Court of Colombia and the Supreme Court of Mexico for the translation of judgments concerning the rights of persons with disabilities into easy read formats for the benefit of the petitioners and other persons with intellectual disabilities; in Finland, the police have designed their website to provide a range of accessible formats; in Australia, a Disability Access Bench Book was developed to provide recommendations and guidance on how to provide procedural accommodations to individuals with disabilities, including in criminal law processes. See Off. of the U.N. High Comm'r for Human Rights, *Right to Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities*, Rep. of the Office of the United Nations High Commissioner for Human Rights, A/HRC/37/25, at ¶ 22, 30 (Dec. 27, 2017). And for work addressing some of the procedural barriers facing refugee claimants with disabilities, see Kuowei Tay et al., *A Mixed-Method Study of Expert Psychological Evidence Submitted for a Cohort of Asylum Seekers Undergoing Refugee Status Determination in Australia*, 98 SOC. SCI. & MED. 106 (2013) (highlighting barriers that asylum claimants experiencing trauma may face in the refugee decision-making process). For earlier work on this topic, see Arlene S. Kanter, R. Blake Chisham & Christopher Nugent, *The Right to Asylum and Need for Legal Representation of People with Mental Disabilities in Immigration Proceedings*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 511 (2001); Zachary Steel, Naomi Frommer & Derrick Silove, *Part I: The Mental Health Impacts of Migration: The Law and Its Effects – Failing to Understand: Refugee Determination and the Traumatized Applicant*, 27 INT'L J. L. & PSYCHIATRY 511-12 (2004).

42 See Refugee Convention, *supra* note 3, at art. 28.

43 See *id.* at arts. 27-28. See also World Bank, *Creating Disability Inclusive ID Systems* (2020) (disclosing the many barriers persons with disabilities experience in accessing legal proof of identity).

caregivers, traditional healers, or employees of private institutions.⁴⁴ Thus, claimants must make a strong case for the proposition that persecution by private actors is attributable to the State, as in the case of its failure to monitor private actor conduct in the running of an orphanage, prison, or institution where an individual with a disability was persecuted. This presents challenges given the received State-as-perpetrator standard.⁴⁵ The Refugee Convention, when considered without regard to progressive developments in refugee protection and, for present purposes, apart from recent transformations in international and domestic disability rights, seems facially ill-equipped at best to accommodate refugees and asylum claimants with disabilities.

B. Progressive Development of Refugee Law in Other Spheres

Productive and creative lines of flight—a rhizomatic treaty practice that is inventive, dynamic, and in motion—may seem unlikely, even highly implausible when set against the strictures of the Refugee Convention and its narrowly enumerated grounds. Yet, advocacy on behalf of non-traditional claimants premised on expanded understandings of lived experience, very often triggered through dynamic human rights treaty practice, demonstrates such improbable movement. State practice reveals a gradual broadening of the refugee definition to encompass persecution based on grounds not appearing in the Refugee Convention, effectively incorporating shared understandings of persecution not contemplated in the original definition.⁴⁶ The adoption of the Refugee Convention's 1967 Protocol reflects a notably progressive expansion of protection insofar as it

44 See, e.g., Janet E. Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT'L & COMP. L. REV. 27, 29-30 (2011).

45 For the parallel problem posed in the context of gender asylum, see Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007).

46 Here one might point to the adoption by Canada and the United Kingdom, respectively, of specific guidelines for asylum decision makers considering claims based on gender identity. See Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act, Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, IMMIGRATION AND REFUGEE BOARD OF CANADA (revised Dec. 17, 2021), <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>. See also VISAS AND IMMIGRATION, GENDER IDENTITY ISSUES IN THE ASYLUM CLAIM: TRANSGENDER (2011) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257387/genderissueintheasylum.pdf; HOME OFFICE, SEXUAL IDENTITY ISSUES IN ASYLUM INTERVIEWS (2015) (UK), <https://www.gov.uk/government/publications/sexual-identity-issues-in-the-asylum-claim>; HOME OFFICE, GENDER ISSUES IN THE ASYLUM CLAIM (2010) (UK), <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process>.

removed time and geographical limits from its ambit.⁴⁷ In so doing, it became an instrument freed from time-bound and geographical limitations designed to address refugee flows in the aftermath of World War II. The Protocol reflected the acknowledgement that the refugee experience transcended that era and space.

Beyond those important developments, advocacy in support of refugee claims that fall under a broader rubric of social group membership—rather than those that square with explicitly recognized persecutory grounds of race, religion, nationality, or political opinion—started to move first in the domains of age and gender. Claims founded on the basis of gender persecution,⁴⁸ and later persecution on the basis of sexual orientation and gender identity,⁴⁹ and age-related persecution, in particular child-related abuses, have met with some success despite their lack of explicit enumeration in the Refugee Convention.⁵⁰ This expanding sensitivity within refugee law to age and gender-related persecution is important for disability-related asylum claims and bears further examination, as persons with

47 United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (Oct. 4, 1967). The Protocol provides “the term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘. . . as a result of such events’, in article 1 A (2) were omitted.” *Id.* at ¶ 1. Paragraph 3 provides that “[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation . . .” *Id.* ¶ 3. Further, its Preamble noted “that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention.” *Id.* at pmb1.

48 See Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 693 (2008); see also GERALD SEIPP, ASYLUM CASE LAW SOURCEBOOK § 2:80 (2021).

49 See generally Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L.L. REV. 439 (1994) (“an obituary for the homosexual exclusion” provisions of the American Immigration and Nationality Act); Nuno Ferreira, *Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?*, 5 GENIUS: RIVISTA DI STUDI GIURIDICI SULL’ORIENTAMENTO SESSUALE E L’IDENTITÀ DI GENERE 25 (2018) (assessing sexual orientation and/or gender identity (SOGI) claims in the Common European Asylum System, as well as proposals to reform how such claims are evaluated); Calogero Giametta, *New Asylum Protection Categories and Elusive Filtering Devices: the Case of “Queer Asylum” in France and the UK*, 46 J. ETHNIC & MIGRATION STUD. 142 (2018) (evaluating the rise of the “LGBTI asylum seeker” as a “prominent avatar for refugees” and how refugee granting systems function as filtering devices to both protect and control certain migrants).

50 See generally Ellen M. Walker, *The HIV/AIDS Pandemic and Human Rights: A Continuum Approach*, 19 FLA. J. INT’L L. 335 (2007); Alida Yvonne Lasker, Note, *Solomon’s Choice: The Case for Granting Derivative Asylum to Parents*, 32 BROOK. J. INT’L L. 231 (2006); Louise K. Newman & Zachary Steel, *The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention*, 17 CHILD & ADOLESCENT PSYCH. CLINICS OF N. AM. 665 (2008); SHANE DIZON & POOJA DADHANIA, 2 IMMIGRATION L. SERVICE 2D § 1:6 (2021).

disabilities are statistically more likely to be older persons⁵¹ and women of all ages.⁵²

1. Gender-Based Persecution

Successful gender-related claims to refugee status are a recent development, gaining traction only during the last thirty years and at first instance encompassing claims of persecution against women and only more recently, claims rooted in sexual orientation and gender identity.⁵³ The resulting advocacy represented an interactional pragmatic field of engagement between the conventional refugee regime and, at first instance, women's rights treaty practice.⁵⁴ Early signaling that gender-related claims may fall within the purview of the Refugee Convention came in 1985, when the Executive Committee of the UNHCR acknowledged the possibility of grounding a successful claim by women asylum claimants in harsh treatment on the basis of failure to adhere to socially-constructed norms.⁵⁵ By 1991, the UNHCR adopted the Guidelines on the Protection of Refugee Women,⁵⁶ highlighting the need to address the experience of refugee women and promoting training for officials on processing the claims of women asylum claimants. Thereafter, in 1993, the Executive Committee issued a Conclusion recommending that States develop appropriate guidelines on women asylum claimants on the basis that women refugees have different

51 Catalina Devandas-Aguilar, *Rep. of the Special Rapporteur on the Rights of Older Persons with Disabilities*, U.N. Doc. A/74/186 (July 17, 2019), <https://undocs.org/en/A/74/186>.

52 ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT (OECD), GENDER AND SUSTAINABLE DEVELOPMENT: MAXIMISING THE ECONOMIC, SOCIAL AND ENVIRONMENTAL ROLE OF WOMEN 51 (2008), <https://www.oecd.org/social/40881538.pdf>.

53 See Edwards, *supra* note 35, at 51-57; see also THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS (2000). On the queering of refugee and asylum law, see Sabine Jansen & Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* (Vrije Universiteit Amsterdam 2011); Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBTQ Asylum Claims*, 50 L. & SOC'Y REV. 856 (2016).

54 The dynamic process suggested here draws from the work of Félix Guattari and the notion of assemblage. Guattari develops his more abstract notion of assemblage (*agencement* in French) which comprises components of passage and expresses connectivity and interaction inside a system and transversally. The assemblage is facilitative of intra-and inter-assemblage transversal relations. While highly abstract, the concept can be put to work to capture that aspect of treaty practice that can be so challenging to express – the rhizomatic connections made within and across treaty practices, the traversing of boundaries that seem stable but are also permeable, that leak out. Per Guattari, regarding this sense of assemblage: “It is through these components of passage that possible worlds and real worlds clash and proliferate.” FÉLIX GUATTARI, *THE MACHINIC UNCONSCIOUS: ESSAYS IN SCHIZOANALYSIS* 147 (1979).

55 UNHCR Exec. Comm. of the High Comm'r's Programme, *Refugee Women and International Protection No. 39 (XXXV)*, ¶ k, U.N. Doc A/40/12/Add.1 (Oct. 18, 1985) (indicating that new programs may need to be established “to meet the specific problems of refugee women.”).

56 See U.N. High Comm'r for Refugees, *Guidelines on the Protection of Refugee Women* (July 1991), ¶ 4 [hereinafter *Gender Guidelines*], <https://www.unhcr.org/en-us/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>.

experiences from their male counterparts and different needs.⁵⁷ This move resulted in further work, and in 2002 UNHCR released concurrently two Guidelines on International Protection.⁵⁸ These Guidelines explicitly recognize that the refugee definition within the Refugee Convention does indeed cover gender-related claims and that there is no need to add an additional category to existing grounds because a gender-sensitive interpretation should extend protection for gender-based persecution, for example under the social group category.⁵⁹ The Guidelines likewise set in motion a gendered treaty practice that in time worked creative change in the way refugee claims were pursued and decided.

Alice Edwards has adeptly traced the progressive development of a gendered sensibility in the determination of refugee status and asylum claims, finding that this process of development took time and was met with resistance.⁶⁰ She notes that as originally conceived and drafted, the refugee framework was never intended to accommodate gender-related claims of persecution and there was a fear that expanding claims beyond the explicitly articulated grounds might result in a deluge of claims.⁶¹

Karen Musalo's explanation as to why the floodgates argument regarding gender-based claims is without merit is crucial for anticipating opposition to disability asylum claims on similar grounds, and worth quoting at length:

There are several explanations why the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection. First, women who would have legitimate claims for gender asylum often come from countries where they have little or no rights, which limits their ability to leave their countries in search of protection. Second, they are frequently – if not always – primary caretakers for their children and extended family. Thus, they often have to choose between leaving family

57 Exec. Comm. of the High Comm'r's Programme, *Refugee Protection and Sexual Violence No. 73 (XLIV)* (Oct. 8, 1993), <https://www.unhcr.org/en-us/excom/exconc/3ae68c6810/refugee-protection-sexual-violence.html>.

58 U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* [hereinafter *Gender-Related Persecution Guidelines*], U.N. Doc HCR/GIP/02/01 (May 7, 2002), <https://www.unhcr.org/3d58ddef4.pdf>; U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 2: "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*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

59 See *Gender-Related Persecution Guidelines*, *supra* note 58, at ¶ 6.

60 See Edwards, *supra* note 35, at 48-49, 68-69. See also ALICE EDWARDS, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW* (2011).

61 Edwards, *supra* note 35, at 70.

behind, or exposing them to the risks of travel to the potential country of refuge. . . . Finally, women asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum.⁶²

As noted above, persons with disabilities with a strong basis for asylum—much like women making similar claims—face numerous barriers. Persons with disabilities are disproportionately poor and lack access to education and thus are often unaware of information regarding asylum, a point noted in the Joint Statement of the CRPD and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), which asserts that “[s]tates have failed to provide appropriate shelter and support, including adequate information in accessible formats, and reasonable accommodation.”⁶³ They frequently hail from countries where persons with disabilities have no legal basis for rights claims, rendering the likelihood of their ability to leave their countries quite slim.⁶⁴ Further, the very same persecution and egregious instances of disability-based discrimination that would often prompt persons with disabilities to file asylum claims in the first place can directly trap them inside their countries of origin. For example, widespread access barriers in transport systems, such as busses or trains, prevent many persons with disabilities from traveling.⁶⁵ Accounts of refugee flows out of conflict-affected areas underscore the likelihood that persons with disabilities are very often unable to flee.⁶⁶ It stands to reason, therefore, that the

⁶² See Musalo, *supra* note 45, at 133.

⁶³ Addressing Disabilities in Large-Scale Movements of Refugees and Migrants, Joint Statement by the U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) & the Comm. on the Rights of Persons with Disabilities, 1, 2 (2017), <https://www.ohchr.org/Documents/HRBodies/CMW/JointStatementCMW-CRPDFINAL.pdf>. See World Health Org. & World Bank, *World Report on Disability* (2011), at 39-41 [hereinafter *World Report on Disability*] (assessing disability-poverty connection); *id.* at 223-32 (assessing disability-education connection).

⁶⁴ Here it is worth noting that 80% of persons with disabilities live in developing countries and, further, of these, 20% are living in extreme poverty and many live in environments of fragility, conflict or disaster where legal frameworks and institutions remain weak and without protections for persons with disabilities. See *World Report on Disability*, *supra* note 63, at 11.

⁶⁵ Julie Babinard et al., World Bank, *Accessibility of Urban Transport for People with Disabilities and Limited Mobility: Lessons from East Asia and the Pacific*, TRN 44 (2012), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/17104/779690BRI0Box30C00TRN0440ADD0VC0KNS.pdf?sequence=1&isAllowed=y>.

⁶⁶ Amnesty Int'l, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, AI Index MDE 31/1383/2019 (Dec. 3, 2019), available at <https://www.justice.gov/eoir/page/file/1227171/download>; Nujeen Mustafa, Human Rights Watch, 'You Can and Should Do More to Ensure That People with Disabilities Are Included in All Aspects of Your Work—We Can't Wait Any Longer,' (Apr. 24, 2019), available at <https://www.hrw.org/news/2019/04/25/you-can-and-should-do-more-ensure-people-disabilities-are-included-all-aspects-your> (transcript of Ms. Mustafa's statement during the U.N.

introduction of a disability sensitive interpretation of refugee law is unlikely (for better or worse) to result in a deluge of disability asylum claims.

Developments in the recognition of gender-related claims illustrate that movement does occur within and across treaties through productive treaty practices. While new lines of flight can spin off in any direction, this example shows the potential for international human rights law to produce lines that help clarify and inform the content of refugee and asylum law. This example of treaty practice also allows for new understandings regarding the mutually constitutive relationship between, for example, disability and the type of persecution and harm experienced by a person with a disability and the reasons for such treatment.⁶⁷ Beyond progressive work to generate a gender-inclusive treaty practice in refugee and asylum law, work in the area of age-related asylum advocacy has also yielded some success that could inform disability-related asylum claims.

2. Age-Related Persecution

While progress has been slower to emerge in terms of advancing age-related analysis in the refugee protection regime, the near universal adoption of the Convention on the Rights of the Child (CRC) notwithstanding,⁶⁸ developments in this context likewise offer some lessons for advancing disability asylum claims. However, there is little evidence of an appreciable link made between age-related forms of harm and claims to refugee status.⁶⁹ Age-related issues of capacity parallel legal capacity issues frequently raised in relation to persons with certain cognitive and mental disabilities in the asylum-seeking process. The standards set forth in the CRPD carefully distinguish these and introduce supported decision-making frameworks to facilitate rather than substitute decision-making for individuals with cognitive and mental disabilities.⁷⁰

Security Council briefing on the humanitarian situation in Syria); HelpAge Int'l & Handicap Int'l, *Hidden Victims of the Syrian Crisis: Disabled, Injured, and Older Refugees*, (Apr. 9, 2014), <https://reliefweb.int/report/syrian-arab-republic/hidden-victims-syrian-crisis-disabled-injured-and-older-refugees>.

⁶⁷ *Gender Guidelines*, *supra* note 56, at ¶ 6. And as Foster notes, in relation to the development of a gender- and child-sensitive refugee sensibility, human rights law has served to highlight the specific needs of women and children, crucially for refugee decision-makers who need guidance in understanding how age and gender impact experience of human rights abuses. While such impacts may be different from those experienced by men, they are nonetheless persecutory. MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGEE FROM DEPRIVATION* 65 (2009).

⁶⁸ Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter CRC].

⁶⁹ See Edwards, *supra* note 35, at 58.

⁷⁰ The CRPD makes clear that persons with disabilities enjoy legal capacity on an equal basis with others and that supported decision-making must be provided in order to facilitate the right of all persons with disabilities to exercise and enjoy their legal capacity. CRPD, *supra* note 7, at art. 12. For

Despite challenges for an age-sensitive refugee treaty practice, age-related dimensions of refugee law, like gender sensitive approaches, are beginning to inform approaches in ways not contemplated by the drafters of the Refugee Convention who excluded age in the refugee definition.⁷¹ Circumstances surrounding successful claims include, for example, persecution suffered by child brides and ensuing domestic violence,⁷² forcible or under-age subjection to military service,⁷³ and past persecution coupled with a well-founded fear of future persecution as an abandoned street child.⁷⁴ In the United States, asylum has been granted to children based on findings of a well-founded fear of persecution on account of membership in a particular social group and the UNHCR has promulgated guidance on child asylum claims.⁷⁵ Nonetheless, other groups have been less successful in founding asylum claims through the social group channel, in particular persons with disabilities. Likewise, persons advanced in age warrant special attention, either on account of age-related persecution or on account of accommodations required to ensure their equal access to asylum proceedings, yet research suggests they are less likely to fare well in such proceedings.⁷⁶

C. Disability-Based Persecution

The foregoing summary review of gender and age-related asylum claims suggest some possible lines of flight for a disability rights treaty practice to emerge under the Refugee Convention. Positively, the elaboration and

further discussion of the CRPD framework and its relevance for assessing disability asylum claims, see Part II, A.

⁷¹ Refugee Convention, *supra* note 3, at art. 1.

⁷² See *W. (Z.D.) (Re)*, [1993] CRDD No. 3, No. U92-06668, Feb. 19, 1993 (Can. Immigr. & Refugee Bd.).

⁷³ See Edwards, *supra* note 35, at 57.

⁷⁴ *Id.*

⁷⁵ See generally 2 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE 2D § 10:159 (2021). For UNHCR guidance on child claims, see U.N. High Comm’r for Refugees, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08 (Dec. 22, 2009).

⁷⁶ The special protection accorded on account of advanced age is increasingly recognized in international human rights law and may yet form the basis of a specialized international convention on the rights of older persons. See, e.g., *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 175 (June 17, 2005) (addressing the right of indigenous people to their ancestral lands and underscoring the obligation of the State in respect of elderly persons to “take measures to ensure their continuing functionality and autonomy, guaranteeing their right to adequate food, access to clean water and health care” and to “provide care for the elderly with chronic diseases and in terminal stages, to help them avoid unnecessary suffering.”). For the work of a newly established Open-ended Working Group on Aging, see the U.N. Department of Economic and Social Affairs website, <https://social.un.org/ageing-working-group/>. See also G.A. Res. 65/182 (Dec. 21, 2010), available at <https://undocs.org/A/RES/65/182> (establishing the Working Group).

enthusiastic uptake of the CRPD might put into motion a more informed understanding of the disability experience and its interrelationship with the type of persecution or harm experienced by would-be refugee claimants and the reasons for such treatment. A disability rights narrative so actualized could therefore impart a disability analysis using the rules, principles, and concepts reflected in the CRPD (and related institutional lines) of the protection framework in much the same way that gender analysis via the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁷⁷ and related institutional lines has shaped the direction of refugee law and practice. Parallels might also be seen in the development of child-related claims informed by the CRC and related institutional lines.

The contemporary manifestation of disability-based persecution includes egregious abuses, although they are still largely excluded from review in the human rights documentation relied upon by States and still limited in mainstream human rights documentation by non-governmental organizations.⁷⁸ The impact of this exclusion with regard to asylum claims is to create informational barriers about the lived experience of disabled asylum claimants and the ways in which they experience persecution. This invisibility notwithstanding, it was the recognition of disability-based human rights abuses that served as the impetus for the drafting of the CRPD, as a disability-specific human rights convention, in the first decade of the twenty-first century.⁷⁹ Understanding the current human rights situation of persons with disabilities provides context for analyzing the placement of individuals with disabilities within the refugee framework, and in turn of the rethinking of that scheme compelled by the CRPD's mandates. To that end, the discussion that follows analyzes disability-based persecution and its various manifestations and considers the CRPD-framework and its potential

⁷⁷ Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

⁷⁸ See Janet E. Lord, *Disability Rights and the Human Rights Mainstream: Reluctant Gate-Crasher?*, in THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 83 (Clifford Bob ed., 2009). The notable exception to this general rule is the path-breaking work of Disability Rights International (formerly Mental Disability Rights International) [hereinafter DRI]. See DISABILITY RIGHTS INT'L, <https://www.driadvocacy.org/>. Also of note is the work of the Hungary-based NGO Validity (formerly Mental Disability Advocacy Center). See VALIDITY, <https://validity.ngo/>. These groups, however, are focused in their reporting primarily (though not exclusively) on instances of abuse against individuals with psychosocial and intellectual disabilities and much of their reporting is on the population of such individuals in institutional settings.

⁷⁹ CRPD, *supra* note 7, at pmb1. The United Nations emphasizes disability as a risk factor for human rights abuse and persecution. See U.N., Dept. of Econ. & Soc. Aff., Factsheet on Persons with Disabilities, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> ("Persons with disabilities are more likely to be victims of violence or rape, according to a 2004 British study, and less likely to obtain police intervention, legal protection or preventive care. Research indicates that violence against children with disabilities occurs at annual rates at least 1.7 times greater than for their peers without disabilities.").

to inform determinations of refugee status for asylum claimants with disabilities.

Disability is a risk factor when considering vulnerability to torture, neglect, and isolation, and other forms of inhuman or degrading treatment.⁸⁰ Human rights violations against individuals with disabilities may go unnoticed, particularly where they take place in institutionalized settings and other places that are similarly isolated and shielded from scrutiny.⁸¹ In many parts of Europe and North America, persons with disabilities today are subjected to long-term and even permanent institutionalization in psychiatric facilities and social care homes, frequently in isolated environs within rural areas and locations set apart from established communities and without social or program supports.⁸² The horrific abuses visited upon children and adults with disabilities in the institutions of Central and Eastern Europe and throughout the former Soviet Union have been documented and the perils of institutionalized living in the United States have also been highlighted during the COVID-19 pandemic.⁸³ To cite other examples, abuses in Mexico and other Latin American institutions have been exposed where persons with disabilities are dumped and left without access to basic necessities, hygiene and sanitation, or meaningful activity of any kind.⁸⁴

80 See Manfred Nowak (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report*, ¶¶ 27-76, U.N. Doc. A/63/175 (July 28, 2008) [hereinafter *Nowak Interim Report*]; see also Rep. of the Office of the High Comm'r for Human Rights, Expert Seminar on Freedom from Torture and Ill-Treatment and Persons with Disabilities (Dec. 11, 2007), <http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorturereportfinal.doc>.

81 DRI has documented egregious human rights violations against person with disabilities in institutional settings, such as orphanages, social care homes, and psychiatric hospitals. See MENTAL DISABILITY RIGHTS INT'L, HUMAN RIGHTS & MENTAL HEALTH: MEXICO 13-41 (2000), <https://www.driadvocacy.org/wp-content/uploads/Human-Rights-Mental-Health-English.pdf> [hereinafter MEXICO REPORT]; MENTAL DISABILITY RIGHTS INT'L, CHILDREN IN RUSSIA'S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM 10-23 (1999), <https://www.driadvocacy.org/wp-content/uploads/MDRI-Children-in-Russias-Institutions-1999.pdf>; MENTAL DISABILITY RIGHTS INT'L, HUMAN RIGHTS & MENTAL HEALTH: HUNGARY 16-63 (1997), <https://www.driadvocacy.org/wp-content/uploads/Hungary.pdf>; DISABILITY RIGHTS INT'L, HUMAN RIGHTS & MENTAL HEALTH: URUGUAY 16-48 (1995), <https://www.driadvocacy.org/wp-content/uploads/Uruguay-report-1995.pdf>.

82 See Camilla Parker & Luke Clements, *The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?*, 4 EUR. HUM. RTS. L. REV. 508, 511-12 (2008). As noted by one scholar, around the world, "conditions for [persons with disabilities] who are institutionalized provide examples of mistreatment that are equal to or more severe than the mistreatment for which other groups have gained asylum under the social group category." Laura E. Hortas, *Asylum Protection for the Mentally Disabled: How the Evolution of Rights for the Mentally Ill in the United States Created a "Social Group,"* 20 CONN. J. INT'L L. 155, 180 (2004).

83 See, e.g., MENTAL DISABILITY ADVOC. CTR, CAGE BEDS: INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT IN FOUR EU ACCESSION COUNTRIES 36-41 (2003), https://www.mdac.org/sites/mdac.info/files/English_Cage_Beds.pdf.

84 See, e.g., DISABILITY RTS. INT'L, ABANDONED AND DISAPPEARED: MEXICO'S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES (2010), <https://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf>; DISABILITY RTS. INT'L, HUMAN RIGHTS AND MENTAL HEALTH IN PERU (2004), <https://www.driadvocacy.org/>

These represent some of the better documented examples of abuse perpetrated against persons with disabilities.

The same dehumanization impulse that pushes institutionalization and segregation in horrific living conditions in many such societies manifests in similarly brutal treatment in other regions where institutionalization is not prevalent. Some of the documented instances of abuse in several West African communities expose manifestations of disability-based stigma rooted in fear and misunderstanding about the cause of impairments. These social conventions have led to grievous harms, for example, to cases where autistic persons are thrown into the bush and left to die on the basis that they are “possessed” and their behavior is “demonic” in origin.⁸⁵ Isolation from the wider community is also common in the region, as evidenced by reports of leper colonies’ amputee encampments.⁸⁶ Similarly, in Ethiopia, forced ingestion of harmful substances is regarded in some communities as an antidote to mental disability;⁸⁷ this is the correspondent to practices documented in developed countries of forced medication, restraint, and psycho-surgical intervention without informed consent.⁸⁸ In other parts of East Africa, persons with albinism are fearful of their lives and, in addition to falling victim to egregious discrimination, have been killed for their body organs associated with superstition and witchcraft practices; a recent Amnesty International report details similar abuses in Malawi where authorities do not prosecute perpetrators who have killed persons with albinism for their body parts.⁸⁹ Persecution against persons with albinism

wp-content/uploads/Peru-Report-Eng-Final.pdf; *South African Scandal after Nearly 100 Mental Health Patients Die*, THE GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/world/2017/feb/01/south-african-scandal-after-nearly-100-mental-health-patients-die>.

⁸⁵ Michelle Funk et al., World Health Org., *Mental Health and Development: Targeting People with Mental Health Conditions as a Vulnerable Group* (2010) (“Attributions of mental health conditions to possession by evil spirits or punishment for immoral behaviour frequently lead to harmful treatment practices.”).

⁸⁶ See Natasha Frost, *Quarantined for Life: The Tragic History of US Leprosy Colonies*, HIST. CHANNEL (Mar. 31, 2020) <https://www.history.com/news/leprosy-colonies-us-quarantine>; LINDA POLMAN, THE CRISIS CARAVAN: WHAT’S WRONG WITH HUMANITARIAN AID? 63-72 (2010).

⁸⁷ Lord, *supra* note 44, at 78. (detailing customary practices in some traditional societies such as the forced ingestion of harmful substances to heal persons with psycho-social disabilities, a practice observed in Ethiopia).

⁸⁸ See generally ELYN SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS (2007); ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL 8 (2003); FROM THE FRYING PAN INTO THE FIRE: PSYCHOSOCIAL CHALLENGES FACED BY VULNERABLE REFUGEE WOMEN AND GIRLS IN KAMPALA 45-46 (Refugee Law Project, 2014).

⁸⁹ See IKPONWOSA ERO ET AL., PEOPLE WITH ALBINISM WORLDWIDE: A HUMAN RIGHTS PERSPECTIVE 33-34 (Off. of the U.N. High Comm’r for Hum. Rts., June 13, 2021), https://www.ohchr.org/Documents/Issues/Albinism/Albinism_Worldwide_Report2021_EN.pdf; *Malawi: Impunity fuels Killings of People with Albinism for their Body Parts*, AMNESTY INT’L (June 28, 2018),

has often come before courts in immigration proceedings. The subsequent rulings often reflect, however, little understanding of the nature and extent of persecution experienced by this population.⁹⁰

Elsewhere, commentators have pointed to the ghost bride tradition in rural communities in China, wherein women with intellectual disabilities are “married” to deceased men and then killed off as a means of ensuring companionship for the ghost husband in the afterlife, as a chilling example of disability-based persecution.⁹¹ Other forms of persecution include forced labor; visited in particular upon women with intellectual disabilities, it is apparently rampant yet under-documented, as is the trafficking of women with disabilities.⁹² Research suggests that children with disabilities are three times more at risk of violence than their peers without disabilities.⁹³ Human rights reports on North Korea point to a practice of segregating persons with disabilities from society and forcing them into segregated population camps.⁹⁴ Trenchantly, interviews with a physician who defected from North Korea suggested the killing of newborns with disabilities was commonplace

<https://www.amnesty.org/en/latest/news/2018/06/malawi-impunity-fuels-killings-of-people-with-albinism-for-their-body-parts/>.

90 *Makatengkeng v. Gonzales*, 495 F.3d 876, 881-82 (8th Cir. 2007) (rejecting the claim of an asylum petitioner on the basis that the petitioner did not suffer past persecution and did not have a well-founded fear of future persecution. Stating that the petitioner’s claim was essentially one of social discrimination and expressing doubt as to whether albino Indonesians qualify as members of a social group for asylum purposes). *But see* AC (Egypt) [2011] NZIPT 800015 (Immigr. and Prot. Tribunal, Nov. 25, 2011) (N.Z.).

91 *See Ghost Bride Returns to Haunt China Trio*, THE SCOTSMAN (Jan. 26, 2007), <https://www.scotsman.com/news/world/ghost-bride-returns-haunt-chinese-trio-2507269> (reporting the practice of a ghost bride killing of a woman with an intellectual disability); *see also* Jane Macartney, *Ghost Brides are Murdered to Give Dead Bachelors a Wife in the Afterlife*, WORLD-WIDE RELIGIOUS NEWS (Jan. 26, 2007), <https://wwrn.org/articles/24055/> (recounting the ghost bride phenomenon in China and the link to human trafficking).

92 MEXICO REPORT, *supra* note 81.

93 YOUNG PERSONS WITH DISABILITIES: GLOBAL STUDY ON ENDING GENDER-BASED VIOLENCE, AND REALISING SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS 25 (U.N. Population Fund 2018), https://www.unfpa.org/sites/default/files/pub-pdf/Final_Global_Study_English_3_Oct.pdf. *See also* Karen Hughes et al., *Prevalence and Risk of Violence against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, 379 THE LANCET 1621 (2012); Lisa Jones et al., *Prevalence and Risk of Violence against Children with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, 380 THE LANCET 899 (2010); Comm. on the Rights of Persons with Disabilities, General Comment No. 3, U.N. Doc. CRPD/C/GC/3, at ¶10 (Sept. 2, 2016).

94 *See* Jae-Chun Won et al., *Disability, Repressive Regimes, and Health Disparity: Assessing Country Conditions in North Korea*, in HAGUE Y.B. INT’L L. 27, 40 (Jure Vidmar & Ruth Kok eds., 2014); Damien McElroy, *North Korea Locks up Disabled in ‘Subhuman’ Gulags, Says UN*, THE TEL. (Oct. 21, 2006), <https://www.telegraph.co.uk/news/worldnews/1532036/North-Korea-locks-up-disabled-in-subhuman-gulags-says-UN.html>; Vitit Muntarbhorn (Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea), *Situation of Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/61/349, ¶¶ 44-45 (Sept. 15, 2006).

and that “there are no babies with physical defects in North Korea” because they were killed in hospitals or at home and “quickly buried.”⁹⁵

Notwithstanding the aforementioned documentation of disability-based persecution and abuse, mainstream human rights documentation, of the kind relied upon by decision-makers in countries where individuals are seeking asylum, tends not to provide coverage of such treatment nor to amplify such treatment through the lens of disability rights or the CRPD.

II. DISABILITY ASYLUM CLAIMS IN THEORY AND PRACTICE

The CRPD contributes to international law by placing existing human rights obligations within the specific context of disability; it views persons with disabilities not as special objects of care and charity characteristic of medical and charity conceptualizations, but rather recognizes their personhood and human rights.⁹⁶ The CRPD’s integration of international humanitarian law and other humanitarian protections⁹⁷ creates new pathways for addressing the concerns of refugees and asylum claimants from within the community of persons with disabilities. But it accomplishes far more than that if we consider the image of thought it reflects and the accompanying treaty practice it sets forth. This Part picks up on the notion of the CRPD as a treaty practice in motion through its concepts, principles, rules, processes, and institutions—its potentiality for a rhizomatic treaty practice and proliferating lines of flight—and queries how asylum claims might be informed by this perspective. The discussion is followed by a review of disability asylum case law post-CRPD adoption.

A. *The Reframing of Disability under the CRPD*

The CRPD creates, within the frame of international law, a social concept of disability according to which disability is understood not in terms of individual deficit but as a phenomenon that is systemic or societal in nature. The social model, reflected in the preamble of the CRPD and in Article 1 (Purpose), responds to a specific problem presented by standard accounts of disability in law.⁹⁸ Such accounts view disability as individual limitation and, under that view, law treats disability as a medical and social protection matter. The social model seeks to broaden the aperture, to

⁹⁵ Janet E. Lord, *Nothing To Celebrate: North Koreans with Disabilities*, FOREIGN POL’Y IN FOCUS (Dec. 3, 2013), <https://fpif.org/nothing-celebrate-north-koreans-disabilities/>.

⁹⁶ See generally THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES xvii (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

⁹⁷ See, e.g., CRPD, *supra* note 7, at art. 11 (addressing situations of risk).

⁹⁸ *Id.* at art. 1.

reposition disability as a phenomenon situated not in an individual but within the social environment where barriers work to inhibit the participation of persons with disabilities.⁹⁹ In this vein, the philosophy offered up by the CRPD is very much a challenge to conventional Aristotelian identity, where identity is primary and difference is subsumed and secondary.¹⁰⁰ Difference is not subsumed and overshadowed by identity under this reorientation. Indeed, the very project of the social model is to wrest the image of the “able-bodied”—a dogmatic image of thought that becomes the ground for thinking and imagining—from the foreground. The identity of the able-bodied/rational man paradigm extant in Western thought stifles altogether the potentiality for connection, for living, for becoming.¹⁰¹

Consistent with the social model, the CRPD thus reframes disability as an “evolving concept” that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others” and not as an inherent characteristic.¹⁰² This understanding allows the recognition of persons with disabilities as active agents and equal holders of rights; it departs from the static dynamic of the medical model and creates a concept that moves.¹⁰³ This movement allows a human rights conception to take flight through the reorientation of perspective away from individual deficit and negation of some mythical “norm” and toward the identification of societal obstacles that need dismantling. As such, the rights-based approach reflected in the CRPD affirms that all people with all types of disabilities must enjoy all human rights and fundamental freedoms.¹⁰⁴ It sets up a treaty practice that is as much about moving ideas about disability

⁹⁹ As noted by the Committee on the Rights of Persons with Disabilities in its General Comment No. 6: “The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights.” See Comm. on the Rights of Persons with Disabilities, General Comment No. 6, ¶ 9, U.N. Doc. CRPD/C/GC/6 (Apr. 26, 2018), <https://digitallibrary.un.org/record/1626976>.

¹⁰⁰ From Aristotle onward, identity is primary, and difference is secondary. As underscored by Deleuze, it is difference that is primary: “We propose to think difference in itself, independently of the forms of representation which reduce it to the Same, and the relation of different to different independently of those which make them pass through the negative.” See GILLES DELEUZE, *DIFFERENCE AND REPETITION* ix (Paul Patton trans., 1995).

¹⁰¹ CLAIRE COLEBROOK, *Politics and the Origin of Meaning, in DELEUZE: A GUIDE FOR THE PERPLEXED* 115, 141 (2006). She explains: “For Deleuze and Guattari, it is this concept which is key to *all* becomings precisely because it is ‘man’ as the image of reason, thought, representation and action that has allowed the flow of life’s images to be centred on a single governing image” and this leads, of course, to “woman [being] the other of ‘man.’”

¹⁰² See CRPD, *supra* note 7, at pmb. (e).

¹⁰³ *Id.* at pmb. (m) & art. 1.

¹⁰⁴ For an inquiry into the CRPD and its reflection of the social model of disability, see Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS L. REV. 1 (Jan. 24, 2008).

within the social environment and our very image of thought as it is about making change through law. At the same time, recognition of disability as both an evolving concept and heterogenous category sets up a tension within the refugee law regime which relies heavily (though not exclusively) on immutability when proving, for instance, membership in a social group for the purposes of asylum claims.

The CRPD picks up on the social model orientation of disability by specifying the general principles that must be applied for framing human rights standards in the context of disability. They are pitched at a level of generality that may easily be given specificity when applied to particular substantive provisions. These general principles include respect of individual dignity, autonomy, and independence (Article 3(a)); respect for difference and acceptance of disability as human diversity (Article 3(d)); non-discrimination (Article 3(b)); equal opportunity (Article 3(e)); participation and inclusion (Article 3(c)); accessibility (Article 3(f)); gender equality (Article 3(g)); and respect for children's rights together with support of their evolving capabilities (Article 3(h)). They should be applied transversally across the treaty and used to guide the crafting of domestic refugee disability law, policy and programming.¹⁰⁵ Illustratively, should there be any doubt about the thrust of the right to education (Article 24), applying the general principles of inclusion and participation and non-discrimination, for instance, make a clear case for inclusive as opposed to segregated education for children with disabilities.¹⁰⁶ Likewise, the CRPD principles of independence, participation, and inclusion signal a clear break from policies of institutionalization in congregate, isolating settings.¹⁰⁷ For a disabled refugee claimant from a country where institutionalization is the prevailing policy (and often only option), the CRPD clearly establishes that such policies could very well ground a claim of disability-based persecution.

General obligations set out in Article 4 of the CRPD require a range of measures – some standard, others more distinctive – to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities and, to that end, States Parties are to: (i) adopt legislative, administrative and other measures for treaty implementation and must (ii) abolish or amend existing laws, regulations, customs and practices that discriminate against persons with disabilities.¹⁰⁸ This ought to be a trigger for guidance highlighting—in the same way guidance on gender-based discrimination often does—that legislation very often does discriminate on the basis of disability and can potentially ground a basis for

¹⁰⁵ See CRPD, *supra* note 7, at art. 3.

¹⁰⁶ *Id.* at art. 24.

¹⁰⁷ *Id.* at art. 3.

¹⁰⁸ *Id.* at art. 4.

a well-founded fear of persecution in the refugee context. The existence of laws that work to disadvantage and discriminate against persons with disabilities may be indicative that an asylum claimant with a disability has a well-founded fear of persecution if such discriminatory laws are enforced against them. Indeed, the existence of discriminatory laws and policies may create a climate of impunity for perpetrators of violence and contribute to the social stigmatization and discrimination against persons with disabilities by reinforcing, legislatively, negative societal attitudes about disability. At the same time, an absence of discriminatory laws based on disability should not be taken to mean discrimination based on disability does not exist nor a signal that state protection is available to persons with disabilities (here the failure to address horrific treatment in psychiatric institutions and warehousing facilities for persons with disabilities comes readily to mind).

Likewise, Article 4 mandates that States (iii) adopt an inclusive approach to protect disability rights in all policies and programmes; and (iv) refrain from conduct violative of the Convention. Finally, measures must be undertaken to ensure that the public sector respects the rights of persons with disabilities along with measures to abolish disability discrimination by persons, organizations, or private enterprises. These general obligations are applicable to refugee law and policy and require careful scoping of the existing refugee law framework to ensure alignment with the CRPD.

The articulation of equal recognition before the law in the CRPD shores up the treaty's participation directive. Article 12 clarifies that persons with disabilities are presumed to have legal capacity and, as opposed to presumptions of incapacity and consequent measures of guardianship or other decision-stripping devices, must be supported in exercising decision-making where needed.¹⁰⁹ The CRPD Committee in General Comment 1 holds that "universal legal capacity" is constituted by the treaty and that it cannot be limited on grounds of disability or mental incapacity.¹¹⁰ Further, the CRPD Committee takes the position, still contested by some States, courts, and commentators, that all forms of substitute decision-making are prohibited by the treaty.¹¹¹

Trenchantly, the CRPD introduces in place of substituted decision-making a mandate to establish supportive decision-making frameworks to provide assistance where needed for people to exercise their legal

¹⁰⁹ *Id.* at art. 12.

¹¹⁰ CRPD Committee, General Comment No 1, Article 12: Equal Recognition Before the Law, *adopted* 11 Apr. 2014, CRPD/C/GC/1, (May 19, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>.

¹¹¹ *Id.* For a spectrum of views by human rights lawyers, psychiatrists, and people with lived experience, see MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS (Michael Ashley Stein, Faraaz Mahomed, Vikram Patel & Charlene Sunkel eds., 2021).

capacity.¹¹² Article 12 also triggers shifts in a broad range of areas of domestic law, including guardianship regimes, civil and criminal proceedings, the criminal defence of insanity, restrictions in electoral codes, mental health legislation, civil codes, and contract law, among others.¹¹³ The human rights-based perspective of disability in Article 12 focuses on recognizing and then creating the conditions necessary for persons with disabilities to lead self-determined lives in community with others, whilst also providing protection against state interference with individual choice and autonomy. The implications for refugee law suggest here that States must recognize in a refugee claim that plenary guardianship and substituted decision-making is discriminatory on its face and thus a valid ground for establishing well-founded fear of persecution based on disability status for some claimants with disabilities. And Article 12 likewise has procedural implications for asylum claimants. The need for support in decision-making should in no way be used as a basis for impugning the credibility of a claimant in an asylum proceeding.

The CRPD is the first human rights convention to so explicitly attempt to address intersectional discrimination, based on disability and other characteristics such as age and gender. It does so through its provisions in Article 6 (Children with disabilities) and 7 (Women with disabilities) as well as preambular paragraphs (j) and (p). In so doing, the Convention recognizes that children with disabilities may be especially vulnerable to harm as, for instance, when isolated in an institution or home environment, or that women with disabilities may face particular forms of abuse including sexual violence, domestic violence by family members or caregivers, sex trafficking (especially a risk for children with disabilities transitioning out of orphanages), discrimination in relation to housing, and access to emergency shelters (some shelters will not accommodate women with disabilities fleeing violence). Acknowledgement of individuals requiring intensive supports are made in preambular paragraph (j), and treatment that would amount to persecution includes, among others, forced medical procedures, forced confinement (often in the guise of “protection”), and involuntary institutionalization. Recognition that some persons with disabilities face differential risk due to additional factors such as race, ethnicity, faith or belief system, sexual orientation, gender identity, health status, age, social class, or education is pertinent to assessing asylum claims and these factors should be considered when determining whether an individual has established a well-founded fear of persecution. SOGIESC individuals with disabilities likewise face differentiated risk.

¹¹² CRPD, *supra* note 7, at art. 12.

¹¹³ *Id.*

Procedural equality and due process is covered in the CRPD in a broad articulation that applies to all types of proceedings, whether criminal, civil, administrative, and certainly inclusive of proceedings such as refugee status determination for asylum claims.¹¹⁴ Integral to ensuring non-discrimination in the processing of asylum claims for persons with disabilities is the design of accessible refugee facilities, services, procedures, and materials.¹¹⁵ Further, Article 9 introduces into human rights law obligations regarding accessibility—measures to facilitate participation and inclusion collectively to persons with disabilities such as physical access to refugee determination facilities.¹¹⁶ The CRPD also recognizes the need for individualized measures of accommodation and support and the duty to provide reasonable accommodation to avoid discrimination. Thus, in order “to promote equality and eliminate discrimination,” States Parties are required to “take all appropriate steps to ensure that reasonable accommodation is provided.”¹¹⁷ This accommodation duty applies equally to all rights and applies in all contexts including, of course, refugee and asylum proceedings. As UN agencies work to develop reasonable accommodation procedures and a range of accessibility measures to advance disability equality across the Organization as part of the UN Disability Inclusion Strategy, it stands to reason that all UN agencies engaged in supporting refugee and asylum procedures and mechanisms, including but not limited to the UNHCR, should respond in like measure.¹¹⁸

Such protections must inform international refugee law process like the changes brought about by a more child-friendly and gender-sensitive approaches. Within refugee status determination (RSD) proceedings, for example, the global refugee system has acknowledged that credibility assessments measuring adult claimants’ level of consistency, detail, and emotion throughout asylum interviews are inappropriate to assess children’s credibility. In contrast to adults, children typically lack the situational awareness or cognitive ability to produce highly detailed reports of past

114 *Id.* at art. 13.

115 Accessibility is a core principle of the CRPD, expressed in Article 3 (General principles) and is also the subject of a general provision, applicable across the treaty, Article 9 (Accessibility), according to which States must identify and eliminate “obstacles and barriers to accessibility.” CRPD, art. 9. *See generally* Janet E. Lord et al., *Access to Justice*, in HUMAN RIGHTS YES! ACTION AND ADVOCACY ON THE RIGHTS OF PERSONS WITH DISABILITIES (Nancy Flowers ed., 2d ed. 2012); Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. OF INTL. & COMP. L. 281 (2011); G3ict (Global Initiative for Inclusive ICTs), *Inclusive Courts Checklist* (June 2014), https://g3ict.org/research_programs/access-to-justice.

116 CRPD, *supra* note 7, at art. 9.

117 *Id.* at art. 5(3).

118 Reasonable accommodation features as a core element of the U.N. Disability Strategy, and entities are required to develop a specific reasonable accommodation policy. U.N., *Disability Inclusion Strategy* (2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>.

persecution in a coherent, linear manner.¹¹⁹ Acknowledging this, the UNHCR, for example, has published guidance for EU Member States to utilize an adjusted interpretive stance in evaluating children's credibility.¹²⁰ Notably, this child-centered approach does not provide accommodations or adjustments to the process in order for interviewers to assess children in the same manner as adults. Rather, most actors assess children's asylum claims using entirely different paradigms for credibility as compared to adults.¹²¹

Yet while children are being increasingly accommodated within RSD proceedings, the system has yet to do the same for asylum claimants with disabilities. Credibility assessments can pose challenges for individuals with disabilities. For asylum claimants with PTSD, for example, it may be neurologically impossible to present their experiences of persecution in a linear or coherent narrative. Held to current credibility standards, a person with a psychosocial disability may be deemed suspect; "emotional" or the opposite—overly flat in affect; or else glaringly inconsistent in presenting the facts of their claim.

Further, what few allowances immigration courts have made to account for asylum claimants with disabilities take an "all or nothing" approach.¹²² The Australian High Court, for instance, has ruled that an adverse credibility finding shall not be vacated against an applicant with a disability unless the individual's disability is so profound as to render them wholly unfit to prosecute their claim.¹²³ Relatedly, Clara Straimer argues that asylum claimants with disabilities should be afforded accommodations such as extended time to prepare for credibility interviews.¹²⁴ The authors would go a step further, however, and argue that in a truly CRPD-informed asylum

119 See generally Kate Halvorson, *Decisions on Separated Children Who Apply for Asylum*, in *THE ASYLUM-SEEKING CHILD IN EUROPE* 67 (Hans E. Andersson et al. eds., 2005); *Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards*, INT'L ASSOC. OF REF. L. JUDGES 47 (2013).

120 U.N. High Comm'r for Refugees & European Refugee Fund of the European Comm'n, *The Heart of the Matter: Assessing Credibility When Children Apply for Asylum* (Dec. 2014), at 142-43 [hereinafter *The Heart of the Matter*].

121 For example, the UNHCR advocates an enhanced "shared burden of proof" approach to evaluating children's claims, in which an assessor carries a greater burden of proof to substantiate a child's claims, rather than the child herself. Certain States, including Canada, instead promote a "best interests of the child" approach for evaluating child asylum claimants. For detailed discussions of these approaches, see *id.*; see also Karen Elizabeth Smeda, *Truth or Dare: A Framework for Analyzing Credibility in Children Seeking Asylum*, 50 CORNELL INTL. L. J. 307, 321-22 (2017).

122 See Crock, Ernst, & McCallum, *supra* note 10, at 758-60 (citing Minister for Immigration and Citizenship v SZNCR [2011] FCA 369, [30] (Tracey J)).

123 In *Minister for Immigration and Citizenship v. SZNCR*, the court found that the visa applicant's "mental state" had merely "interfered" with his capacity to advance his case and not that he had been altogether "unfit" to advance his application before the Tribunal. Minister for Immigration and Citizenship v. SZNCR [2011] FCA 369, [30] (Tracey J) at para. 34.

124 Clara Straimer, *Between Protection and Assistance: Is There Refuge for Asylum Seekers with Disabilities in Europe?*, 26 DIS. & SOC'Y 537, 542 (2011).

framework, interviewers must be trained to ensure reasonable accommodations when needed, and adjust what they consider credible behavior for claimants with intellectual or psychosocial disabilities, similar to the interpretive flexibility with which they assess children. In this more transformative form of reasonable accommodation, not only would applicants with disabilities be afforded the tools they need to successfully advocate for themselves, but the system itself would recognize that “credibility” does not look the same for everyone and is influenced by disability, age, and other protected identities.

Indeed, the CRPD provides specific recognition of the measures States must undertake to ensure the accessibility of justice mechanisms to persons with disabilities, on an equal basis with others. It underscores specifically that States are obliged to “facilitate their effective role as direct and indirect participants, including as witnesses.”¹²⁵ Persons with disabilities—who have a long history of being denied personhood in the form of non-recognition as witnesses—may participate, directly or indirectly, in “all legal proceedings” including as witnesses and including investigative (fact-finding) or other preliminary stages.¹²⁶ Further, the provision requires States to undertake measures to that end, “including through the provision of procedural and age-appropriate accommodations.”¹²⁷ And Article 13(2) requires States to promote training for those working in the field of administration of justice.¹²⁸ Disability is a risk factor when considering vulnerability to torture and other forms of inhuman or degrading treatment.¹²⁹ It does not follow from practice, however, that human rights reporting and fact-finding bodies nor country of origin information prepared by national authorities consider the manifestations of disability-based persecution in their work.¹³⁰ Here, several provisions in the CRPD assume special relevance for the refugee law context, including recognition that persons with disabilities enjoy the right to life (Article 10),¹³¹ the right

125 CRPD, *supra* note 7, at art. 13(1).

126 *Id.* at art. 13(1).

127 *Id.*

128 *Id.* at art. 13(2).

129 See *Nowak Interim Report*, *supra* note 80; see also Rep. of the Off. of the High Comm’r for Human Rights, *Expert Seminar on Freedom from Torture and Ill-Treatment and Persons with Disabilities* (Dec. 11, 2007), <http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorturereportfinal.doc> [hereinafter OCHR Report].

130 One could point to numerous illustrations but the investigation of possible crimes against humanity in the context of North Korea is a good case in point. There, despite ample evidence of persecution against persons with disabilities, this dimension of human rights abuse in North Korea is barely grazed by the fact-finding body mandated to investigate possible crimes against humanity. See Won et al., *supra* note 94, at 35; see also Human Rights Council, *Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in The Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014). For more on the gaps in the U.N. Commission’s Report, see Won et al., *supra* note 94.

131 CRPD, *supra* note 7, at art. 10.

to be free from torture or other cruel, inhuman or degrading treatment or punishment (Article 15); and the right to physical and mental integrity (Article 17).¹³² The prohibition against torture, for instance, helps to clarify that forced treatment—such as electroshock treatment without consent and without anaesthesia—is impermissible and cannot be justified on the basis of disability. Such treatment could found a claim of persecution for the purposes of refugee status determination assuming that there is a disability-sensitive understanding of the torture prohibition.

The CRPD also proscribes all forms of slavery and forced labor and underscores that medical decisions must not be taken in the absence of informed consent or substituted decision-making.¹³³ Here it should be noted that the anti-torture provision in Article 15 of the CRPD, read together with Article 17 (respect for mental and physical integrity), Article 19 (right to independent living in the community), and Article 12 (legal capacity), require the application of a highly robust informed consent regime and a supported decision-making framework, a point affirmed by the CRPD Committee and related practice recognizing forced and non-consensual administration of medical treatment as a form of torture or inhuman treatment.¹³⁴ As the work of Janos Fiala-Butora emphasizes with clarity, specific procedures are required to ensure that domestic authorities (and international ones in the current context) will effectively and with due diligence investigate torture and other ill-treatment in respect of persons with disabilities.¹³⁵

The move from disability as pathology or charitable concern to disability as a rights issue that confronts socially constructed barriers is significant for the purposes of refugee and asylum claim analysis and also for its creation of a mandate for all UN agencies, including those agencies responsible for refugee protection.¹³⁶ Grounding a successful asylum claim, therefore, hinges on an understanding of the socially constructed nature of disability.

132 *Id.* at arts. 15 & 17. The CRPD anti-torture framework makes clear that States Parties are obliged to do more than merely prohibit such conduct by means of domestic legislation and must “take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.” *Id.* at art. 15.

133 *Id.* at arts. 15, 27.

134 See Nowak *Interim Report*, *supra* note 80, at ¶¶ 37-76.

135 See Janos Fiala-Butora, *Disabling Torture: The Obligation to Investigate Ill-Treatment of Persons with Disabilities*, 45 COLUM. HUM. RTS. L. REV. 214, 214-80 (2013) (underscoring the need for the CRPD Committee to prioritize effective investigation as a high priority in order to give persons with disabilities an effective remedy for human rights violations perpetrated against them).

136 The creation of a disability-inclusion mandate for U.N. agencies is being coordinated through an Inter-Agency Support Group. For the webpage, see *Inter-Agency Support Group for the Convention on the Rights of Persons with Disabilities*, U.N. DEPT. OF ECON. AND SOC. AFF., <https://www.un.org/development/desa/disabilities/about-us/inter-agency-support-group-for-the-convention-on-the-rights-of-persons-with-disabilities.html> (last visited Mar. 20, 2022).

As noted below, this perspective is not always understood by immigration officials and judges, nor within refugee assistance agencies.¹³⁷

B. Non-discrimination as an Animating Principle in Refugee Law

A basic premise of international human rights law and an animating theme of the refugee protection framework is the recognition of human rights and fundamental freedoms without discrimination.¹³⁸ Accordingly, the refugee definition, properly interpreted to incorporate CRPD norms, can and indeed must accommodate disability-related claims. Further, persecution and discrimination based on disability that is of a cumulative nature may, depending on the circumstances, amount to a well-founded fear of persecution. There are a broad variety of circumstances that could constitute persecution of a cumulative nature in this respect such as: restrictions on access to education; restrictions on access to health care and rehabilitation; restrictions on access to housing, community-based and/or social services; being the target of repeated acts of intimidation and harassment; school-based bullying and mistreatment. National authorities promulgating guidance in other spheres—such as gender as well as sexual orientation and gender identity—make parallel points.

A core development arising out of the CRPD is the recognition that the non-discrimination obligation, explicit in its protection against disability discrimination, includes the duty to provide reasonable accommodation. Failures to provide reasonable accommodation to an individual with a disability can, in certain instances, amount to persecution.¹³⁹ Indeed, many of these instances occurred in the context of criminal law proceedings and

¹³⁷ See, e.g., *Korneenkov v. Holder*, 347 F. App'x 93 (5th Cir. 2009) (demonstrating the court's unwillingness to consider that facts brought forward by two Russian claimants with intellectual disabilities could amount to cumulative acts of discrimination and thus persecution).

¹³⁸ Leading commentators acknowledge the refugee protection framework has, as its overarching principle, non-discrimination. See generally Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459 (2017) (arguing, in the context of religious and national origin discrimination, that domestic and international law clearly point in the direction of nondiscrimination); Jason M. Pobjoy, *Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection*, 34 MELB. U. L. REV. 181 (2010) (arguing anti-discrimination principle mandates the closure of the “protection gap” between refugees and beneficiaries of complementary protection).

¹³⁹ See Stephanie A. Motz, *The Persecution of Disabled Persons and the Duty of Reasonable Accommodation: An Analysis Under International Refugee Law, the EU Recast Qualification Directive and the ECHR, in SEEKING ASYLUM IN THE EUROPEAN UNION* 141, 142-194 (2015) (showing emerging recognition that disability discrimination can found claims of persecution especially where there are cumulative forms of harm or cumulative vulnerabilities). See generally Colm O’Cinneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 163, 224-29 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

punishment.¹⁴⁰ Here it is axiomatic that disability discrimination—including the failure to reasonably accommodate persons with disabilities—frequently manifests in violations of physical and mental integrity. This recognition clarifies that disability is a risk factor when considering vulnerability to torture and other ill-treatment.

Accordingly, the prohibition of disability discrimination in the CRPD amplifies the meaning of persecution in human rights law as it applies to persons with disabilities. Persecution has been variously defined, but commentators are in general accord that it hinges on actions “which deny human dignity in any key way” such that the “sustained or systemic denial of core human rights is the appropriate standard.”¹⁴¹ The appropriate inquiry runs in the direction of those rights recognized by the international community in human rights law and an analysis of the nature of the right at issue, the nature of the threat at issue, and the degree of harm under threat. A finding of persecution requires proof of both serious harm and the failure of state protection.¹⁴²

The CRPD Committee has highlighted some of the more egregious forms of discrimination visited on persons with disabilities, referencing that:

[d]iscrimination has occurred and continues to occur, including in brutal forms such as non-consensual and/or forced systematic sterilizations and medical or hormone-based interventions (e.g. lobotomy or the Ashley treatment), forced drugging and forced electroshocks, confinement, systematic murder labelled “euthanasia”, forced and coerced abortion, denied access to health care, and mutilation and trafficking in body parts, particularly of persons with albinism.¹⁴³

Although the full catalog of recognized rights violations can theoretically qualify as persecution, rights abuses that harm a person’s life, liberty, or physical integrity¹⁴⁴ have traditionally received “priority status”

¹⁴⁰ Cases of gross failures to accommodate prisoners with disabilities are illustrative of this point. See *Price v. United Kingdom*, App. No. 33394/96, Eur. Ct. H.R. (2001) (finding a violation of Article 3 of the European Convention of Human Rights on basis of failure to provide needed supports to disabled prisoner left alone for hours in cell); *Farbtuhs v. Latvia*, App. No. 4672/02, Eur. Ct. H.R., ¶ 61 (2004) (finding continued imprisonment of a disabled elderly prisoner with intensive support needs and several serious health conditions inappropriate, as continued detention would cause him permanent anxiety and a sense of inferiority and humiliation so acute as to constitute degrading treatment contrary to Article 3).

¹⁴¹ See Rodger Haines, *Gender-Related Persecution*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 319, 327 (Erika Feller et al. eds., 2003).

¹⁴² See *id.* at 323, 327.

¹⁴³ See U.N. Comm. on the Rights of Persons with Disabilities, General Comment No. 6 on Equality and Non-Discrimination, at ¶ 7, CRPD/C/GC/6 (Apr. 26, 2018).

¹⁴⁴ Refugee Convention, *supra* note 3, at art. 33(1).

when adjudicating persecution claims under refugee law. Persons with disabilities regularly experience rights violations that violate their liberty or physical integrity, such as forced sterilization,¹⁴⁵ institutionalization,¹⁴⁶ and numerous other examples that are starting at long last to appear in human rights documentation as the disability rights violations they are. This has required, however, an understanding of disability beyond the bounds of mainstream human rights treaty practice. It requires a treaty practice that seizes on the disability-specific nature of certain human rights abuses that amount to persecution and requires connection to the refugee law regime itself.

C. Using the CRPD as an Analytical Tool to Assess and Inform Instances of Disability-based and Disability-related Persecution

The CRPD makes no direct reference to the right of persons with disabilities to seek asylum or to the principle of non-refoulement, the obligation not to return a person to a State where he or she is likely to be subjected to torture or other core human rights violations.¹⁴⁷ In 2017, the CRPD Committee released a joint statement with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families discussing for the first time the CRPD's relevance to the forced displacement sector.¹⁴⁸ This represented a hopeful and potentially creative line of flight wherein treaty bodies working together co-created something new and transformative. Unfortunately, the statement focuses primarily on States Parties' obligation to provide reasonable accommodation to persons with disabilities throughout RSD proceedings and the process of integrating refugees into host countries' communities.¹⁴⁹ While important, the statement offers little guidance to adjudicators on the nature of disability-related persecution or how to properly interpret the CRPD when evaluating disability-related asylum claims.

145 Priti Patel, *Forced Sterilization of Women as Discrimination*, 15 PUB. HEALTH REV. 38 (2017); OPEN SOCIETY FOUNDATIONS, *AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE* (Oct. 2011); World Health Org., *Eliminating Forced, Coercive, and Otherwise Involuntary Sterilization: An Interagency Statement*, OHCHR, U.N. Women, UNAIDS, UNDP, UNICEF and WHO (May 2014), http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1.

146 Parker & Clements, *supra* note 82, at 511.

147 See GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 117 (4th ed. 2021) (defining the principle of non-refoulement to mean that "no refugee should be returned to any country where he or she is likely to face persecution or torture").

148 Comm. on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) & Comm. on the Rights of Persons with Disabilities (CRPD), *Joint Statement Addressing Disabilities in Large-Scale Movements of Refugees and Migrants* (2017), <https://www.ohchr.org/Documents/HRBodies/CMW/JointStatementCMW-CRPDFINAL.pdf>.

149 *Id.* at 2-4.

It is important to note, however, that like other core human rights treaties such as the CRC or the CEDAW,¹⁵⁰ the CRPD provides protection against expulsion. As is well-established, deporting or extraditing a person to a country where he or she is likely to face torture or ill-treatment may constitute a violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.¹⁵¹ The CRPD, and human rights law more generally, makes it clear that States Parties must do more than merely prohibit discrimination and human rights abuse by means of domestic legislation. In order “to promote equality and eliminate discrimination,” States Parties are required to “take all appropriate steps to ensure that reasonable accommodation is provided.”¹⁵²

The CRPD thus imposes positive duties on the state to protect persons with disabilities against CRPD violations, including, as noted above, the right to be free from torture and cruel, inhumane, and degrading treatment or punishment. These duties must include the obligation to undertake an effective investigation where an individual raises a claim of abuse.¹⁵³ State responsibility will attach where state authorities know or should know that abuse is taking place. Further, States have the obligation to exercise due diligence to prevent, investigate, prosecute, and punish non-state officials or private actors.¹⁵⁴ For example, given the prevalence of abuse in these institutions, it is plausible that a person with a disability suffering torture or degrading treatment in a psychiatric facility could successfully gain asylum on the basis of their State’s failure to protect in monitoring the facility and preventing this brand of persecution.

Last, it bears noting that some of the rigidity seen in the processing of disability asylum claims is the lack of recognition—let alone acknowledgment—regarding what comprises the failure of State protection within the context of disability. Consider the myriad of States who espouse the notion that institutionalization is protective and in the best interests of their domestic populations of person with disabilities, despite the horrific

¹⁵⁰ Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13 (Dec. 18, 1979).

¹⁵¹ See, e.g., U.N. Comm. Against Torture, *Balabou Mutombo v. Switzerland*, U.N. Doc. CAT/C/12/D/013/1993 (Apr. 27, 1994), <https://www.refworld.org/docid/3ae6b6784.html>. The Human Rights Committee, in its General Comment on Article 7, emphasized that “[s]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” U.N. Hum. Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 9 (Mar. 10, 1992).

¹⁵² See CRPD, *supra* note 7, at art. 5(3).

¹⁵³ See *Assenov v. Bulgaria*, App. No. 24760/94, 28 Eur. Ct. H.R. 652, 654-55 (1999) (holding that States must carry out an effective investigation where a person raises an arguable claim of an Article 3 violation by State agents, and that such investigation “should be capable of leading to the identification and punishment of those responsible.”).

¹⁵⁴ See Pons, Lord & Stein, *supra* note 1.

conditions that characterize these congregate “care” settings. Such cognitive dissonance leads to judicial beliefs that sending a person with a disability seeking asylum back to their country where they face placement in an institution is not a deleterious outcome.

D. Establishing a Nexus between Disability Persecution and Membership in a Particular Social Group

Establishing a nexus between persecution and group membership on the basis of disability ultimately hinges on an informed understanding of a potential link between the persecutory conduct and membership in a particular group by asylum assessors. Failure in human rights reporting to canvass human rights conditions of highly marginalized groups, such as persons with disabilities, only reinforces this knowledge gap as human rights reporting is heavily relied upon by immigration officials. This was appreciated by the drafters of the CRPD and was the impetus for the development of the most detailed awareness-raising obligation in human rights law in Article 8 of the CRPD.¹⁵⁵ Article 8 both underscores that stigmatization of persons with disabilities is a major barrier to the enjoyment of human rights and implies that State disability rights training must prioritize asylum assessors and others engaged in the immigration system. But it likewise requires civil society treaty practitioners to make the case that disability animus is real and can be persecutory. This is not a connection that will necessarily obtain absent dynamic treaty practice activism. Trenchantly, an individual's profile as a person with a disability may be sufficient to demonstrate a well-founded fear of persecution in their country of origin where stigmatizing and discriminatory legislation or an atmosphere of intolerance and repression is extant.¹⁵⁶

The CRPD clarifies that the duty to accommodate is part of the non-discrimination and equality framework. The failure to provide reasonable accommodation to a prisoner with a disability has repeatedly been held to constitute a violation of the torture prohibition.¹⁵⁷ Particularly relevant to

¹⁵⁵ CRPD, *supra* note 7, at art. 8.

¹⁵⁶ While guidelines specific to persons with disabilities have yet to be developed, it should be noted that guidelines adopted to address persecution in respect of other highly marginalized people do acknowledge the impact of stigma and discrimination and its potential link to a well-founded fear of persecution. For example, Canadian Guidelines help to inform decision-makers about the unique experience of persecution SOGIESC individuals may experience based on their identity, including the impact of harassment or discrimination that cumulatively may constitute a well-founded fear of persecution. *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, IMMIGRATION AND REFUGEE BOARD OF CANADA (revised Dec. 17, 2021), <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>.

¹⁵⁷ *See, e.g., Price v. United Kingdom*, No. 33394/96, 2001-VII Eur. Ct. H.R. (ruling that the United Kingdom inflicted degrading treatment against a woman with a physical disability while she was

applying a disability rights analysis in expulsion and extradition cases are the decisions by the European Court of Human Rights in *D. v. United Kingdom*,¹⁵⁸ and, more recently, *Paposhvili v. Belgium*.¹⁵⁹ These cases established that States must not deport individuals to countries where substandard medical resources would result in either the imminent death of the petitioner or else “a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy,” as established in *Paposhvili*.¹⁶⁰ According to the *Paposhvili* Court, removing seriously ill individuals in such cases would violate Article 3 of the European Convention on Human Rights and Fundamental Freedoms. Placed within the context of the CRPD, one might well imagine that a CRPD-informed reading of cases concerning, illustratively, individuals with disabilities requiring intensive supports or specialized rehabilitation, which could likewise form the basis for non-expulsion.

Applying human rights within the context of disability, the CRPD contributes to a deeper understanding of core principles of disability rights, including dignity, non-discrimination, participation, autonomy, and independence.¹⁶¹ And yet lines of flight and transversal connectivity which move these principles in creative ways—working connections within CRPD treaty concepts, as between protection in situations of risk and freedom of movement, or beyond the treaty to other international mechanisms and treaty instruments—is not a given. Nonetheless, there is evidence of a disability narrative starting to emerge in contemporary practice and opportunities for an even more productive treaty practice through the CRPD Committee and the work of the UNHCR.

E. Disability-Sensitive Interpretations of Refugee Law: Australia and New Zealand

detained in jail. The woman was forced to receive assistance from male prison staffers in using the toilet, as the jail facilities were not accessible.); see also Andrew Byrnes et al., *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, No. 14-2007, 9-20 (jointly prepared by the U.N. Dep’t of Econ. & Soc. Aff., The Inter-Parliamentary Union & U.N. Off. of the High Comm’r for Hum. Rts., 2007), <http://archive.ipu.org/PDF/publications/disabilities-e.pdf>.

¹⁵⁸ *D. v. United Kingdom*, 1997-III Eur. Ct. H.R. (1997).

¹⁵⁹ *Paposhvili v. Belgium*, No. 41738/10, Eur. Ct. H.R. (Dec. 13, 2016).

¹⁶⁰ *Id.* ¶ 183. The case reinforced, however, an exceptionally and unreasonably strict standard that Motz persuasively characterizes as paradigmatic of a medical model orientation in cases concerning the expulsion of aliens. Motz, *supra* note 10, at 12, n. 61. For other case law likewise applying a strict standard in assessing whether persons with disabilities or health issues had met the required threshold, see, for example, *SHH v. United Kingdom*, App. No. 60367/ 10, Eur. Ct. H.R. (2013); *D. v. United Kingdom*, App. No. 30240/ 96, Eur. Ct. H.R. (May 2, 1997); *N. v. United Kingdom*, App. No. 26565/ 05, Eur. Ct. H.R. (gc) (May 27, 2008). *But see* a lower threshold applied in the context of detention: *Aswat v. United Kingdom*, App. No. 17299/ 12, Eur. Ct. H.R. (Apr. 16, 2013).

¹⁶¹ CRPD, *supra* note 7, at art. 3.

The protection of refugees with disabilities requires disability-informed interpretations of the Refugee Convention and its five grounds, coupled with accessible RSD procedures that accommodate individuals with disabilities. The discussion that follows assesses one potentially promising trend in contemporary practice of disability-sensitive applications of refugee law. Case law worldwide is decidedly mixed, as it often lacks awareness of the human rights conditions affecting persons with disabilities within the asylum context. At the same time, however, there are signs of progress and some groundwork being laid for applying disability rights principles to asylum claims in the manner contemplated by the CRPD framework. What follows is a review of claims in Australia and New Zealand showing some success with consideration of the limits of this jurisprudence.

1. *Australia*

There are traces of an emerging disability sensibility in Australia. In a 2016 case,¹⁶² the *AATA Case No. 1419893*, an ethnic Chinese woman from Indonesia, a wheelchair user with a significant physical disability, requested asylum in Australia on account of the likelihood of persecution she would face in Indonesia because of her status as 1) a person with a disability and 2) a single, unwed mother.¹⁶³ The petitioner argued that the confluence of these intersecting identities together would incur harms amounting to persecution, if forcibly returned to Indonesia.

The petitioner testified that in Indonesia, she was a “prisoner in her own home,”¹⁶⁴ unable to leave the house as neither the pavements nor local buildings were accessible to wheelchair users. She was unable to pursue education or employment on account of this infrastructure inaccessibility. Additionally, she had a child in Australia, and if forcibly returned to Indonesia, her ability to parent her child would be incapacitated.¹⁶⁵ The petitioner also detailed verbal and physical abuse directed at her by local community members in Indonesia, explaining that there remains widespread prejudice and stigma against persons with disabilities in her home country.¹⁶⁶

Crucially, Australian asylum jurisprudence law has established that courts should consider an applicant’s “personal attributes” and “personal vulnerabilities” when assessing persecution claims.¹⁶⁷ Here, the tribunal

162 AATA Case No. 1419893, [2016] Austl. Admin. App. Trib. 4338 (Aug. 19, 2016).

163 The applicant additionally referenced her status as an ethnic and religious minority as well, but the tribunal determined that both her disability status combined with the fact that she was a single mother were themselves sufficient for granting asylum. *Id.* ¶¶ 37, 50.

164 *Id.* ¶ 17.

165 *Id.* ¶¶ 17, 22.

166 *Id.* ¶ 21.

167 *See, e.g.*, AGA16 v. MIBP [2018] FCA 628 (Austl.) (affirming that an applicant’s “age or frailty” could transform harms that would not normally be considered sufficiently serious to meet the

assessed country conditions that would not typically arise to persecution in a claim submitted by a non-disabled person. In interpreting these circumstances through a CRPD lens, however, the Australian tribunal effectively recognized how “disabling” inaccessibility and stigma can be for persons with disabilities, successfully acknowledging how this lack of reasonable accommodation and ex ante access impaired the petitioner’s ability to realize her core socioeconomic rights.¹⁶⁸

Thus, the *AATA Case No. 1419893* provides an encouraging recent example of an immigration court applying the CRPD to interpret with sufficient gravity the harm that many persons with disabilities encounter, despite the fact that these harms may not resemble the types of rights abuses typically ruled as persecution in “mainstream” asylum cases. The main question, however, involves jurisdictions with immigration legal frameworks that do not consider the context within which an applicant with a disability is situated when assessing persecution. Would such jurisdictions also apply the CRPD in such a way as to accommodate the claimant’s unique experiences of persecution?

2. *New Zealand*

New Zealand’s legal framework regarding immigration has proven similarly amenable to disability-sensitive asylum rulings. In this jurisdiction, courts define persecution rooted in socioeconomic harm as a state denial of the “core content” (i.e., minimal essential level) of a right set out in a core human rights convention, including the CRPD.¹⁶⁹ Additionally, a finding of socioeconomic persecution in New Zealand also requires that such harm “result from deliberately retrogressive legislative or policy steps taken by the

threshold of persecution into an adequately serious harm when interpreted in relation to the applicant’s individual vulnerabilities); see also *A Guide to Refugee Law in Australia*, AUSTRALIAN ADMINISTRATIVE APPEALS TRIBUNAL, LEGAL SERVICES SECTION OF THE MIGRATION AND REFUGEE DIVISION, 4010-4-11 (2021), https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter4_Persecution.pdf (discussing the relevance of an asylum applicant’s personal attributes).

¹⁶⁸ As an aside, the authors wonder whether the tribunal could have alternatively ruled that Indonesia denied the applicant her core political rights as well, including, for example, the right to freedom of movement. For example, if the applicant was a “prisoner in her own home,” she would ostensibly be unable to travel to a polling place and cast her vote. The CRPD establishes that for persons with disabilities, their human rights cannot be separated across the traditional divide between negative political rights and positive socioeconomic rights. This is because persons with disabilities, as illustrated in the above voting access example, often require positive provisions by the State in order to realize their right to civil and political activities. Framing the *AATA Case No. 1419893* in this way would have revealed just how far New Zealand’s commitment to CRPD-compliant asylum rulings actually extends. See O’Cinneide, *supra* note 139; Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 78, 118-20 (2007).

¹⁶⁹ See BG (Fiji) [2012] NZIPT 800035, ¶¶ 88-89, 93-94; see also the U.N. Comm. on Econ., Soc. and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 10, U.N. DOC. E/1991/23 (Dec. 14, 1990).

state on a discriminatory basis, or whether societal discrimination prevents fuller levels of enjoyment by disadvantaged groups.”¹⁷⁰

The case of *AC (Egypt) [2011]*¹⁷¹ presents New Zealand’s CRPD-sensitive understanding in the context of the socioeconomic persecution encountered by persons with albinism. In this case, an Egyptian man with albinism filed for asylum in New Zealand on account of the significant violence directed toward persons with albinism in Egypt, as well as his complete inability to secure employment in Egypt, despite the petitioner’s exhaustive attempts and multiple university degrees.

According to court documents, on account of the petitioner’s appearance, he suffered several physical assaults throughout his life, including at the hands of his own teachers and school personnel as a child.¹⁷² After passersby in the streets physically attacked him multiple times, the petitioner no longer left his home during daylight hours out of fear.¹⁷³ In addition to these direct threats on his life, the petitioner tried earnestly to pursue a career in Egypt, studying various degrees and applying to jobs both in public and private sectors.¹⁷⁴ However, discrimination prevented him from earning a living and foreclosed every opportunity he pursued.

Remarkably, the petitioner presented a written statement by an Egyptian government official testifying that the administration intentionally declined to employ persons with disabilities—despite Egypt’s ratification of the CRPD and despite an on-paper government scheme to reserve a certain percentage of public-sector jobs for persons with disabilities.¹⁷⁵ Thus, the IPT could easily link the petitioner’s violation of his core “right to work” with “deliberately retrogressive legislative or policy steps taken by the State on a discriminatory basis” by the Egyptian government. After considering the evidence, the New Zealand Immigration and Protection Tribunal (IPT) readily granted the petitioner his request for asylum.¹⁷⁶

While the case of *AC (Egypt) [2011]* suggests that the CRPD’s principles can be applied productively and yield disability-informed asylum decisions, it should be noted that New Zealand’s definition of socioeconomic persecution precludes asylum claims on the basis of society-wide accessibility barriers alone, as the case considered below demonstrates.

Similar to the Australian decision in *AATA Case No. 1419893* above, the case of *Refugee Appeal No 76015 [2007]*¹⁷⁷ involved a Bolivian national

170 *BG (Fiji) [2012]*, NZIPT 800035, at ¶ 98.

171 *See AC (Egypt) [2011]* NZIPT 800015 (NZ IPT, Nov. 25, 2011) (N.Z.).

172 *Id.* ¶¶ 9-10, 15.

173 *Id.* ¶ 12.

174 *Id.* ¶¶ 16, 17, 18, 21, 23-24.

175 *Id.* ¶¶ 23-24.

176 *Id.* ¶¶ 90, 96, 98.

177 *Refugee Appeal No. 76015/96* (N.Z. Refugee Status App. Auth. (Nov. 14, 2007)).

who sought asylum in New Zealand on account of his inability to navigate his city of origin due to sweeping access barriers. The city's pavements and bus system were unusable for those with mobility aids such as crutches or wheelchairs.¹⁷⁸ Additionally, the claimant was legally barred from driving after the government automatically revoked his driving license following his lower leg amputation.¹⁷⁹ Like *AC (Egypt) [2011]*, the claimant reported that his struggle to navigate the city's inaccessible infrastructure prompted verbal, and at times physical, harassment from passersby. He also claimed that the access barriers rendered him unable to protect his wife, who suffered daily sexual harassment while navigating the city.¹⁸⁰

In contrast to the Australian court's finding in the similar *AATA Case No. 1419893*, the New Zealand tribunal ruled here that the severity of the harms reported by the claimant did not arise to socioeconomic persecution.¹⁸¹ The court found that the ability of a person with a disability to safely navigate her city on an equal basis with others did not constitute the "core content" of any right enshrined within international law. While the CRPD was not yet in force at the time of this 2007 case, the court noted that it did refer to the treaty's text in drafting its decision. However, the ruling merely notes that CRPD provisions "do not lend any further support to the appellant's claim."¹⁸²

This inconsistency in courts' interpretations of disability asylum claims centering on physical access highlights the need for the CRPD Committee to clarify the application of the CRPD to asylum claims and weigh in on how persecution is experienced for persons with disabilities. Other lines of treaty practice might also help foment new approaches to refugee claims premised on persecution against persons with disabilities, including the work of the UN Special Procedures, among others. Such reflection could help align CRPD concepts regarding serious instances of discrimination and abuse with the types of conduct amounting to persecution within the refugee framework. This reconciliation is important for the development of a disability inclusive asylum treaty practice.

III. POTENTIAL LINES OF FLIGHT TOWARD A DISABILITY-INCLUSIVE ASYLUM PRACTICE

The treaty practice that accommodates persons with disabilities in the refugee and asylum law domain is not yet realized. While this is undoubtedly

178 *Id.* ¶ 19.

179 *Id.* ¶ 23.

180 *Id.* ¶ 19.

181 *Id.* ¶ 52.

182 *Id.* ¶ 49.

an area ripe for consideration by the over-worked CRPD Committee, the Committee's treaty practice in the area of disability-inclusion in refugee proceedings is limited. That said, the CRPD produces some connectivity that might, in time, generate the kinds of creative practices that are more apparent in relation to gender and age-based persecution grounding a claim for refugee status. The development of such practices is essential as barriers to disability asylum are likely to persist in the absence of specific international or domestic guidance.

The discussion that follows addresses entry points for advancing a disability inclusive asylum practice and proposes several lines of flight. It first discusses the jurisprudential line of flight and assesses emergent trends in the case law. Then it turns to the CRPD Committee itself and other institutional arrangements likely to generate traction. These include, most importantly, the issuance of guidance by the UNHCR on disability-inclusive asylum as well as suggestions to improve coverage of disability human rights in mainstream human rights reporting on which claimants and decision-makers rely. This Part concludes with a discussion of two specific issue areas that bear close attention in advancing a disability-inclusive asylum practice, namely, the accessibility of RSD proceedings and the treatment of persons with disabilities held in detention pending asylum claim decision.

A. Jurisprudence

A disability asylum jurisprudence calls for a new way of reading the CRPD, a new kind of treaty practice that recognizes and acts on the connectivity sought by its drafters across domains of international law. This kind of rhizomatic connection, transversal reading, and movement across treaties is at least suggested in some of the emerging case law. While a disability rights narrative is still nascent in jurisprudence concerning asylum claimants with disabilities seeking refugee status on the basis of disability-related persecution, some lines of movement are discernable.

In *Temu v. Holder*,¹⁸³ the U.S. Board of Immigration Appeals was willing to address and make explicit the connection between the applicant's psychosocial disability and his treatment at the hands of his torturers in a mental health facility. The applicant, who had severe bipolar disorder, requested asylum on account of torture suffered by mental health hospital and prison staff in his country of origin. In State-run mental health facilities and prisons, the applicant was tied up for up to seven hours a day and beaten by staff on account of his mental health condition. The applicant submitted records from his former prison documenting that, as a matter of practice,

¹⁸³ *Temu v. Holder*, 740 F.3d 887, 888-90 (4th Cir. 2014).

detainees with mental illness received disproportionately higher abuse amounting to torture.¹⁸⁴ While the case presents a particularly stark example of egregious mistreatment meted out in a psychiatric facility, it is nonetheless uncommon and thus striking for a court to recognize the connection between abhorrent treatment and disability-based animus, in this instance, by the psychiatric staff. The Fourth Circuit Court of Appeals ruled that no rational factfinder could deny that the petitioner suffered torture on account of his identity as a person with mental illness detained in Tanzanian psychiatric and prison facilities.¹⁸⁵

Temu is also notable because the historical trend in human rights reporting by organizations such as Amnesty International has been to treat such instances of abuse as not worthy of documentation unless the abused individual was in a psychiatric institution for politically motivated purposes.¹⁸⁶ Absent that, the presumption was that other persons detained but subject to the same treatment and conditions of detention were “patients” under treatment for mental illness. Set against this backdrop of disregard, the *Temu* case assumes a more hopeful development in disability asylum practice.¹⁸⁷ The *Temu* case is important for its clear acknowledgement of the routine violence that persons with disabilities encounter throughout the world, too often cast as “treatment” in the name of “cure”—something crucial for promoting a CRPD-compliant framework for international refugee law insofar as the CRPD tackles disability animus and clarifies that the physical and mental integrity of persons with disabilities must be protected (Article 14) and that torture in the name of treatment is still torture and thus proscribed (Article 15). The specific invocation of CRPD concepts—including the supported decision-making framework in Article 12 and the principles of reasonable accommodation and accessibility—could run productive lines of treaty practice in asylum litigation.

A case in Hungary seemed to indicate a more progressive turn animated by a consideration of the specific circumstances of an applicant with a disability.¹⁸⁸ In a case before the Metropolitan Court of Public Administration and Labour, the court considered the individual circumstances of the applicant who was blind, single, and without support on her return to Egypt, apart from her mother who was physically abusive. A return would not only subject her to disability discrimination faced by all Egyptians with disabilities, but, beyond generalized disadvantage based on

184 *Id.*

185 *Id.* at 890-92.

186 Lord, *supra* note 78.

187 *Holder*, 740 F.3d at 888-90.

188 Metropolitan Court of Public Administration and Labour (Hungary), 6 March 2015, 7.K.34.513/2014/11.

disability, the Court considered the need for a more individualized consideration of circumstances not undertaken by the deciding court, namely, her specific needs arising from her situation as a claimant in need of special protection. The Court examined whether the Applicant would be subject to torture, cruel, inhuman or degrading treatment or punishment if she had to return to her country of origin, to Egypt. The Court again emphasized that the Applicant was a vulnerable person and thus Act LXXX of 2007 on Asylum must be applied to persons in need of special treatment with due consideration. The Court took into account the personal circumstances of the Applicant, and the cumulative grounds, such as that the Applicant has limited opportunities, she was single, physically disabled, and she would have to rely on her abusive mother if she returned to Egypt, who was seriously abusing her physically and psychologically. She was given special subsidiary protection status.

Similar consideration was given to the particular circumstances of a child with a disability whose family's claim was rejected. In a case before the Austrian Constitutional Court, it was determined that the facts of the case required a more extensive investigation of the specific circumstances and needs of the at-risk family member – while disability rights principles were not explicitly involved, the case supports an individualized assessment of the circumstances and specific needs of an applicant with a disability.¹⁸⁹

The failure of disability rights concepts to be reflected even in egregious cases of abuse is still evident in recent jurisprudence, nonetheless, and in cases concerning mistreatment of persons with disabilities more generally. As seen in another U.S. case, *Perez-Rodriguez v. Barr*,¹⁹⁰ well-documented horrific conditions of abuse—including the use of long-term restraints and isolation, of “patients observed sitting in their own bodily wastes,” and “stories of patients suffering rape and abuse at the hands of medical personnel”¹⁹¹—were deemed not to be persecutory conduct falling within the refugee frame. The Eighth Circuit held “that a reasonable factfinder would not have to conclude that a group membership actually and sufficiently motivated the Mexican government's acts or inaction toward the group” but that “the record must show that the persecutor was acting ‘on account of’ protected status.” The Court reasoned that other factors were attributable to the poor treatment, as opposed to intentional mistreatment on account of mental disability, such as the severe lack of resources.¹⁹² Unexamined in that case was the decision by the Mexican Government to

189 Austria Constitutional Court, Sept. 21, 2009, U591/09.

190 *Perez-Rodriguez v. Barr*, 951 F.3d 972 (8th Cir. 2020).

191 *Id.* at 973-75.

192 *Id.* at 974, 976.

perpetuate the mental health system long after its ratification of the CRPD (and leadership role in its negotiation) and knowingly discard individuals with mental disabilities in such conditions. No analysis of disability discrimination was undertaken that could have placed the conditions in which the claimant was subjected as an individual with mental disability within a persecution frame. And yet even progressive cases have their shortcomings and have not always produced the connections that the CRPD and domestic disability rights frameworks might inspire. For example, in the otherwise progressive Australian decision, *AATA Case No. 1419893*, the tribunal might have looked to the political rights implications of the asylum claimant, especially in the light of Australia's progressive disability rights framework and enthusiastic uptake of the CRPD.¹⁹³ In sum, looking at how barriers rooted in social environment (attitudinal, physical, legal, institutional, communication) can produce harms that constitute persecution requires a transversal reading of persecution—a reading across texts that seeks to contextualize harms in the light of the specific disadvantage that certain groups experience on account of who they are. But it also requires a reading of harm that may not be immediately apparent, especially for decision-makers holding onto a stereotypical, medical, and charity conceptualizations of disability. Such an approach would read the difference of disability underscored in Article 3 through CRPD principles of non-discrimination and equality (Article 5), reasonable accommodation (Article 2), accessibility (Article 9), and other elements of support to generate those potential connections between the CRPD and refugee practice. It would also require a reading of marginalization that sees socialization (Article 8, Awareness raising) and community inclusion (Article 19) as fundamental to an individual's enjoyment of the full spectrum of human rights and isolation and segregation as inimical to disability rights and a relevant risk factor in the persecution analysis.

The limited evidence of productive lines of flight from the CRPD into the realm of refugee and asylum law lends some support to the notion of international law as a fragmented system.¹⁹⁴ A recent decision of the European Court of Human Rights seems to underscore this point. In *Savran v. Denmark*, the Court addressed the permissibility of a deportation order in relation to a Turkish citizen who had essentially grown up in Denmark and who had committed a serious crime that involved detention in a psychiatric

¹⁹³ AATA Case No. 1419893, [2016] Austl. Admin. App. Trib. 4338 (Aug. 19, 2016).

¹⁹⁴ See generally Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (discussing fragmentation in context of emergence of technically specialized cooperation networks—including human rights networks—that are global in scope).

facility followed by expulsion on release.¹⁹⁵ The applicant complained that his removal to Turkey constituted a breach of Article 3 of the European Convention on Human Rights as he did not have a real possibility of receiving the appropriate and necessary psychiatric treatment, including follow-up and supervision, in connection with his paranoid schizophrenia, in the country of destination. He also alleged that the implementation of the expulsion order had been in breach of Article 8 of the Convention owing to his lack of familial and social supports in Turkey. The Court assessed whether sending the individual back to Turkey, where he would likely experience highly inadequate mental health care to meet his needs, would provide a basis for violation of Article 3 of the European Convention on Human Rights. Trenchantly, the Court ruled no violation of Article 3, applying a high threshold according to which removal and return to Turkey where he would be unlikely to receive adequate treatment and supports would not amount to “intense suffering.”¹⁹⁶ Nonetheless, the Court did find a violation of Article 8, and it did so on the basis that the removal violated the privacy rights under Article 8 and not family rights. And yet this seemingly more progressive turn recognizing the particular circumstances of an individual with psychosocial disability who was unlikely to have access to the supports he needed should he be deported back to his country of origin did not draw on the CRPD. Moreover, as noted in the Concurring Opinion of Judge Serghides, the Court declined to read the right to family life broadly in such cases where an individual faced vulnerability without familial ties.¹⁹⁷ This analysis, though not drawing on the breadth of community notions of support reflected in the CRPD, nonetheless embraced a more progressive approach. It contrasts sharply with the decision of the Italian Constitutional Court in a case that recognized the inviolability of the right to family unity in relation to the reunification of a foreign citizen with his spouse and with underage children, nonetheless said that, in reunification cases involving adult children, legislators could balance issues of affection against other important issues. Taking a decidedly ill-informed and outmoded medical model approach without acknowledging the variability in needs and supports needed by an individual with a disability, the Court stated that it is reasonable only to allow reunification with adult children where there is a situation of need resulting from a

¹⁹⁵ Savran v. Denmark, App. No. 57467/15, Eur. Ct. H.R. ¶ 3, (Dec. 7, 2021), <https://hudoc.echr.coe.int/fre#%7B%22tabview%22:%5B%22document%22%2C%22itemid%22:%5B%22001-214330%22%7D>.

¹⁹⁶ *Id.* ¶ 143. (“[I]t has not been demonstrated in the present case that the applicant’s removal to Turkey exposed him to a serious, rapid and irreversible decline in his state of health resulting in intense suffering, let alone to a significant reduction in life expectancy.”).

¹⁹⁷ Savran v. Denmark, Partly Concurring Opinion and Partly Dissenting Opinion of Judge Serghides, App. No. 57467/15, Eur. Ct. H.R. (Dec. 7, 2021).

permanent inability to provide for their own needs on account of their state of health.¹⁹⁸

Another decision with potentially promising implications for assessing asylum claims of persons with disabilities concerned the contestation of a removal order to Kosovo from Switzerland by a resident in Switzerland subject to an expulsion order following a criminal offense.¹⁹⁹ The applicant, an individual with a psychosocial disability, submitted medical certificates to support his experience of depression and suicidal ideation and generalized pain disorder. He claimed to be entirely dependent on his family for care and expulsion to Kosovo would risk his condition deteriorating. The European Court of Human Rights, in reviewing whether the removal interfered with the applicant's right to respect for private and family life, considered the assessment of the applicant's Article 8 rights in relation to his removal order deficient. The Court said it should have encompassed, among other factors, "the nature and gravity of the offence committed; the length of stay in Switzerland; the length of time elapsed since the offence; the applicant's family circumstances; the interests and welfare of the applicant's children; the strength of social, cultural and family ties in Switzerland and Kosovo; and any circumstances particular to the case, such as state of health."²⁰⁰ It further noted that the Swiss court had not considered the changed conduct of the applicant some 12 years following his offense nor the deteriorating state of his health. The Court concluded that the examination by the domestic court was superficial and had not demonstrated that the removal order was proportionate to the legitimate aim pursued and necessary in a democratic society.

Reading transversally across treaties and international law landscapes is needed if a human rights treaty practice is to have the impact it is intended to have. This is to acknowledge the complexity of human rights treaty practice, and the messiness of working lines of flight in all directions, sometimes chaotically, to work change in discriminatory structures and institutions. This is perhaps another way of saying that the fragmentation of international law is impeding human rights progress, especially when it comes to highly disadvantaged at-risk groups. Looking forward, the lackluster jurisprudential line of flight is unlikely to yield comprehensive absent attention to disability rights uptake by institutional arrangements that create pathways for progress.

198 Const. Ct., Sept. 26, 2007, No 335 (It).

199 I.M. v. Switzerland, App. No. 23887/16, Eur. Ct. H.R. (Apr. 9, 2019).

200 *Id.*

B. Seeking Disability-Inclusive Asylum Practices through the Institutional Arrangements of the CRPD

The institutional arrangements of the CRPD provide a platform which international and domestic guidance for disability asylum might be pressed.²⁰¹ Nevertheless, the CRPD's treaty practice has not been fully actualized, nor has it produced lines of flight through these arrangements resulting in proactive reforms. The CRPD Committee itself has been extremely limited in the breadth and scope of its coverage of the human rights of persons with disabilities seeking asylum or those who are internally displaced within their own country. Nonetheless, some useful guidance may be gleaned from a composite account of individual recommendations made to States by the CRPD Committee in the State reporting exercise and from a consideration of how the CRPD's other institutional arrangements could prompt the actualization of a disability inclusive asylum treaty practice. This requires a shift in perception and action as to what treaty practice is to be able to discern its latent and actionable potential to work change in the too static processes of refugee law. While the CRPD offers us a set of complexity-embracing approaches to addressing disability-centered barriers, the need remains for a treaty practice that dismantles barriers in the context of structures and inflexible and rigid governance.

To date, much of the CRPD Committee's commentary in its concluding observations and recommendations sparsely asserts, as in the case of Sudan, that there is "limited support provided to persons with disabilities who are internally displaced, refugees or asylum seekers" and recommend that the State "strengthen its efforts to provide adequate support to persons with disabilities who are internally displaced, refugees or asylum seekers."²⁰² Other accounts provide a greater level of specificity, as in the case of Iraq where the CRPD Committee recommended "human, technical and financial resources necessary to provide services, including habilitation and rehabilitation services, mental health services, sanitation, safe spaces, education and vocational training, to persons with disabilities, particularly women and children with disabilities" who are "internally displaced, migrants or refugees, including measures to facilitate the safe and voluntary return of persons with disabilities."²⁰³ Even more elaborate and operationally focused are the CRPD Committee's detailed observations and recommendations regarding Greece, a country hit hard by the numbers of

²⁰¹ CRPD, *supra* note 7, at arts. 38, 40.

²⁰² Comm. on Rts. of Persons with Disabilities, Concluding Observations on the Initial Report of the Sudan, ¶ 22(b), U.N. Doc. CRPD/C/SDN/CO/1 (Feb. 26, 2018).

²⁰³ Comm. on Rts. of Persons with Disabilities, Concluding Observations on the Initial Report of Iraq, ¶ 22(a), U.N. Doc. CRPD/C/IRQ/CO/1 (Sept. 16, 2019).

individuals seeking safety and asylum on its shores. Among the recommendations posed by the CRPD Committee to Greece were making reception facilities for refugees accessible and equipped with needed health care services, ensuring that organizations of persons with disabilities were consulted in making such arrangements and making vulnerability assessments inclusive of disability and undertaken by persons well-versed in assessing the needs of person with disabilities.²⁰⁴ The CRPD Committee also addressed the need for access to social protection, assistive technologies, information and adequate services and, specifically, safe shelter, sanitation and medical care through the provision of individualized support.²⁰⁵

The CRPD Committee could help to elevate its own coverage of the human rights barriers that persons with disabilities experience in seeking refugee status in the State reporting process through the development of a specific General Comment on the issue of refugee protection by the Committee. Second, the COSP—held annually and bringing together States Parties and a host of other stakeholders to consider implementation of the CRPD—could usefully focus its attention on the intersection between the CRPD and refugee law and policy as part of its thematic focus at a future meeting, with the CRPD Committee playing a part in that discussion.²⁰⁶ In this regard, the Secretariat for the Conference together with civil society could learn from other international arrangements that create periodic COSPs and use the opportunity to further refine and develop guidance for the application of the treaty, adopting such guidance in the form of an Annex to the COSP report. International environmental law treaties, international arms control agreements, and the WHO Framework Convention on Tobacco Control all utilize COSPs in these ways.²⁰⁷

An additional avenue for putting into motion a disability-informed approach to refugee and asylum law claims lies in the mandate and practice of the Special Rapporteur on the Rights of Persons with Disabilities. There are several promising, but as yet untapped lines where some salient

²⁰⁴ Comm. on Rts. of Persons with Disabilities, Concluding Observations on the Initial Report of Greece, U.N. Doc. CRPD/C/GRC/CO/1 (Oct. 29, 2019).

²⁰⁵ *Id.*

²⁰⁶ For prior themes of the Conference of States Parties, see *Conference of States Parties to the Convention on the Rights of Persons with Disabilities*, U.N. DEPT OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2.html> (last visited Mar. 19, 2022).

²⁰⁷ For more on how the COSP might draw from the experience of other treaty practices, see Michael Ashley Stein & Janet E. Lord, *The Committee on the Rights of Persons with Disabilities*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 547, 560-63 (Philip Alston & Frédéric Mégret eds., 2d ed. 2020); Michael Ashley Stein & Janet E. Lord, *Monitoring the Committee on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 *HUM. RTS. Q.* 689, 691-93 (2010).

connections could advance a disability asylum sensibility and practice. The current Special Rapporteur has taken up as one of his core areas of concern Article 11 of the CRPD, the issue of protecting persons with disabilities in armed conflict and, more broadly, addressing the impact of armed conflict on persons with disabilities.²⁰⁸ His first report to the UN General Assembly,²⁰⁹ engagement with the UN Security Council under the Arria Formula, and country communications, are but a few potentially dynamic types of treaty practice that could advance CRPD-informed claims for asylum for persons with disabilities and perhaps press both asylum receiving countries and refugee agencies such as the UNHCR, to adopt high quality and detailed guidance for asylum decision-makers on how to analyze disability based claims for asylum. Also of note, the (former) Special Rapporteur on the Rights of Persons with Disabilities, working collaboratively with the CRPD Committee and the Special Envoy of the Secretary-General on Disability and Accessibility as well as organizations of persons with disabilities and the International Commission of Jurists, engaged in a process resulting in the adoption of International Principles and Guidelines on Access to Justice for Persons with Disabilities. There is nothing to preclude this type of approach in the promulgation of guidance on persons with disabilities in refugee and asylum proceedings.²¹⁰ This would be an appropriate and feasible role for the Special Rapporteur to undertake as would letters of allegation submitted to the special procedures of the UN Human Rights Council in instances where States Parties to the CRPD fail to apply disability rights principles in rejecting the asylum claims of persons with disabilities.²¹¹

208 Rep. of Special Rapporteur on Rts. of Persons with Disabilities, *Rights of Persons with Disabilities*, ¶ 46, U.N. Doc. A/HRC/46/27 (Jan. 19, 2021) (emphasizing a prioritization of his mandate to address the protection of persons with disabilities in “armed conflicts and associated peacebuilding processes and humanitarian settings.”).

209 Rep. of Special Rapporteur on Rts. of Persons with Disabilities, *Rights of Persons with Disabilities*, ¶ 73, U.N. Doc. A/76/146 (July 19, 2021) (noting the role of UNHCR in assisting States to protect refugees with disabilities and the recommendations of UNHCR concerning the need for “measures to accommodate persons with disabilities (for example, ensuring the identification and registration of persons of concern with disabilities, ensuring that programmes, services and procedures are accessible, enhancing international cooperation for improving living conditions and ensuring equal opportunities for durable solutions and appropriate support”).

210 U.N. Hum. Rts. Special Proc., *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Aug. 2020), https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf.

211 This is a little known but potentially useful form of treaty practice that could press States to adopt disability-specific guidance for asylum decision-makers wherein U.N. special procedures take action to facilitate the cessation of human rights violations. Of relevance here, for example, is the intervention on December 7, 2018 where the Special Rapporteur on torture and the Working Group on arbitrary detention issued a joint communication alleging that Mr. Hakeem Ali Mohamed Alarabi, a refugee and former member of Bahrain's national football team, faced the imminent risk of being deported from Thailand to Bahrain despite the clear possibility of being persecuted and tortured (THA 5/2018). Letter from the Vice-Chair of the Working Group on Arbitrary Detention and the Special

Finally, for those States who have ratified the Optional Protocol to the CRPD,²¹² additional authority is given to the CRPD Committee to consider individual and group complaints against them for violations of the treaty.²¹³ The Convention likewise provides a mandate for its independent treaty body to undertake investigative inquiries into grave and systemic violations.²¹⁴ While States Parties to the CRPD have been slower on the uptake of the Optional Protocol than the CRPD itself,²¹⁵ the Optional Protocol has the potential to generate a treaty practice that contributes to the growing body of human rights investigative activity in the disability context and to the shared understanding of disability-based persecution within States generally and reflected specifically in refugee and asylum law and practice.²¹⁶

C. Seeking Disability-Inclusive Asylum Practices through Guidance Issued by UNHCR

UNHCR's Executive Committee's adoption of the Conclusion Concerning Refugees with Disabilities,²¹⁷ while an encouraging first step, requires follow-up in the form of specific guidelines for disability asylum, complementing those developed in relation to other social groups. The Conclusion was adopted ten years ago and has not yielded a CRPD-

Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 7, 2018), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24241>. This communication led to the withdrawal of the extradition order and Mr. Alaraibi's release. Subsequently, the Prime Minister of Australia also confirmed that Mr. Alaraibi was granted citizenship. See: *Impact of the work of Special Procedures: Prevention and/or Cessation of Human Rights Violations*, U.N. HUM. RTS. OFF. OF HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Preventioncessationhumanrightsviolations.aspx> (last accessed Mar. 19, 2022) ("Thailand withdraws extradition order and Australia grants citizenship to a refugee.").

²¹² Optional Protocol to the Convention on the Rights of Persons with Disabilities, *entry into force* May 3, 2008, 2518 U.N.T.S. 28.

²¹³ *Id.* at art. 6.

²¹⁴ *Id.* at art. 6(2).

²¹⁵ *Optional Protocol to the Convention on the Rights of Persons with Disabilities - Status of Ratification*, 20 U.N. TREATY COLLECTION, 1 (Jan. 20, 2021), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15-a.en.pdf>.

²¹⁶ The limitations of the Optional Protocol should be acknowledged, as they do not result in legally binding decisions. Moreover, the proceedings are confidential, although they are reported in general terms in the Committee's annual reporting. Views adopted by the Committee in respect of the proceedings are made public. See, e.g., Comm. On the Rts. of Persons with Disabilities, Communication No. 4/2011 Views adopted by the Committee at its tenth session, ¶¶ 8.1-11, U.N. Doc. CRPD/C/10/D/4/2011 (Sept. 9, 2013). Still, the potential of these procedures—and indeed those of other treaty bodies that may begin to take disability-based claims into account—should not be lost on scholars and practitioners interested in the progressive development of disability human rights and disability asylum.

²¹⁷ U.N. High Comm'r for Refugees Exec. Comm. of the High Comm'r's Programme, *Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR* (Oct. 12, 2010), <https://www.unhcr.org/en-us/excom/exconc/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html>.

informed practice, for instance, in spurring governments to adopt disability-specific guidance for decision-makers or to produce country of origin information that is meaningfully detailed regarding country conditions for persons with disabilities and upon which decision makers can rely or to help mainstream disability issues into asylum training programs.²¹⁸ While the UNHCR lacks decisive leadership on disability-inclusion in the refugee framework, it could nevertheless usefully draw on its experience in other contexts to inform its approach.²¹⁹ Inasmuch as the UNHCR's work on gender, sexual orientation and gender identity, social group, and age-related guidelines have prompted progressive shifts in policy at the domestic level, action on the part of the UNHCR should be a priority, a point made implicitly in the UN Special Rapporteur's report to the UN General Assembly concerning the protection of persons with disabilities in armed conflict.²²⁰

Using the CRPD as an interpretive guide and coupled with the other existing guidelines that should likewise help inform guidance on disability asylum claims, the UNHCR could usefully address the following questions: 1) How should decision-makers approach consideration of asylum claims made on the basis of disability? 2) What are the additional factors for decision-makers to weigh when assessing claims for asylum that may include issues pertaining to disability? 3) When does disability-based harm amount to persecution and how exactly should the nexus between disability social group status and persecution be analyzed? 4) How should disability-related claims be objectively considered to assess future fear of persecution within the legal, political and social context of the country of origin? 5) How should decision-makers take disability issues into account when looking at the persecution experienced and whether there has been a

218 See, e.g., *Asylum Division Training Programs*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs> (last visited Jan. 11, 2022) (noting training curricula on specific populations including women and children but not persons with disabilities).

219 See Gender Guidelines, *supra* note 56. See also U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims of Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶7, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) (describing how The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity “set out the human rights protection framework applicable in the context of sexual orientation and or/gender identity”).

220 U.N. Special Rapporteur on the Rts. of Persons with Disabilities, *Rep. to the UN General Assembly on the Protection of Persons with Disabilities in Armed Conflict*, GA Res. A/76/146. (2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/196/98/PDF/N2119698.pdf?OpenElement>. Gerard Quinn (U.N. Special Rapporteur on the Rights of Persons with Disabilities), *Rights of Persons with Disabilities*, para. 68, U.N.Doc. A/76/146 (July 19, 2021) (noting that “the issue of protecting persons with disabilities who are displaced or seeking refugee protection has been addressed to some degree by the Office of the High commissioner for Refugees”). *Id.*

failure of state protection? 6) What evidentiary issues are especially pertinent to disability asylum claims? and 7) How can refugee determination proceedings be made accessible to persons with disabilities, including guidance on the provision of reasonable accommodation?

A more invigorated treaty practice might consist of the UNHCR and the CRPD Committee joining forces with the holding of a General Day of Discussion on the protection of refugees with disabilities for the dual purpose of improving the UNHCR's guidance and paving the way for a CRPD Committee General Comment on the subject. Various elements could inform both a new UNHCR policy and interpretive guidance by the CRPD Committee. Some of these include, for instance, calling upon States to collect disability data and statistics relevant to refugee and asylum claims and human rights violations pursuant to Article 31 as a mandatory part of their reporting,²²¹ and ensuring the review and revision of asylum proceedings consistent with the CRPD, including Article 13 on access to justice and general principles of non-discrimination. In any process leading to the development of UNHCR guidance or a general comment, engagement by a diverse set of stakeholders is therefore an essential element in advancing a disability-inclusive asylum treaty practice.

D. Improving the Assessment of Disability-Based Persecution in Human Rights and Country Information Reporting

Guidelines adopted by the UNHCR routinely assist the authorized decision-making body in a State in making its objective assessment of the well-founded fear of persecution in a manner consistent with domestic law. This is also the case with guidelines adopted by national authorities to assist refugee determination decisions, for instance, guidelines developed on gender and sexual orientation and gender identity that provide specific examples of persecutory risks. Assessments that account for the harms to which persons with disabilities may be exposed in their country of origin may be extraordinarily difficult if little is known about country-specific disability rights conditions and in the absence of guidance.²²² As indicated by the UNHCR, although:

²²¹ CRPD, *supra* note 7, at art. 31.

²²² This is a point made in Canadian guidance on sexual orientation and gender identity, pointing to the challenge of obtaining information on persons with disabilities within the SOGIESC community. *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, IMMIGRATION AND REFUGEE BOARD OF CANADA, at sec. 8.5.10.1, (revised Dec. 17, 2021), <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx#a85> [hereinafter SOGIESC Guidelines].

the burden of proof in principle rests [on the refugee claimant], the duty to ascertain and evaluate all the relevant facts is shared between the [claimant] and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.²²³

This presents an obstacle for persons with disabilities seeking asylum, given the lack of awareness and understanding of the human rights of persons with disabilities by decision-makers.²²⁴ It also points to the need to ensure that human rights documentation utilized by claimants, their lawyers and immigration officials captures the lived experience of persons with disabilities in a country. There are an increasing number of credible human rights groups reporting on disability issues,²²⁵ yet there is still a wide gap in understanding as compared to human rights conditions impacting other groups, such as prisoners, women, or LGBTI people. Reliable, relevant and current country condition information on persons with disabilities in many countries can be scarce, incomplete or too general to be useful.²²⁶ Information deficits may be more pronounced for persons with disabilities who are, for example, racial or ethnic minorities. Accordingly, reliance by immigration officials and judges on documentation of the human rights of persons with disabilities assumes a particular relevance, and absent an understanding of disability discrimination and the persecution experienced by persons with disabilities, poor decisions will undoubtedly result.²²⁷

223 See Michel Moussalli (Dir. of Int'l Protection, Off. of the U.N. High Comm'r for Refugees), *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶¶ 196-97, HCR/IP/4/Eng/REV.1 (1992).

224 The CRPD underscores the necessity of expanding awareness and understanding of disability as a fundamental element of implementing the human rights of persons with disabilities. This explains the rationale for a general obligation on disability awareness raising in the CRPD at Article 8. See CRPD, *supra* note 7, at art. 8.

225 In the years since the adoption of the CRPD, Human Rights Watch has enhanced its disability rights reporting and developed a fully staffed Division on Disability Rights. Although Amnesty International has been far slower in tuning into the implications of the CRPD for its own documentation and reporting than Human Rights Watch, it nonetheless published a well-documented report on conditions for persons with disabilities in conflict-affected Yemen. See Amnesty Int'l, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, AI Index MDE 31/1383/2019 (Dec. 3, 2019).

226 The absence of country information on highly marginalized groups is readily acknowledged in guidance to asylum assessors. See HOME OFFICE, GENDER IDENTITY ISSUES IN THE ASYLUM CLAIM (2011), at 14 (UK) (noting "[t]here may be very little evidence on the ill-treatment of transgender men and women in the country of origin."). *Id.* at 14.

227 For example, the United States Department of State's Bureau of Democracy, Human Rights, and Labor (DRL) produces annual country reports on States' human rights practices. See generally *Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>. These are a key resource utilized by immigration judges in the United States. See Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOB. LEGAL STUD. 197, 197 (2000). DRL is required to prepare and submit reports annually to Congress pursuant to legislation requiring the Secretary of State to provide to the Speaker of the House of Representatives

Further, a lack of information should not be assumed to indicate the absence of persecution in a given country. On the contrary, sparse reporting on the situation of persons with disabilities may be attributable to their stigmatization, marginalization, and isolation, a point underscored in Canadian immigration guidance on sexual orientation and gender identity.²²⁸

Quality documentation about country human rights conditions specifically as they impact persons with disabilities is critical for persons with disabilities seeking asylum and for immigration officials and judges rendering decisions.²²⁹ It is apparent that a disability rights lens is missing and greatly needed in a number of areas that ought to animate refugee status determinations. The non-navigability of public and private spaces to such a degree that segregation and home isolation is the only option is but one example of how a disability rights analysis can illuminate an assessment of persecution. Many other examples might be referenced. The absence of independent living arrangements for persons with intellectual disabilities and the likelihood of placement in institutional facilities could, under some circumstances, constitute persecution.

In the face of limited evidence on the ill-treatment of persons with disabilities in the country of origin, guidance for decision makers on what types of information to look for is critical and should, for instance, urge consideration of country of origin information including 1) social and cultural norms about disability, including their access to healthcare and rehabilitation, education and employment, and how existing barriers may affect persons with disabilities; 2) the level of “visibility” of individuals with disabilities in the community, including the presence of dedicated community-based supports, organizations of persons with disabilities, among others; 3) the legal status of persons with disabilities, including recognition of legal capacity, discriminatory measures in the area of

and the Committee on Foreign Relations of the Senate, “a full and complete report regarding the status of internationally recognized human rights, within the meaning of subsection (A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.” These annual submissions are required to comply with sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, §116(d), Stat. 41 (codified as amended at 22 U.S.C. § 2151 et seq.); Foreign Assistance Act of 1961, Pub. L. No. 87-195, §502(B)(b), Stat. 175; (codified as amended at 22 U.S.C. 20302.); and section 504 of the Federal Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2070 (1978) (codified as amended at 19 U.S.C. §§ 2101–2497b). Two of the authors have contributed submissions regularly on various disability-related human rights issues.

²²⁸ See SOGIESC Guidelines, *supra* note 222.

²²⁹ Examining the implications of the U.S. Department of State Country Human Rights Reports and other human rights documentation provided by the Department of State to INS for asylum claimants is beyond the scope of this study. It stands to reason, however, that gaps in reporting on the human rights situation of marginalized populations is likely to have a chilling effect on successful asylum claims. Unfortunately, there is evidence to suggest that the lack of information on the human rights of people with disabilities is a barrier to successful asylum claims.

education, employment, healthcare, political rights, among others; and 4) protection from discrimination and the existence of anti-discriminatory measures.

Instead of creating new lines of flight and connections between the CRPD and the refugee regime, while some progress is apparent, in the main, refugee case law approximates the same old story: where the paradigmatic instance of persecution against a person with a disability is not readily identifiable, evidence of disability-related persecution will remain unaddressed. Thus, mainstream human rights organizations as well as organizations of persons with disabilities must enhance their capacity to report on disability rights violations to fill a serious gap in human rights reporting that undoubtedly hampers disability asylum claims. This, in turn, may help attune national authorities to the situation of persons with disabilities and, further, prompt the promulgation of guidance for decision makers on the types of persecution that persons with disabilities may confront in their countries of origin. And, as noted by Motz,²³⁰ there is a transnational judicial dialogue on refugee law organized by the International Association of Refugee Law Judges whose purpose is to foster a shared understanding of refugee law principles among decision-makers, and it stands to reason that enhancing the visibility of persons with disabilities in the context of asylum could help mainstream disability into such dialogues.

Refugee assistance organizations must also work to address the significant hurdles that claimants with disabilities face, both substantively in proving persecution and procedurally in accessing refugee proceedings.

CONCLUSION

In refugee law and practice, disability has operated more often than not as a trigger for otherness and outsider status. The received paradigm, still very much in operation, makes disability an outright basis for exclusion, as so many immigration laws make apparent.²³¹ From this perspective, disability identity is foregrounded and the difference of disability is employed secondarily, most often to define otherness and dissimilarity from

²³⁰ Motz, *supra* note 10, at 47.

²³¹ Until 1990, for example, U.S. federal immigration law explicitly included disability as a ground for exclusion. *See, e.g.*, Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. § 1101). For an historical treatment, see DOUGLAS BAYNTON, DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS (2020). More recently and implicitly, disability rights advocates asserted that the “public charge rule” in effect under the Trump administration that prevented Green Card eligibility on the grounds of having received public benefits, discriminated heavily against immigrants with disabilities and their families and echoed historical exclusions. U.S. Citizenship and Immigration stopped applying the public charge rule in March 2021. *See Public Charge Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/archive/public-charge-fact-sheet> (last visited Mar. 19, 2022).

an ideal type of refugee claimant. Here, then, a disabled claimant is deemed likely to become a public charge and unlikely to contribute to society in ways that non-disabled claimants are presumed to do. Insofar as disability is less an identity and more a difference, the treaty practice that unfolds from the CRPD offers endless possibilities and connections to inform human rights law. This is a much more expressive, potentially change-making approach to treaty practice than characterizing the CRPD as merely an identity-based treaty that seeks to retrofit human rights law through the simple insertion of “disability” and thus make amends for the relative invisibility of persons with disabilities in international human rights law.

The social model understanding of disability reflected in the CRPD, its embrace of disability and difference as a natural element of human variation, and its recognition of reasonable accommodation as integral to the non-discrimination duty is an example of how the treaty foregrounds difference. In so doing, it upends traditional notions of disability identity as foregrounded, fixed, static, and inferior.²³² The duty-bearer, in order to meet the non-discrimination obligation, must accommodate difference on an individual basis and accord accessibility measures and supports collectively to persons with disabilities.²³³ The CRPD introduces into human rights law, via Article 11 into refugee and asylum law, a disability narrative and accompanying principles, rules and concepts applicable to persons with disabilities.²³⁴ The CRPD framework has cast lines of flight and fostered connections that are currently precipitating change in numerous domains of international law.

We argue that addressing the problem that asylum claimants with disabilities presently face calls for a CRPD treaty practice not yet realized. The difference of disability in this context nonetheless might produce connections between the CRPD and refugee practice and actualize CRPD principles of non-discrimination and equality, reasonable accommodation, accessibility, and other elements of support. The adoption of the CRPD does provide some reason for optimism insofar as awareness of disability rights and human rights violations on the basis of disability is on the rise. In October 2010, the Executive Committee of the UNHCR adopted a

232 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW at 106, 157-59 (1990) (noting how categorization in law and policy more often than not “treats differences as intrinsic to the person or institution, as functions of internal competencies and abilities”). Further, the decision of the CRPD drafters to resist a rigid definition of disability but instead to provide a floor rather than a ceiling of who is covered under the treaty together with an explicit acknowledgement that “disability is an evolving concept” is an example of how the treaty foregrounds difference. See CRPD, *supra* note 7, at pmbl. (e).

233 CRPD Committee, General Comment No. 6, *supra* note 99, at ¶ 23.

234 CRPD, *supra* note 7, at art. 11.

Conclusion on refugees with disabilities.²³⁵ While it does not address in any substantive sense the particular barriers faced by asylum claimants with disabilities, the Executive Committee's Conclusion does provide a variety of general recommendations regarding the need to ensure that the UNHCR, States, and assistance providers work to better accommodate persons with disabilities. In due course, the UNHCR should turn its attention to the crafting of specific guidelines on international protection in the particular case of persons with disabilities.

Other mechanisms might also contribute to the further development of an accommodating refugee framework, one that better accords with the 2030 SDG framework's mantra of leaving no one behind and addresses persistent barriers not only for refugees with disabilities, but others who stand to gain from the CRPD framework.²³⁶ The UNHCR, working with and through the institutional arrangements of the CRPD, including the CRPD Committee and COSP, could adopt guidelines consistent with its practice in the area of gender-based asylum. Indeed, the failure of the UNHCR to do so when it has adopted detailed guidance in other spheres is troubling and likely reflects the failure of the organization to adequately build internal capacity and expertise on disability but also a lack of sustained pressure by civil society. The CRPD Committee, for its part, could assist in this process while at the same time building the interpretive guidance needed to inform its own reporting and handling of cases under the CRPD's Optional Protocol. This could happen in various ways, including through the adoption of a General Comment on the topic of disability asylum. Another approach could be the uptake by the CRPD Committee of a more productive line of questioning regarding disability asylum cases in the context of CRPD reporting processes, although time constraints might render this avenue implausible. Action would undoubtedly need to be led by forward-thinking action on the part of UNHCR. Finally, regardless of which of these mechanisms is pursued, mainstream human rights NGOs, along with organizations of persons with disabilities, have crucial roles to play in ensuring that the lived experience of persons with disabilities is amplified in their human rights reporting, upon which refugee status determination heavily relies.

Seen in this way, the CRPD offers continuous opportunities for alternatives; for a new metaphysics that regards the world—including treaty practice—as a constantly changing process that enables an ontology of

²³⁵ U.N. High Comm'r for Refugees Exec. Comm. of the High Comm'r's Programme, Conclusion on Refugees with Disabilities and other Persons with Disabilities Protected and Assisted by UNHCR No. 110 (LXI)- 2010, U.N. Doc. No. A/AC.96/1095 (Oct. 12, 2010).

²³⁶ U.N. DEP'T OF ECON. & SOC. AFFS., DISABILITY AND DEVELOPMENT REPORT: REALIZING THE SDGS BY, FOR AND WITH PERSONS WITH DISABILITIES, at U.N. Doc, U.N. Sales No. 19.IV.4 (2018).

becoming.²³⁷ It is with this perspective that this Article suggests the potential of the CRPD to connect with the refugee regime in ways not contemplated under the conventional order.

²³⁷ This approach is suggested, albeit implicitly, in those international law commentators who point to an international treaty as a “living instrument” or underscore its processual, interactional and expressive characteristics. *See generally* Jutta Brunée & Stephen J. Toope, *International Law and the Practice of Legality: Stability and Change*, 49 VICT. U. WELLINGTON L. REV. 429 (2018); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007).

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