

UNDERSTANDING DISABILITY UNDER THE CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPACT
ON INTERNATIONAL REFUGEE AND ASYLUM LAW

*Vandana Peterson**

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* Vandana Peterson is a graduate of Smith College and the University of Michigan Law School.

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Despite some of the most comprehensive legislation protecting the rights of Americans with disabilities, in 2012 the United States Senate voted against the ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹ The CRPD would have made explicit many new rights and freedoms for persons with disabilities around the world. However, disabilities, and in particularly mental health, have been a focus of discussion amongst policymakers and the general public in the United States and elsewhere, as relates to gun control and individuals with mental health disorders.² This Article argues that the evolving definition of disability should enable persons with disabilities (both physical and mental), who were unable to do so before, to seek asylum and/or refugee status under the 1951 Refugee Convention.³

Since its inception in 1951, the Refugee Convention's definition of what constitutes refugee status⁴ has been the subject of debate and varying interpretation. Most common law jurisdictions have looked to international human rights law either as a comprehensive framework to adjudicate asylum claims or as an interpretive tool.

To gain refugee status, an applicant must show not only that he or she is outside their country of nationality but also has a well-founded fear of persecution due to one of five enumerated grounds (race, religion, nationality, political opinion or membership in a particular social group).

Disabled applicants have struggled with (1) demonstrating that their fear is well-founded under both objective and subjective criteria, (2) proving that the conduct at issue rises to the level of "persecution"; and (3) linking their fear of persecution to their membership in a particular social group.

¹ U.N. treaty on disabilities falls short in Senate, Brian Montopoli / CBS News/ December 4, 2012, http://www.cbsnews.com/8301-250_162-57557077/u.n-treaty-on-disabilities-falls-short-in-senate/.

² Laura Meckler & Jack Nicas, *Spotty Records Weaken Background Checks*, WALL ST. J., Jan. 15, 2013, http://online.wsj.com/article/SB10001424127887324595704578244153323_837058.html.

³ Randal C. Archibold, *Abuses Found at Mexican Institutions for Disabled*, N.Y. TIMES, Nov. 30, 2010, <http://www.nytimes.com/2010/12/01/world/americas/01mexico.html>.

⁴ Asylum and refugee status are often conflated and both determinations are made under the same legal standard that requires persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. However, those seeking refugee status typically must apply while outside both their country of nationality and the host country. Asylum-seekers must be in the host country or applying for admission at a host country port of entry. Another distinction is that a refugee is an asylum-seeker whose application has been successful. In this Article, both asylum-seeker and refugee are used to denote those persons who have left their country of nationality and are seeking legal entry or status in a host country.

This Article examines the human rights and social approaches to understanding “disability” and argues that the CRPD supports both approaches, which in turn facilitate a showing of persecution on grounds of membership in a particular social group. While so-called socio-economic rights have rarely been the basis of successful applications for asylum, the CRPD and the evolving definition of disability shifts the focus from more traditionally acceptable bases for asylum such as torture and the physical threat to life, and enables applicants to make claims based on deprivation of other basic human rights. Although some of the challenges faced by applicants with disabilities, will be mitigated by the CRPD and its more inclusive approaches to understanding disability, relying on the CRPD will not open the floodgates and greatly increase the number of asylum seekers with disabilities.

Part I establishes the utility of a human rights framework and the CRPD for adjudicating asylum claims. Part II shows how the CRPD has expanded the definitional constraints of “disability,” primarily through a human rights and social approach to understanding the concept. Part III summarizes new proposals to show the objective and subjective elements of well-founded fear. Part IV argues that under the CRPD’s human rights model of disability, persons with disabilities will have a lower burden in showing persecution. Finally, Part V demonstrates how the CRPD’s social approach to understanding disability helps to show that persons with disability comprise a “particular social group,” in contemporary asylum adjudication.

I. USING A HUMAN RIGHTS FRAMEWORK TO ADJUDICATE ASYLUM CLAIMS

[M]en walked around half-naked, feces littered a yard, bedsheets were missing, the smell of urine permeated a day room, bathroom faucets malfunctioned and patients lay sprawled on several patches of grass . . . elderly women sat tied to wheelchairs, staff members hustled to clean soiled floors as investigators moved through, and patients and their caretakers could not fully explain how or why they were institutionalized. A trembling blind woman said she had been raped by a staff member—who officials said was dismissed during a criminal investigation—and would feel safer on the streets. “I don’t have any hope,” she said. “I don’t have a nickel to get out of this place.”⁵

⁵ Archibold, *supra* note 3.

A New York Times reporter wrote of these deplorable findings at a Mexican mental health institution in November 2010.⁶ Two years later, in November 2012, the same reporter wrote of similar violations in Guatemala:

Children and adults were abused at the hospital, basic medical care was denied and women were subjected to sex trafficking, often controlled by guards from the national police and gang members given access to the hospital from an adjacent prison Patients lay about on the ground in dirty or tattered clothing, while others were tied to chairs and beds in dank, dreary buildings—freshly scrubbed for the inspection, it appeared, by the suffocating scent of bleach—or wandered around with no purpose or attention A woman locked in an isolation cell moaned in confusion, and staff members reported shortages of medicine and inconsistent care by doctors.⁷

Not much appears to have changed in the past two years, or even the past ten years when reporters found similar conditions in a Mexican asylum.⁸

Such blatant violations of fundamental human rights are a primary concern of international refugee law, whose main purpose is to protect individuals who are vulnerable to human rights violations and are not adequately protected by his/her own government.⁹ The definition of refugee is a person who “owing to a 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 to or, owing to such fear, is unwilling to avail himself of the

⁶ *Id.*

⁷ Randal C. Archibold, *Commission Calls for Guatemala to Protect Patients*, N.Y. TIMES, Nov. 29, 2012, http://www.nytimes.com/2012/11/30/world/americas/commission-calls-for-guatemala-to-protect-patients.html?_r=0.

⁸ Just as we walked in, 15 naked women were being marched toward us, and we backed away, to give them privacy. But the naked women paraded past, to a hallway where a male attendant stood beside the shower room. There, as hospital workers came and went in the hall, the 15 naked women squatted, shivering, their arms folded over their breasts for warmth, waiting to shower. Standing nearby, the ward nurse, Oliveria Garcia, explained, “Most days, we may have two towels for 98 women.”

Michael Winerip, *The Global Willowbrook*, N.Y. TIMES, Jan. 16, 2000, 6 (Magazine), at 63.

⁹ James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991).

protection of that country.”¹⁰ Professor James Hathaway breaks down this definition into practical terms. In practice, a person seeking refugee status must demonstrate that (1) he/she is outside his/her country of origin; (2) he/she has a well-founded fear, which involves both an objective and subjective determination of that fear; (3) the fear is of being persecuted (i.e., experiencing sufficiently serious harm); and (4) the persecution is primarily due to his/her race, religion, nationality, political opinion or for belonging to a particular social group.¹¹ These latter three elements are often difficult for refugees to prove, and the high burden of proof means that many potentially valid claims are either denied or subjected to excessive scrutiny.¹² Applying the UN Convention on Rights of Persons with Disabilities (CRPD) in framing the claim for refugee status alleviates this burden.

A. Relationship between International Human Rights Law and International Refugee Law

International human rights law, its treaties, conventions, and customs are closely related to international refugee law. The treaty bodies that constitute international refugee law are the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Optional Protocol. Most states have incorporated them into domestic legislation (such as the Immigration and Nationality Act or INA in the United States),¹³ to establish the legal framework applied by adjudicators to asylum claims. In the United States, the asylum program, which consists of an affirmative and defensive application for asylum (to be discussed below), is overseen by the Department of Homeland Security’s United States Customs and Immigration Services (USCIS) and the Department of Justice’s Executive Office of Immigration Review (EOIR).

The general instrumentalities of international human rights law are: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the UDHR is non-binding in nature, it remains an influential source globally. Several human rights instruments deal with specific “vulnerable parties” (i.e., the Convention on the Elimination of All Forms of Discrimination Against

¹⁰ Convention Relating to the Status of Refugees, art. 1A, Apr. 22, 1954, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

¹¹ Hathaway, *supra* note 9, at 113.

¹² *Id.*

¹³ 8 U.S.C.A. § 1158 INA 208.

Women (CEDAW), the Convention on the Rights of the Child or (CRC)). These instruments provide several explicit protections against physical and psychological harm that could befall their respective constituents.

One of the oldest and most fundamental protections contained in international human rights instruments is the prohibition of torture or cruel, inhuman, or degrading treatment.¹⁴ This prohibition is a rule of special character in international human rights law, from which no derogation is permitted. In other words, even when certain elements of a treaty are breached by a signatory state, the clause or provision prohibiting torture may not be breached.¹⁵ The prohibition against torture is treated as customary law (or a *jus cogens* norm) by the global community and is respected even when it is not explicitly codified in treaty or legislation.¹⁶ Every human rights instrument contains an anti-torture provision,¹⁷ and the prohibition against torture has even merited a specialized convention, dealing with the

¹⁴ 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 (2010).

¹⁵ *Id.* at 33 & n.26

The *jus cogens* status of the torture prohibition has been recognized by the Committee against Torture, the treaty body that monitors the Convention against Torture, and provides authoritative interpretations of CAT obligations. . . . Judge [Rosalyn] Higgins, in discussing the legal character of the UDHR, states: “[T]he suggestion has been made that human rights treaties have the character of *jus cogens*. There certainly exists a consensus that certain rights—the right to life, to freedom from slavery or torture—are so fundamental that no derogation to them is permissible. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognized by civilized States, and not only as mutual treaty commitments.” Internal citations omitted.

¹⁶ *Id.* (citing M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 *LAW & CONTEMP. PROBS.* 63–74 (1996)).

¹⁷ See, e.g., Universal Declaration of Human Rights Art. 5; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, art. 14; Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13, art. 11; Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, art. 24; Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3, art. 15 [hereinafter CRPD]. Article 5 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 2005), states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Regional human rights instruments echo the same statements. For example, Article 5 of the American Convention on Human Rights, July 18, 1978, 1144, U.N.T.S. 123, recognizes the right of the individual “to have his physical, mental and moral integrity respected” along with the right to be free from torture and cruel, inhuman, or degrading treatment or punishment.

issue in greater depth: the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁸

Although refugee law and human rights law were created to serve different purposes under different global circumstances, many scholars, activists, and practitioners have advocated using a human rights approach to adjudicating asylum claims. For example, Hathaway has stated that international human rights law is a means of regulating state actions and of curtailing state sovereignty, arguably in order to protect individual citizens.¹⁹ While international refugee law seeks to protect individuals, it is also concerned with protecting states' sovereign borders and territories from unwanted influxes of foreign nationals. At the crux of the difference is that when human rights protections, which must come from an individual's home country, fail, then refugee law protection, which comes from a foreign state, can be invoked as a last resort. To identify the precise point at which human rights protections fail and refugee law protections may be invoked, the instruments in both fields must be read together.

Indeed, some adjudicators already use both refugee and human rights law in tandem, though many continue to rely exclusively on refugee law, hearing claims in a vacuum of sorts. Refugee law, when considered without the benefit of a human rights framework, runs into a series of problems. To begin, refugee law is a product of post-World War II Western political objectives and is therefore an outdated Euro-centric regime that was created to address the main political problems of the time, namely the rampant human rights violations of the Holocaust era.²⁰ Applying refugee law in a vacuum today would likely overlook and exclude most refugees from non-European and developing countries.²¹ Second, the reality of contemporary refugee law is that most persons who are forced to migrate and seek refugee status must rely not on the state, but upon whatever emergency assistance or resettlement opportunities are available to them through the *aegis* of various unofficial and non-governmental agencies.²²

The overwhelming challenges faced by vulnerable individuals who are forced to migrate to find alternate protections, makes a strong argument for re-conceiving refugee law as human rights protection. This re-conceptualization involves a showing of well-founded fear of persecution

¹⁸ Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter CAT].

¹⁹ Hathaway, *supra* note 9.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

through a risk to basic human rights in addition to some differential impact based on civil or political status.²³ Additionally, there should be a “sphere of autonomy for the victims of human rights violations so that any person whose basic human dignity is at risk in her home state is empowered to leave the abusive situation.”²⁴

The CRPD can inform and influence domestic adjudication of asylum claims in two ways: (1) as one of the many human rights instruments that provide the framework in which refugee and asylum law should be situated (i.e., the Hathaway approach to re-conceiving refugee and asylum law); or (2) as an additional consideration in the so-called “defensive” asylum programs of states where typically the CAT is the sole basis on which adjudicators rely.

B. The CRPD as a Complement to the CAT in Defensive Asylum Claims or Withholding of Removal

The CAT provides an alternative form of relief when a vulnerable party is fleeing from his/her home country. In the United States, the affirmative asylum program involves the submission of Form I-589 which is the “Application for Asylum and for Withholding of Removal,” and is based on the Refugee Convention and also in part on the United States’ obligations under Article 3 of the CAT.²⁵ The defensive asylum program (i.e., when an individual is seeking asylum as a result of finding himself/herself in deportation proceedings) is also based in part on the CAT.²⁶ Under relevant treaty provisions, the United States agrees not to “expel, return, or extradite aliens to another country where they would be tortured.”²⁷ Section 208.18 of the Implementation of the CAT describes how a human rights treaty came to be incorporated in the domestic asylum adjudication process and how it should be interpreted.²⁸

On December 13, 2006 when the CRPD was officially being adopted by resolution of the UN General Assembly, the Chair of the Ad Hoc Committee, Ambassador Don MacKay, reiterated that

²³ *Id.*

²⁴ *Id.*

²⁵ CAT, *supra* note 18, art. 3.

²⁶ *Id.*

²⁷ U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FACT SHEET (Jan. 15, 2009), available at <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtecti ons.pdf>.

²⁸ Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities . . . many of the obligations under other instruments are set out in quite a broad and generic way, which can leave grey areas for their practical implementation in respect of particular groups.²⁹

The CRPD, along with its Optional Protocol, was unique in its very inception—it was the result of the fastest negotiations in human rights history, and received almost immediate, widespread approval (ratified faster than all treaties other than the CRC) from states.³⁰ The CRPD entered into force on May 3, 2008.³¹

The CRPD's provisions, when read together and in keeping with the drafters' intent, form a powerful basis for human rights protections that bolsters the provisions already in place through the CAT and other instruments. Indeed the convention was ratified so quickly and widely in part because its mandate was not to create "new" law, but rather to apply existing rights to persons with disabilities, and provide context to the determinations made on human rights issues concerning persons with disabilities.³² However, Article 15 of the CRPD—the final formulation of the prohibition of torture and cruel, inhuman, or degrading treatment or punishment—parallels the provision found in Article 7 of ICCPR,³³ and disability rights scholars are critical of its failure to contextualize the torture prohibition with respect to persons with disabilities in any one specific article.³⁴ Instead, the prohibition set out in Article 15 of the CRPD is

²⁹ Statements made on the Adoption of the Convention on the Rights of Persons with Disabilities, available at <http://www.un.org/disabilities/default.asp?id=155>.

³⁰ It was negotiated during eight sessions of an Ad Hoc Committee of the UN General Assembly from 2002 to 2006 and received an unprecedented eighty-two signatures, as well as forty-four signatures to the Optional Protocol, and one treaty ratification on its opening day. See Lord, *supra* note 14; see also 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).

³¹ CRPD, *supra* note 17.

³² Lord, *supra* note 14.

³³ Compare CRPD, *supra* note 17, art. 15, with ICCPR, *supra* note 17, art 7.

³⁴ Article 15 of the CRPD, *supra* note 17, provides that:

Freedom from torture or cruel, inhuman or degrading treatment or punishment.

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation. (includes private and public institutions)

reinforced by an austere Article 17, which simply guarantees the physical and mental integrity of persons with disabilities.³⁵ Articles 15 and 17 must therefore be read in conjunction with the remaining provisions of the CRPD, in particular: the general principles in Article 3,³⁶ along with Article 14, (arguably serving the function of prohibiting forced or compulsory treatment or living situations such as institutionalization), and Article 16, which prohibits violence, abuse, and exploitation of persons with disabilities. Such a reading will ensure a more accurate and nuanced process of interpretation that is in line with the objectives of the treaty and with the rules of international treaty interpretation.³⁷

The Vienna Convention on the Laws of Treaty Interpretation states in Article 31 that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁸ Furthermore, states’ obligations under international law stem from the combination of international instruments they have ratified. Treaties must be viewed as part of a whole rather than as discrete, unrelated documents.³⁹ Even when a state is not party to a treaty, when the treaty has been as widely ratified as the CRPD, it should

2. States Parties shall 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.

³⁵ *Id.* art. 17: Protecting the integrity of the person: Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

³⁶ *Id.* art. 3 : General principles:

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

³⁷ *See* Lord, *supra* note 14.

³⁸ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S 331 [hereinafter VCLT].

³⁹ U.N. GAOR, 58th Sess., Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (April 13, 2006) (especially 1.3; 3, self-contained regimes).

be valued by the international community as a whole and by non-parties at least such that their actions are not in direct contravention of the treaty.⁴⁰

The CRPD, when read as a whole,⁴¹ contains the specific and relevant standards enshrined in the CAT but situates them in the context of disability.⁴² In cases where torture is threatened or an individual risks cruel, inhuman treatment upon return to his/her home country, the CAT is relied upon with particularity, in addition to and sometimes in *lieu* of the national legislation for determining refugee status or withholding of removal. Similarly, in cases involving persons with disabilities the CRPD should carry special weight in asylum adjudication and in the withholding of removal. Like the CAT, it should have a specific role in domestic legislation which incorporates the Refugee Convention and Optional Protocol.

When faced with the inability to persuade adjudicators of the linkage between the harm and one of the five nexus grounds prescribed by refugee law, applicants with disability often turn to the CAT as a fall back option and attempt to show that the harm they face is so severe that it does not matter whether it is related to one of the five grounds. The CRPD should alleviate the burden of proof that applicants with disability have had to shoulder in the past, by relying on the CAT as the only human rights treaty available to them. For example, in the United States, the Third Circuit decided a case in favor of an HIV positive Haitian amputee whose claim was brought on the basis of his unique susceptibility to torture and cruel and inhuman treatment upon return to Haiti.⁴³ Although adjudicators had rejected previous cases involving Haitian nationals without disabilities,⁴⁴ on the grounds that torture required particular intent on the part of the Haitian state and its authorities, the Court of Appeals found that the applicant had satisfied his burden of proof by submitting reports of his specific condition, and general reports of the prevalent conditions in Haiti, in reliance on the CAT.⁴⁵ The anti-torture provisions of the CRPD when read holistically with the remainder of the treaty should permit a disabled applicant to make a stronger case in reliance on his/her disability rather than on the general terms of article 3 of the CAT which requires a high threshold to be met to show that an act constitutes

⁴⁰ *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

⁴¹ See *supra* text accompanying notes 35–37 (discussing arts. 15 and 17 of the CRPD).

⁴² Lord, *supra* note 14.

⁴³ *Lavira v. Attn’y Gen.*, 478 F.3d 158, 170–71 (3d Cir. 2007), *overruled in part by Pierre v. Attn’y Gen.*, 528 F.3d 180 (2008) (finding that willful blindness of a disability can be used to establish knowledge by a government official of heightened risk of torture but it does not satisfy the specific intent requirement in the CAT).

⁴⁴ *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005).

⁴⁵ *Lavira*, 478 F.3d at 170.

torture per se. The critical element in Lavira was the combination of factors he could demonstrate, not only that the applicant was an amputee but rather the discriminatory behavior of Haitian authorities against those who were HIV positive and that he had been a longtime political supporter of Haiti's exiled political leader. Without the combination of factors and most importantly, the known discrimination against HIV positive individuals, Lavira's case may have been decided differently. As courts become increasingly hesitant to grant asylum to such individuals, the CRPD will be a useful tool.

C. Situating Refugee and Asylum Law in a Human Rights Framework that Includes the CRPD

When the CAT was drafted in 1984, the UN appointed a Special Rapporteur to monitor compliance by states. The plight of persons with disabilities was the subject of a recent report by the Special Rapporteur who "haile[d] the entry into force of the Convention on the Rights of Persons with Disabilities, which reaffirm[ed] the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment, and which offers authoritative guidance in the interpretation of the rights and fundamental freedoms of persons with disabilities,"⁴⁶ because despite the existing human rights instruments, disability-specific instruments, such as the CRPD, provide necessary additional guidance on matters pertaining to the physical and mental integrity of persons with disabilities.⁴⁷ When the CRPD was created, it consolidated and replaced a host of existing bodies and programs which had proven inadequate, over time, in addressing the needs of persons with disabilities.⁴⁸

Even if the CRPD does not support a separate basis for seeking asylum or withholding from removal similar to the CAT, like the CRC and CEDAW, which are commonly invoked in cases of especially vulnerable classes of refugees, the CRPD should be considered by adjudicators when hearing claims brought by persons with disabilities. For example, in *Baker v.*

⁴⁶ Special Rapporteur of the Human Rights Council, *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/64/215 (Aug. 3, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/437/92/PDF/N0943792.pdf?OpenElement>.

⁴⁷ Lord, *supra* note 14.

⁴⁸ The erstwhile World Programme of Action Concerning Disabled Persons (adopted 1982) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (adopted 1993) both failed to explicitly address the fundamental right of persons with disabilities to live free of torture. Lord, *supra* note 14.

Canada, the Supreme Court of Canada consulted the CRC even though the treaty had not yet been incorporated into Canadian law and held that although the CRC had no direct effect domestically, the “values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”⁴⁹

The question of whether and how the CRPD should be read in conjunction with the pre-existing Refugee Convention (i.e., how it applies to refugees), is addressed implicitly by the United Nations High Commissioner for Refugees (UNHCR), the UN’s specialized agency dealing with refugee populations. After the creation of the CRPD, in 2010, the Executive Committee (Committee) of the UNHCR began drafting a Conclusion on refugees with disabilities, and examined, among other things, the applicability of the CRPD to refugees, both directly and indirectly.⁵⁰ First, the Committee contrasted that in theory, states obligations under the CRPD were owed only to nationals, whereas the obligations under the Refugee Convention were owed to foreign nationals.⁵¹ On a practical level, the Committee was concerned that “host States, which are often developing countries, have limited resources and face various challenges in providing such services and facilities” and therefore, reaffirmed the role of the international community in burden-sharing.⁵² In spite of these concerns, the Committee’s conclusions imply that the CRPD does indeed apply to refugees (although not expressly stated).⁵³ The Committee, by virtue of the language used in its conclusion, implicitly recognizes the relevance of the CRPD to refugees and recalls “the recognition by the [CRPD] of the inherent dignity and equality of persons with disabilities,” and recommends ensuring “that refugee status determination and all other relevant procedures are accessible and designed to enable persons with disabilities to fully and fairly represent their claims with the necessary support.”⁵⁴ The Committee on the Rights of Persons with Disabilities has been in agreement with the UNHCR Conclusions.⁵⁵ Relying on the Vienna Convention and well-established

⁴⁹ *Baker v. Canada* (Ministry of Citizenship and Immigration), [1999] 2 S.C.R. 817, ¶ 69.

⁵⁰ Crock, Ernst & McCallum, *supra* note 30, at 4.

⁵¹ *Id.*

⁵² U.N. High Commissioner for Refugees, *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR*, No. 110 (LXI) - 2010 (Oct. 12, 2010), available at <http://www.unhcr.org/4cbeb1a99.html>.

⁵³ Crock, Ernst & McCallum, *supra* note 30, at 4.

⁵⁴ U.N. High Commissioner for Refugees, *supra* note 52.

⁵⁵ U.N. Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities*, A/66/55 (2011), available at <http://www.unhcr.org/refworld/docid/4eef033a2.html>.

principles of treaty interpretation further bolsters the UNHCR's Conclusions that the CRPD does apply to refugees and can be read as a complement to the Refugee Convention.⁵⁶

The subsequent sections will detail how the CRPD reduces some of the definitional barriers which persons with disabilities have historically faced when seeking asylum under international refugee law.

II. THE HUMAN RIGHTS AND SOCIAL APPROACHES TO UNDERSTANDING "DISABILITY" UNDER THE CRPD

A. *The Evolution of Modern Disability Studies*

Disability has evolved, over time, as a general concept, and correspondingly as a field of legal study. Disability Studies scholars have articulated several models of understanding and defining disability: the medical model or welfare-model, the social model, and the human rights model will be considered below.

This understanding has come about through an evolutionary process, which found its beginnings in a medically-based approach which continues to be the dominant approach in many countries.⁵⁷ Arlene Kanter summarizes Modern Disability Studies as

the examination of disability as a social, cultural, and political phenomenon, which counters the notion of disability as an inherent, immutable trait located in the person, . . . By defining disability as a social category rather than an individual characteristic, disability is no longer the exclusive domain of medicine, rehabilitation, special education, physical or occupational therapy, and other professions oriented toward the cure, prevention, or treatment of a disease, injury, or physical or mental impairment.⁵⁸

⁵⁶ VCLT, *supra* note 38, art. 26 ("Absent a contrary intention, a treaty is binding upon each State Party in respect of its entire territory."); *accord* Crock, Ernst & McCallum, *supra* note 30, at 5.

⁵⁷ In the U.S., there is ongoing debate as to whether the American with Disabilities Act (ADA), the primary legislation dealing with disability, should continue with the social and civil rights approach or revert to the medical and welfare approach. See Mark C. Weber, *Disability Rights, Welfare Law*, 32 CARDOZO L. REV. 2483 (2011).

⁵⁸ Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with it or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 408 (2011).

In its 2011 World Report on Disability, the World Health Organization (WHO) observes: “The disability experience resulting from the interaction of health conditions, personal factors, and environmental factors varies greatly. Persons with disabilities are diverse and heterogeneous, while stereotypical views of disability emphasize wheelchair users and a few other ‘classic’ groups such as blind people and deaf people.”⁵⁹

B. Different Approaches to Understanding Disability

The medical model of disability is perhaps the oldest permutation, forming the basis for many charitable and welfare-style programs for persons with disability. This model is paternalistic, and attaches a heavy burden of stigma to the individual who is viewed through its lens. Simply put, this model uses disability and impairment interchangeably and defines a person exclusively by her impairment.⁶⁰ The medical model has prompted societies to “treat” or use medical intervention to help persons with disabilities but it also influences societies to exclude such individuals through institutional methods that reinforce the marginalization of such persons even while helping them.⁶¹

The modern disability rights movement, which has given rise to the social and civil rights approaches to understanding disability, balances “that physical or mental conditions do not themselves disable, but instead that environmental and attitudinal barriers keep people with physical and mental conditions from full and equal participation in daily life.”⁶² The social model emphasizes the difference between an “impairment,” which is a specific physical or mental condition or a sensory (vision, hearing) deprivation, and “disability,” which is the consequence of society reacting to the impairment.⁶³ However, even within the social approach to disability, there

⁵⁹ WORLD HEALTH ORGANIZATION, WORLD REPORT ON DISABILITY 7 (2011), available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf?ua=1.

⁶⁰ Kanter, *supra* note 58, at 419.

⁶¹ *Id.*

⁶² Weber advocates moving from the social model civil rights model in order to promote the realization that reforms to eliminate the attitudinal and physical barriers society imposes are a matter of fundamental social justice and legal policy. Viewed in this way, the model may have much to say about which welfare reforms to advance. The civil rights approach—identifying societal sources of disadvantage and looking for legal and policy solutions to them—further enriches the discussion by placing law reform front and center.

While this may be viable in a domestic context, in the international context the social model is more broadly acceptable. Weber, *supra* note 57.

⁶³ Kanter, *supra* note 58, at 419.

are variations. On one hand, everyone is considered to have impairments and the negative treatment we face based on those impairments is considered disabling. On the other hand, only systemic disadvantages caused by an impairment is disabling.⁶⁴ Ultimately, under the social model it is the negative treatment of someone with an impairment that constitutes a disability.

Both the medical and social approaches to disability deal with a problem versus solution paradigm. In the former, the problem is the disability and the solution is medical treatment. In the latter, the problem is society's negative treatment of an impairment and the solution is enduring changes in society's behavior. Critical of the social approach's reliance on random social agents to create change, Mark Weber argues that

To achieve equality, the person with the disability must be the agent rather than the passive recipient of social interventions, the subject of the sentence rather than the object. This is what the social model is about, and that realization strongly supports a full-fledged civil rights approach to disability and disability policy.⁶⁵

The civil rights model that he proposes, however, also construes disability under the problem versus solution paradigm; the problem is identifying societal sources of disadvantage and the answer is "looking for legal and policy solutions to them."⁶⁶ The main difference is that the civil rights model "promote[s] the realization that reforms to eliminate the attitudinal and physical barriers society imposes are a matter of fundamental social justice and legal policy," and is therefore more likely to lead to law reform where persons with disability play a central role rather than depend on the vagaries of abstract social agents to bring about change.⁶⁷

The definition of disability adopted by the United Nations⁶⁸ and the international human rights community was developed by the World Health Organization (WHO) in 1980 and also distinguishes between impairment and

⁶⁴ Kevin Barry, *Gray Matters: Autism, Impairment and the End of Binaries*, 49 SAN DIEGO L. REV. 161, 196–97 (2012) (discussing the universal and minority group variations within the social approach to disability).

⁶⁵ Weber, *supra* note 57, at 109.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ G.A. Res. 48/96, 91 20, U.N. Doc. A/RES/48/96 (Dec. 20, 1993).

disability; the former is an anatomical loss, and the latter is a restriction resulting from the impairment.⁶⁹

Realizing that the medical, social, and civil rights approaches to disability regard impairments as a problem, and something to be rid of, and situate the issue in terms of problem and solution, critics created yet another formulation of disability studies: the human rights approach. Professor Michael Stein coined the term “disability human rights” and describes the formulation of this paradigm as one that “combines components of the social model of disability, the human right to development, and philosopher Martha Nussbaum’s version of the ‘capabilities approach,’ but filters these frameworks through a disability rights perspective to preserve that which provides for individual flourishing and modify that which does not.”⁷⁰ Rather than focus on the capabilities of persons with disabilities, or the lack thereof, disability human rights focuses on the talents of persons with disabilities and thereby places greater emphasis on dignity and autonomy.⁷¹ For example, an individual with autism may be deemed incapable of functioning “normally” and therefore cannot contribute sufficiently to society. On the other hand, she may have a keen ear for music and be a violin virtuoso allowing her to contribute to society through creativity and musical skill. Therefore the former classification potentially undermines her human dignity and autonomy. In contrast, the human rights paradigm avoids the marginalization and exclusion which the social approach could allow and argues that the rights enjoyed by an individual “derives from common humanity, rather than actual or potential contribution to the society in reciprocity for benefits, or even from shared vulnerabilities as members of the community.”⁷² The human rights paradigm also treats so-called first generation rights (or negative rights such as the right to be free of discrimination and torture) as equally important to second-generation or positive rights (such as the right to education and to employment).

Paradoxically, while using the human rights approach may prove effective in establishing a well-founded fear of persecution (discussed previously), it is the social approach to disability which is likely to be particularly effective in showing membership in a particular social group.

⁶⁹ See WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES, AND HANDICAPS: A MANUAL OF CLASSIFICATION RELATING TO THE CONSEQUENCES OF DISEASE 47, 143 (1980), available at http://apps.who.int/iris/bitstream/10665/41003/1/9241541261_eng.pdf?ua=1.

⁷⁰ Michael Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 76–77 (2007).

⁷¹ *Id.*

⁷² Weber, *supra* note 57, at 146 (citations omitted).

The CRPD may support both approaches to disability but it remains to be seen whether and how adjudicators will use both in hearing asylum claims.

C. Using the Various Approaches to Disability Studies in Conjunction with the CRPD

The CRPD does not contain a precise or explicit definition of disability, which allows for the term to be interpreted using a social and human rights approach. This was a deliberate choice; given the evolutionary nature of disability studies and the wide divergences in understanding the concept of “disability,” it was decided that the CRPD should not include a definition of disability since any definition would necessarily include some people and not others.⁷³ Further, including a definition of disability in the CRPD could undermine its commitment to interpreting disability using the social model, thereby risking a shift in focus from society’s unequal treatment to the individual.⁷⁴

Although some perceive and celebrate the lack of a definition of “disability,” others find that the CRPD, does define disability, albeit in imprecise terms: “‘as an evolving concept’ that ‘results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders, their full and effective participation in society on an equal basis with others’ and not as an inherent characteristic.”⁷⁵ The absence of a specific definition for “disability” allows applicants to demonstrate their disability in diverse ways. For example, in states where the medical definition is predominant, asylum applications may be dismissed on the grounds that medical treatment and access to healthcare are not permissible grounds for seeking refugee status. Using the CRPD would allow the same applicant to recast her claim under a human rights model of disability to show that the conduct she is fleeing does amount to serious harm and to persecution. Using the CRPD and a social model of disability where the element of societal discrimination or mistreatment is implicit would allow the applicant to satisfy the requirement that the persecution she faces is

⁷³ See generally Kanter, *supra* note 58, at n.121 (citing UN General Assembly, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Aug. 17, 2005, A/60/266, available at <http://www.unhcr.org/refworld/docid/43f30fa60.html>).

⁷⁴ *Id.*

⁷⁵ Michael Ashley Stein & Janet E. Lord, *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, 423 (2011).

particularized to her, as demonstrated below in the discussion of membership within a particular social group.

III. SHOWING WELL-FOUNDED FEAR USING THE CRPD

The Refugee Convention's definition of a refugee, contained in Article 1 of the treaty, forms the basis of the claim adjudication process in most states, and often involves a complicated set of administrative procedures, including interviews, providing evidence and appealing a denial.⁷⁶ Showing that a fear is (1) "well-founded" and a result of (2) "persecution" as required by Article 1, are two of the main challenges which applicants with disabilities most commonly encounter.⁷⁷ In showing that a fear is well-founded, disabled applicants (particularly with mental disabilities) must overcome unique challenges. To be "well" founded, a fear must stem from objectively verifiable grounds.⁷⁸ Also, the "fear" must be subjectively felt by the applicant herself, which can pose unique difficulty in cases involving mental impairments. In a recent piece, Australian scholars Mary Crock, Ron McCallum, and Christine Ernst suggest two interesting strategies that aid in establishing a well-founded fear.⁷⁹ Their models combined with the human rights approach to disability as suggested by the CRPD, facilitate the showing of persecution under the Refugee Convention. Namely such a combination facilitates overcoming two main roadblocks: (1) having to counter that certain harmful conduct resembling discrimination does not rise to the level of seriousness to constitute persecution and (2) showing that certain harm is particularized, not simply the result of a widespread lack of resources in the applicant's home state.⁸⁰ Below is a brief recounting of Crock, McCallum, and Ernst's suggestions for showing "well-founded fear," followed by a discussion of the human rights approach to showing "persecution" arising by reason of one of the five specified grounds.

⁷⁶ Refugee Convention, *supra* note 10, art. 1; see Elisa Mason, Guide to International Refugee Law Resources on the Web (Mar. 5, 2009), available at <http://www.llrx.com/features/refugee.htm/>.

⁷⁷ Mary Crock, Ron McCallum & Christine Ernst, *Where Disability and Displacement Intersect: Asylum Seekers with Disabilities* 4, 12 (Discussion paper prepared for the Vulnerable Persons Working Group International Association of Refugee Law Judges World Conference Sept. 2011), available at http://www.iarjl.org/general/images/stories/BLED_conference/papers/Disability_and_Displacement-background_paper.pdf.

⁷⁸ See *infra* Part III.A.

⁷⁹ See *infra* Part III.A.

⁸⁰ See *infra* Part III.A.

A. Showing Well-Founded Fear

Article 1(A)(2) of the Refugee Convention requires that a refugee's fear of persecution be "well-founded."⁸¹ Well-founded fear imports both a subjective element and an objective one. To satisfy the subjective element, asylum seekers must actually fear persecution. To satisfy the objective element, asylum seekers' fear must be deemed reasonable to the average person.⁸² For example, in the U.S., an asylum applicant must show that her "well-founded fear of persecution . . . is (subjectively) genuine and that it is reasonable in light of the (objective) credible evidence."⁸³ Thus, an applicant must establish that her fear is "both subjectively real and objectively reasonable."⁸⁴ Both of these elements may pose problems for asylum seekers with disabilities, including those whose claims are not substantively related to their disability.⁸⁵

To show objective fear, it is sufficient to show that a person's reasons for perceiving that fear are objective.⁸⁶ Borrowing from the U.S. tort law principle of an egg-shell skull or increased susceptibility, Crock, McCallum, and Ernst suggest that "when a mental or physical condition heightens the perception or severity of a situation which the average person would not objectively find fearful, that fear could still qualify as 'objective' if the mental or physical condition underlying its perception is objectively verified."⁸⁷ In the disability context, "while some persons with disabilities may be incapable of comprehending fear, others may hold fears that are aggravated by their mental or intellectual disability . . . In other words, they may intensely fear situations that would not necessarily induce such fear in persons without any disability," such as social phobias, personality disorders, post-traumatic stress.⁸⁸ While the scholars admit that their approach has not yet been seen in asylum adjudication, key reference tools and guides used widely by the international legal community support accepting as objective a fear that is so perceived due to an individual's disability, and suggest

⁸¹ Refugee Convention, *supra* note 10, art. 1(A)(2).

⁸² U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 38–41 (Jan. 1992) *available at* <http://www.unhcr.org/refwor/ld/docid/3ae6b3314.html> [hereinafter UNHCR HANDBOOK].

⁸³ *Tzankov v. INS*, 107 F.3d 516, 519 (7th Cir. 1997) (citations omitted).

⁸⁴ *Bradvice v. INS*, 128 F.3d 1009, 1012 (7th Cir. 1997).

⁸⁵ Crock, Ernst & McCallum, *supra* note 30, at 12–13.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

adapting the standard for certain vulnerable populations.⁸⁹ Thus, even an exaggerated fear could be considered objective, provided it is reasonable for a mentally or physically disabled person to hold such fears.⁹⁰

In addition to the creative use of U.S. tort law to establish certain atypical fears as objective, Crock, McCallum, and Ernst also suggest borrowing from children's rights rhetoric where children are considered uniquely "vulnerable" and therefore susceptible to fears that adults are not.⁹¹ The corollary to the CRPD in the children's rights context, the CRC, is used by adjudicators in adjudicating claims brought by child asylum applicants. For example, the principle of "best interest of the child" which is a key element of the CRC (the only treaty more widely and rapidly ratified than the CRPD) is used to lower the burden of proof on a child to demonstrate fear in asylum cases. It can be argued that the CRPD should similarly be used by adjudicators in cases involving persons with disabilities.

In Sweden, the domestic legislation for asylum adjudication (Swedish Aliens Act) states "that the best interests of the child can allow residence permits to be granted on humanitarian grounds for less compelling reasons when children are affected than otherwise."⁹² Thus, children may be granted refugee status even when they cannot demonstrate the level of harm normally required to be shown.⁹³ Similarly, in Canadian jurisprudence, national guidelines lower the burden of proof which child applicants face in showing both objective and subjective elements of well-founded fear, and "recognize that children may manifest their fears differently from adults, and harmful actions that may reach the level of harassment or discrimination when applied to adults may constitute persecution in relation to a child."⁹⁴

Crock, McCallum, and Ernst recognize that the second prong of a showing of well-founded fear, the need to demonstrate subjective fear, can prove particularly problematic for persons with mental or intellectual disabilities who, despite being in situations of danger, do not subjectively

⁸⁹ *Id.* The UNHCR HANDBOOK, *supra* note 82, is a resource for government officials, judges, and practitioners applying the refugee definition, and provides critical assistance in resolving variations in interpretation.

⁹⁰ Crock, Ernst & McCallum, *supra* note 30, at 12–13.

⁹¹ Jane McAdam, *Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection*, 14 INT'L J. CHILD. RTS. 260 (2006) (citations omitted).

⁹² *Id.* (citing J. Schiratzki, *The Best Interests of the Child in the Swedish Aliens Act*, 14 INT'L J. LAW, POL'Y & FAM. 206, 218 (2000) (citing [Prop.] 1996/97: 25 at 249 [government bill] (Swed.))).

⁹³ *Id.* (citing Aliens Appeals Board 970130, 970314).

⁹⁴ *Id.* (citing Separated Children in Europe Programme, 2004, ¶ 12.2.1; Malchikov v Canada, I.M.M.-1673-95 (18 January 1996)).

experience fear.⁹⁵ Therefore they suggest, once again, that the field of children's rights can provide some useful examples and guidance for the disability context.⁹⁶ Even when the conditions or circumstances are objectively dangerous, some persons with disabilities lack the psychological or cognitive ability to fear situations.⁹⁷ In theory, if the "subjective fear" requirement is applied too strictly, "all persons who are incompetent will, by reason of that incompetence, be unable to qualify as Refugee Convention refugees."⁹⁸ Sweden provides a useful example: while there are no instances where a child's fears *alone* (without corroborating evidence), gives rise to a right for refugee status, "children's mental reactions to excesses were deemed to strengthen the credibility and weight of the reasons pleaded by the parent as grounds for asylum."⁹⁹

The High Court of Australia has maintained that children lack the "maturity" necessary to perceive subjective fear and has formulated a substitute holding that "it is sufficient for their parents to hold a subjective fear on their behalf."¹⁰⁰ Although there is criticism of using "maturity" as a standard¹⁰¹ in the case of children, Crock, McCallum, and Ernst argue that it is natural to "extend this logic to psychologically or cognitively impaired adults."¹⁰² It follows that as in the case of child-asylum seekers, it is permissible to accept the subjective fear of a guardian or family member (or simply the available evidence)¹⁰³ if a disabled person lacks capacity to hold

⁹⁵ *Id.*

⁹⁶ Crock, Ernst & McCallum, *supra* note 30, at 12.

⁹⁷ MARY CROCK & LAURIE BERG, IMMIGRATION, REFUGEES AND FORCED MIGRATION 383 (2011).

⁹⁸ Canada (Minister of Citizenship v. Immigration) v. Patel, [2008] FC 747, ¶ 28.

⁹⁹ McAdam, *supra* note 91, at 260 (citations omitted).

¹⁰⁰ Crock, Ernst & McCallum, *supra* note 30, at 12 (citing Chen Shi Hai v. Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, 297).

¹⁰¹ See GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 357 (1996); Jacqueline Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 EUR. J. MIGRATION & L. 283, 297–98 (2001). Although Goodwin-Gill agrees that channeling child asylum-seekers into refugee status determination processes "will often merely interpose another obstacle between the child and a solution," he approaches the problem from the perspective of the child's best interests. GOODWIN-GILL, *supra*, at 358. He argues that an emphasis on maturity is misguided because there is no necessary correlation between any particular level of maturity and the existence of a well-founded fear; maturity is irrelevant to the question of whether the child may be persecuted; and maturity does not affect a child's capability of feeling fear (e.g., *Yusuf v M.E.I.*, [1992] 1 F.C. 629), but "may affect merely their capacity to understand the events or conditions which are the basis of that fear." GOODWIN-GILL, *supra*, at 357.

¹⁰² Crock, Ernst & McCallum, *supra* note 30, at 12.

¹⁰³ Canada v. Patel, [2008] F.C. 747, ¶¶ 29, 38; see also *Yusuf v. Canada*, [1992] 1 F.C. 629, 632.

subjective fear of persecution.¹⁰⁴ The determination of fear may be made based entirely on the basis of a family member or third party's fear on behalf of an applicant even when they are unable to accompany the applicant, whose own subjective fear cannot be established using the conventional framework.¹⁰⁵

IV. THE CRPD'S HUMAN RIGHTS APPROACH TO DISABILITY FACILITATES SHOWING PERSECUTION

A. Persecution as Generally Understood in Refugee Law

Once an applicant establishes that her fear is well-founded, she must show that what she fears is conduct that may be characterized as "persecution," under the Refugee Convention. Persecution is the combination of serious harm (arguably also the violation of certain human rights) and the failure of a state to protect from such serious harms and violations of human rights from occurring again. Using the medical definition of persecution, discussed *infra* Part IV.B.1, adjudicators would likely characterize a disabled person's asylum claim as one based purely on socio-economic factors, e.g., access to superior health care and medical treatment, and would deny the claim.

There is no clear, definitive meaning for persecution in refugee law.¹⁰⁶ Reading the Refugee Convention in light of the context, object and purpose, as per traditional treaty interpretation guidelines,¹⁰⁷ gives rise to several meanings. In an era characterized by the dual themes of equality and non-discrimination, persecution is often viewed in terms of a spectrum.¹⁰⁸ For example, persecution is an "especially severe form of discrimination, but less serious than genocide. . . ."¹⁰⁹ In the absence of a universal definition for "persecution," the UNHCR Handbook suggests that a definition may be inferred from Article 33 of the Refugee Convention: "A threat to life or freedom on account of" one of the five protected grounds is "always persecution."¹¹⁰ In the view of some conservative theorists, only this narrow

¹⁰⁴ Crock, Ernst & McCallum, *supra* note 30, at 12.

¹⁰⁵ *Id.* at 13.

¹⁰⁶ See UNHCR HANDBOOK, *supra* note 82, ¶ 51.

¹⁰⁷ VCLT, *supra* note 38, art. 31.

¹⁰⁸ Hathaway, *supra* note 9.

¹⁰⁹ Daniel J. Steinbock, *The Evolving Refugee Definition: Issues of Interpretation*, in REFUGEE RIGHTS & REALITIES 22–25 (Frances Nicholson & Patrick Twomey eds., 1999).

¹¹⁰ UNHCR HANDBOOK, *supra* note 82, art. 33.

subset of human rights violations constitutes persecution.¹¹¹ A less literal reading of Article 33 suggests, however, that other serious violations of human rights would also constitute persecution.¹¹²

Taking a human rights approach to defining persecution, it may be viewed as violations of fundamental rights or as the cumulative violation of several rights, and by reference to the rights and freedoms outlined in various human rights instruments. Courts are often inconsistent in measuring and assessing persecution. Indeed they have several paradigms to choose from. One put forth by Hathaway is “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”¹¹³ Guy Goodwin-Gill’s notion of persecution emphasizes the dynamic nature of persecution, stressing the need for its definition to respond to current developments in human rights.¹¹⁴ Jean-Yves Carlier proposes analyzing persecution in terms of *degrees* of breach—persecution is assumed to be present as soon as the treatment suffered disproportionately violates a basic human right.¹¹⁵ Another approach is to use human rights instruments, considering the *seriousness of breach*, which implicates state responsibility or failure of state protection.¹¹⁶ Yet another paradigm involves sorting the myriad rights enshrined in the ICCPR, ICSCER and UDHR into a hierarchy (e.g., the right the life is more important than the right to vote).¹¹⁷

While some courts, primarily in New Zealand, Canada and the UK use human rights law and its instruments as a resource, the human rights framework is largely absent in the U.S. assessment of serious harm and persecution. However, in recent U.S. jurisprudence, it has received some attention in the context of gender-based asylum claims.¹¹⁸

¹¹¹ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 107 (1991) (citations omitted).

¹¹² Kate Jastram & Shelly Cavalieri, *Human Rights in Refugee Tribunals*, 24 *REFUGEE SURV. Q.*, no. 2, 2005 at 9.

¹¹³ HATHAWAY *supra* note 111, at 104–05.

¹¹⁴ GOODWIN-GILL *supra* note 101, at 67.

¹¹⁵ Jean-Yves Carlier, *The Geneva Refugee Definition and the Theory of the Three Scales*, in *REFUGEE RIGHTS & REALITIES*, at 37, 40–45.

¹¹⁶ INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES, *A HUMAN RIGHTS CONFERENCE REPORT* (1998); *Gashi & Nikshiqi v. Secretary of State for the Home Department*, [1997] INLR 96.

¹¹⁷ HATHAWAY, *supra* note 111, at 110–11.

¹¹⁸ Crock, Ernst & McCallum, *supra* note 30 (citing *In re R-A-*, 23 I&N Dec. 694 (A.G. 2005)).

1. Adjudication of Asylum Cases on the Basis of Gender: A Potential Model for Adjudicating Claims on the Basis of Disability

Following the issuance of specific gender-related Guidelines by the UNHCR,¹¹⁹ Canada, the U.S., Australia, and the UK¹²⁰ have issued their own national guidelines for decision makers in gender-based asylum cases.¹²¹ The UNHCR has similarly issued guidelines for asylum claims based on disability, and in time it is likely that individual states will follow suit. Therefore it is useful to consider existing guidelines for the gender-based claims to understand the possibilities which may exist in the disability context. The Canadian Guidelines, for gender-based claims, recognize the benefit of a common international standard and prescribe the use of human rights instruments to consider whether a harm both experienced and feared is “a serious violation of a fundamental human right” before calling it persecution.¹²² The New Zealand Refugee Status Appeal Authority refused to apply the country of asylum’s domestic human rights standards, reasoning that since refugee law is an international law system, its proper adjudication in light of national politics and biases requires international definitions. The U.S. Guidelines are less dependent on international human rights standards and afford more discretion to decision makers in assessing whether certain instances of harm rise to the level of persecution. For instance, the guidelines provide examples of the types of harm that women might suffer, including sexual abuse, rape, forced marriage, slavery, domestic violence and forced abortion, but do not label such harm as persecution.¹²³

¹¹⁹ Office of the U.N. High Commissioner for Refugees, *UNHCR Guidelines on the Protection of Refugee Women*, 54, U.N. Doc. ES/SCP/67 (1991) [hereinafter UNHCR Guidelines].

¹²⁰ See UNHCR HANDBOOK, *supra* note 82, ¶ 51 (“[S]erious violations of human rights . . . would constitute persecution.”).

¹²¹ See generally IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (Nov. 25, 1996); IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINES ON WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (March, 1993); Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to All INS Asylum Officers and HQASM Coordinators, Consideration for Asylum Officers Adjudicating Asylum Claims for Women (May 26, 1995); AUSTRALIAN DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (July 1996). See also IMMIGRATION APPELLATE AUTHORITY OF THE UNITED KINGDOM, ASYLUM GENDER GUIDELINES (Nov. 2000).

¹²² THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS 173 (2000).

¹²³ Lord, *supra* note 14, at 77 n.276.

B. Persecution in Disability Cases

First is a discussion of the serious harm that constitutes persecution, followed by an analysis of failure of state protection.

1. Showing Serious Harm in a Disability Case

Applicants with disabilities face difficulty in showing that harm they face *is* serious enough to constitute persecution. Commonly, conduct is found to amount to discrimination but not to serious harm. Cases where harm is not so obvious as to immediately invoke images of torture or clearly comprise involuntary institutionalization are often dismissed as not serious enough to rise to the level of persecution. In the absence of a clear guiding framework, decisions involving disability-based asylum claims are often inconsistent. Using a human rights approach to understanding disability would ensure that adjudicators were consistent in decision making, in compliance with the CRPD and adapting to the evolutionary nature of disability studies. A human rights approach also offers some clarity in understanding the relationship between discrimination and disability.

A case which illustrates adjudicators' medically-themed understanding of disability involves a Mongolian applicant in Australia. Although the specifics of his disability are undisclosed, the applicant provided evidence for his claim in the form of letters from medical organizations in Mongolia indicating that his treatment would likely be disrupted upon his return. This was combined with evidence that the applicant's condition was indeed serious and that he was undergoing treatment in Australia. Adjudicators noted that in the absence of a link between a protected grounds for refugee status, the disability alone would not merit consideration and found that while persons with disability face considerable hardship in Mongolia such hardship does not amount to persecution.¹²⁴ The resolution of this case shows how applicants with disabilities are denied relief when their case is construed under the medical model of disability where the disability is a medical condition and the relief sought is treatment.

The human rights approach to disability complements the previously discussed non-hierarchical human rights paradigms for perceiving persecution because, unlike other approaches to understanding disability, it does not emphasize civil and political rights and overlook socio-economic

¹²⁴ RRT Case No. 1002307, [2010] RRTA 532 (July 5, 2010), available at <http://www.unhcr.org/refworld/docid/4c84c7a72.html>.

rights and is therefore the truest reflection of the CRPD. This approach, called “disability human rights” by Professor Michael Stein, allows the CRPD to be analyzed as a series of positive (typically socio-economic) rights such as education, employment, safety, and housing, as well as negative (typically civil and political) rights such as freedom from torture and discrimination, further promotes the human rights approach to disability and the facilitation of showing persecution.¹²⁵ Professor Michael Perlin proclaims the CRPD “furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life.”¹²⁶ Using the human rights approach states cannot get away with ensuring only civil and political rights which are usually cost-free. Instead, they will be more likely to ensure that budgetary allocations are made for providing socio-economic rights as well. Simultaneously, the socio-economic rights of persons with disabilities, which are overlooked in favor of civil and political rights will be respected, and harmful conduct will be identified before it rises to the level of life-threatening seriousness or even death.

The utility of the human rights approach to disability is evident in cases where involuntary institutionalization of a person with disability or other instances of forced confinement and torture are absent, and yet where circumstances create severe constraints on mobility and positive rights. Taking the same example of the Mongolian applicant, had he demonstrated that his impairment rendered him unable to move freely, to secure employment, adequate housing, education and healthcare, his claim may have been adjudicated favorably using the human rights approach to disability.

In the United Kingdom, adjudicators denied the asylum claim of a deaf Liberian national who argued that returning him to Liberia would violate Article 8 of the European Convention on Human Rights (which guarantees the right to respect for private life)¹²⁷ and that there was a lack of assistance

¹²⁵ Weber, *supra* note 57, at 145 (citations omitted).

¹²⁶ Michael L. Perlin, “*A Change is Gonna Come*”: *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 490 (2009).

¹²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 8 provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

for deaf people in Liberia.¹²⁸ The right to private life was interpreted as a “protection against sufficiently adverse effects on a person’s physical and moral integrity” and as a “right to establish and develop relationships with other human beings in the outside world.”¹²⁹ In *Bensaid v. United Kingdom* the court held that its own precedent does not exclude from consideration health cases where “treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.”¹³⁰

In the same case of a Liberian national, discussed above, although the court admits that “Article 8 might be engaged in cases where a claimant suffered from serious mental illness,” the court denied asylum based on the lack of “exceptionality” of the applicant’s claims, stating that Article 8 protections are “directed to the protection of fundamental rights, not the conferment of individual advantages or benefits.”¹³¹ Though the term “exceptionality” may suggest that the court’s decision was based on the generalized nature of the harm (i.e., it was not unique to the applicant), their reasoning also suggests that the harm experienced by the applicant did not rise to the level of seriousness that would merit consideration. Additionally, the adjudicators decided that assistance could possibly be available to deaf citizens in Liberia simply because the Liberia National Association for the Deaf “maintained a current registration as a member of the World Federation of the Deaf,” although it was effectively no longer active in the community. Similarly, it was satisfied that a missionary had helped deaf people in Monrovia in the past, though it was aware that “funding for his work was limited and it was not clear whether he was still able to serve deaf people at the date of the decision. . . .”¹³²

In another case involving a minor child who was deaf and suffered from a specific language impairment, the court found that his removal would result in an Article 8 violation, on the basis that his “special educational needs are complex and pronounced and require a very particular form of intensive and structured teaching input,” and that while he was making progress in the UK,

economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

¹²⁸ *In the petition of FNG*, [2008] CSOH 22, (2008), available at <http://www.unhcr.org/refworld/docid/47fa09572.html>.

¹²⁹ *Id.* (citations omitted).

¹³⁰ 33 EHRR 205 (paras. 46–47).

¹³¹ *In the petition of FNG*, [2008] CSOH 22, para. 19 (2008) (Scot.), available at <http://www.unhcr.org/refworld/docid/47fa09572.html> (citations omitted).

¹³² *Id.*

if he were “required to restart his education in Germany there would be a major discontinuity in the support available to him with a significant risk that in the long-term [he] would not be able to communicate functionally in any spoken language.”¹³³

While discrimination alone is unlikely to rise to the level of harm necessary for a finding of persecution, in disability cases, discriminatory behavior can result in severe and even complete restrictions of freedom of movement. In cases not involving disability, such severe limits on freedom of movement and physical mobility would likely be serious human rights violations.

2. Cumulative Discrimination

Although harassment or discrimination alone have not been found to rise to the level of persecution,¹³⁴ “the cumulative effects of multiple incidents of discrimination, harassment and violence may constitute persecution, as would incidents of verbal harassment or intimidation [accompanied] by physical punishment, infliction of harm or significant deprivation of liberty.”¹³⁵ There are also certain circumstances where discrimination may constitute persecution, “if the measures of discrimination lead to consequences of a substantially prejudicial nature for the person involved.”¹³⁶ For example, restrictions on a person’s livelihood or educational opportunities due to one’s religion may constitute a form of persecution.¹³⁷ In recent cases involving gay and lesbian asylum applicants, discrimination against them in the form of police brutality, police sanctioned “death squads,” and mandatory psychiatric treatment including forced drug “therapies” was sufficient to constitute persecution under the asylum provision of the INA.¹³⁸ Even in instances where physical harm is not one of the consequences of discrimination, cumulative persecution can amount to

¹³³ R (Jegatheeswaran) v Sec’y of State for the Home Department, [2005] EWHC 1131(Admin) ¶ 23.

¹³⁴ Arlene S. Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117 (citing Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)).

¹³⁵ *Id.* (citations omitted).

¹³⁶ *Id.* (citing UNHCR HANDBOOK, *supra* note 82).

¹³⁷ *Id.* (citations omitted). For additional definitions of persecution, see T. Alexander Aleinikoff, *The Meaning of “Persecution” in United States Asylum Law*, 3 INT’L J. REFUGEE L. 5, 21–22 (1991) and GOODWIN-GILL, *supra* note 101, at 351.

¹³⁸ Kanter & Dadey, *supra* note 134, at 149 (citing Keith Donoghue, *After Reno Ruling, More Gays Win Asylum*, LEGAL TIMES, Nov. 6, 1995, at 2); see also Pitcherskaia v. INS, 118 F.3d 641, 648–49 (9th Cir. 1997) (stating that beating, forced institutionalization, and electroshock therapy constitute persecution despite the intent to “cure” one of homosexuality).

persecution where it produces “consequences of a substantially prejudicial nature,” and includes pervasive restrictions which effectively proscribe an individual’s right to mobility, to earn a living, or to access education.¹³⁹ In Europe, adjudicators examine these rights under the umbrella of Article 8 of the ECHR which guarantees the right to private life. The House of Lords interprets the right to private life as a “broad term not susceptible to exhaustive definition,” but states that “Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity,” and goes on to say that “Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”¹⁴⁰ In *Ex Parte Razgar*, the UK adjudicators listed the following questions to answer when considering claims brought under Article 8:

1. Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private life?
2. If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
3. If so, is such interference in accordance with the law?
4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
5. If so, is such interference proportionate to the legitimate public end sought to be achieved?¹⁴¹

Their analysis can be analogized to the subsequent discussion of failure of state protection and to the balancing of interests when considering asylum claims brought on the basis of disability.

¹³⁹ UNHCR HANDBOOK, *supra* note 82, ¶ 54.

¹⁴⁰ *Bensaid v. United Kingdom*, [2001] ECHR 82, ¶ 47.

¹⁴¹ *R v. Sec’y of State for the Home Department, ex parte Razgar*, [2004] UKHL 27, United Kingdom: House of Lords (Judicial Committee), June 17, 2004, *available at* <http://www.unhcr.org/refworld/docid/46c998742.html>.

3. *Failure of State Protection/Reasonable Accommodation and the Challenge of Budgetary Deference*

The failure of state protection can be obvious and the result of clear conduct or it may be subtle in which case it must be deduced from the absence of certain conduct or from the actual effect when it differs from intent. Obvious instances of failure of state protection include state-sponsored or state-condoned mandatory institutionalization, which is seen as a violation of the fundamental rights, an infringement on personal security and, in certain cases, may amount to torture, cruel, and degrading treatment. Failure of state protection can also arise from widespread discrimination and the absence of adequate facilities and resources. Examples of cases which illustrate failure of state protection are discussed below.

Documentation by non-governmental organizations has identified where “treatment” and “protection” of persons with disabilities is degrading and inhumane if not dangerous and life-threatening.¹⁴² For example, in Hungary, Slovenia, the Czech Republic, and Slovakia, cage beds were used as a form of restraint in facilities warehousing children with disabilities.¹⁴³ The use of unmodified electric shock therapy, or ECT, with no anesthesia and no muscle relaxants is prevalent in Bulgaria amongst other states.¹⁴⁴ Such practices most likely amount to torture or cruel, inhuman, and degrading punishment. These are clear instances in which failure of state protection is observed.

There is no universally mandated standard of life or a universally prescribed role for governments to carry out their domestic duties with regard to its citizenry.¹⁴⁵ Yet the international community has adopted minimum standards of behavior to comport with the basic rights (“including freedom from interference and entitlements to resources”) which all states are bound to ensure to all its citizens.¹⁴⁶ Therefore, even in the voluntary institutionalization of individuals can result in persecution when the state fails to prevent harmful conditions from developing in health care facilities and to curtail the harmful practices of medical and other care providers or to

¹⁴² Lord, *supra* note 14, at 30. See Mental Disability Advocacy Ctr., *Cage Beds: Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries* 30–31 (2003), available at http://www.mdac.info/sites/mdac.info/files/English_Cage_Beds.pdf.

¹⁴³ *Id.*

¹⁴⁴ Symposium, *International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 339, 353 (2002).

¹⁴⁵ HATHAWAY, *supra* note 111, at 105 (citation omitted).

¹⁴⁶ *Id.* at 106.

mitigate cultural norms which result in the mal-treatment of institutionalized persons.

Cultural norms and local custom play a powerful role in the treatment of persons with disabilities. As Debra Benko and Brittany Benowitz describe, “[i]n many parts of the world, persons with disabilities are still subjected to long-term and even permanent institutionalization in psychiatric facilities and social care homes, frequently in isolated environs within rural areas or locations set apart from established communities.”¹⁴⁷ Aside from depriving individuals of enjoying their civil and political rights such as freedom of movement and liberty, the living conditions in such locales expose inhabitants to infectious diseases, poor hygiene, inadequate nutrition which result in serious threats to life.¹⁴⁸

Nearly every society in history has treated people with disabilities as unwanted, undesirable, or dangerous, subjecting them to discrimination, neglect, abuse, and even death.¹⁴⁹ In a speech at New York Law School, Professor Michael Perlin said:

Internationally there is a shameful history of human rights abuses in psychiatric institutions: the provision of services in a segregated setting that cuts people off from society, often for life, the arbitrary detention from society that takes place when people are committed to institutions without due process, denial of a person’s ability to make choices about their life when they are put under plenary guardianship, the denial of appropriate medical care or basic hygiene in psychiatric facilities, the practice of subjecting people to powerful and dangerous psychotropic medication without adequate standards, and the lack of human rights oversight and enforcement mechanisms to protect them against the broad range of abuses in institutions.¹⁵⁰

¹⁴⁷ See Lord, *supra* note 14, at 29 (citing Debra Benko & Brittany Benowitz, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 HUM. RTS. BRIEF 9, 11 (2001)).

¹⁴⁸ Benko & Benowitz, *supra* note 147, at 10 (citing Armenian NGO which has documented high mortality rates in such institutions).

¹⁴⁹ Kanter & Dadey, *supra* note 134, at 1117 (citing ARLENE KANTER, TOWARD EQUALITY: THE ADA’S ACCOMMODATION OF DIFFERENCES, IN DISABILITY DIVERS-ABILITY AND LEGAL CHANGE 228 (Melinda Jones & Lee Ann Bassar Marks eds., 1999)).

¹⁵⁰ *International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary*, *supra* note 144.

Nevertheless, some progress and positive change is occurring, particularly in Europe. Kanter & Dadey cite a case that was before the erstwhile European Court of Human Rights which surprisingly found that the “expulsion of an Algerian citizen who had lived in France since childhood constituted a violation of his right to personal integrity and respect for family life under the European Convention on Human Rights.”¹⁵¹ Most notably, the European Court of Human Rights (ECHR) found that “the position of inferiority and powerlessness which is typical of patients in psychiatric hospitals calls for increased vigilance . . . and forms of persecution can likely be found even in the absence of explicit threats or physical harm, given the quality inherent to the environment i.e. incapacitation and loss of freedom.”¹⁵²

Only about 40 of the 193 countries that are members of the UN have enacted domestic disability laws.¹⁵³ Additionally, of those, many continue to rely on charity or medical models of disability and ignore the effects of mistreatment, discrimination and exclusion of people with disabilities themselves as well as on the societies in which they live.¹⁵⁴

For instance, in an attempt to improve the quality of the population and reduce the perceived burden of accommodating persons with disabilities in Chinese society, China passed the Maternal and Infant Health Care Law in 1995.¹⁵⁵ That year, China also purportedly spent roughly \$138 million on collectives for its orphans, disabled, elderly, and young persons. A closer look at the actual effects of the legislation and at its budgetary allocation should allow adjudicators to find a failure of state protection, even when giving deference to governmental decision-making.¹⁵⁶ In practice, the law meant that when a child is born “inferior,” or with a mental disability, he/she is unlikely to receive adequate quality of care and services, and worse,

¹⁵¹ Kanter & Dadey, *supra* note 134, at 1135 (citations omitted) (the case involved a deaf and mute individual who the ECHR found would suffer total sensory deprivation if returned to Algeria, which would constitute cruel and degrading treatment).

¹⁵² *Id.*

¹⁵³ *Some Facts About Persons with Disabilities*, U.N., <http://www.un.org/disabilities/convention/facts.shtml> (last visited Mar. 14, 2014); see also Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287, 309–13 (2007).

¹⁵⁴ Kanter, *supra* note 153, at 291–92 (discussing the pitfalls of state’s relying on medical models of disability and excluding certain individuals from protective laws).

¹⁵⁵ Kanter & Dadey, *supra* note 134, at 1137 (citing Graciela Gomez, Comment, *China’s Eugenics Law as Grounds for Granting Asylum*, 5 PAC. RIM. L. POL’Y J. 563, 563 (1996)).

¹⁵⁶ Lennie Magida, *Population Pressures, Cultural Stigma Limit Lives of Mentally Retarded People*, HARTFORD COURANT, June 14, 1995, at AI (“By comparison, the budget for the state of Connecticut’s Department of Mental Retardation for fiscal year 1995 was \$545 million.”).

persons with serious genetic defects were forced to undergo sterilization.¹⁵⁷ Hospital administrators would only treat patients with at least a moderate IQ due to the government's objective to limit scarce resources to productive members of society.¹⁵⁸

Although not a state-sanctioned policy, in Japan, physicians forcibly sterilized patients to prevent "undesirable pregnancies" in "mentally retarded" women who were likely targets of molestation while institutionalized.¹⁵⁹ Failure of state protection exists outside of Asia, in Europe and the Americas as well. Disability Rights International has published reports and advocacy pieces on the treatment of persons with disabilities in Hungary, Turkey, Serbia, Argentina and Peru, amongst others.¹⁶⁰

A *Los Angeles Times* article described the conditions of facilities in Russia which seek to isolate children with mental disabilities who are deemed "useless to society," as "forgotten pockets of hell tucked away on the concrete fringes of towns, behind walls and barbed-wire fences patrolled by dogs," and tells the story of twelve-year old Sasha.¹⁶¹ The article paints a picture of watching Sasha, standing half-dressed in a corner, rhythmically bashing his head against the wall, while nearby children in strait jackets were tied to their iron beds and others lay in barred cots, flapping their arms and legs.¹⁶² Such investigative reporting has consistently highlighted practices that are widespread in states which have signed and ratified the CRPD.¹⁶³

In addition to external systems of checks and balances, the Committee on the Rights of Persons with Disabilities is a body of independent experts charged with monitoring implementation of the Convention by the party states. States are obliged to submit regular reports to the Committee.¹⁶⁴

¹⁵⁷ Gomez, *supra* note 155, at 563.

¹⁵⁸ *Id.*

¹⁵⁹ Kanter & Dadey, *supra* note 134, at 1137–38 (citing *Mentally Disabled Women's Rights Reviewed*, MAINICHI DAILY NEWS, June 19, 1993, available at LEXIS, News Library, News Group File).

¹⁶⁰ *Our Reports & Publications*, DISABILITY RIGHTS INTERNATIONAL, <http://www.Disabilityrightsintl.org/Media-Gallery/Our-Reports-Publications/> (last visited Mar. 12, 2014).

¹⁶¹ Kanter & Dadey, *supra* note 134, at 1139 (citing Vanora Bennett, *Russia's Forgotten Children*, L.A. TIMES, Feb. 22, 1997, at A1).

¹⁶² *Id.*

¹⁶³ Both Mexico and Russia have signed and ratified the CRPD. *Status: Convention on the Rights of Persons with Disabilities*, U.N.T.S., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (last visited Mar. 12, 2014).

¹⁶⁴ *Committee on the Rights of Persons and Disabilities: Questions and Answers*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx> (last visited Mar. 12, 2014) ("States must report initially within two years of accepting the Convention and thereafter every four years. The Committee examines each

Therefore, the CRPD's own internal reporting and monitoring mechanisms facilitate a showing of failure of state protection in the form of country reports examination, and provide an added layer of evidentiary support for asylum applications brought on the basis of disability.

C. Article 15 of the CRPD and States' Non-refoulement Obligations

The Convention makes no reference to the right of persons with disabilities to seek asylum nor does it make reference to the principle of *non refoulement*,¹⁶⁵ the obligation not to return a person to a State where he or she is likely to be subjected to torture, however the anti-torture provisions of the convention provide disability applicants with a last-resort, albeit one with higher burdens of proof, when they are unable to persuade adjudicators of the connection between persecution and one of the five nexus grounds in refugee law.¹⁶⁶ The Committee Against Torture has commented on the relationship between the anti-torture provision (Article 15) of the CRPD with expulsion, deportation, extradition, and related procedures, and has done so within the framework of other human rights treaties (namely, Article 3 of the ICCPR), rather than by reference to the *jus cogens* nature of the anti-torture provisions.¹⁶⁷ The Human Rights Committee, in its General Comment on Article 7, provides a more universal endorsement of the anti-torture provisions and 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.”¹⁶⁸ Issues of gender are also highly relevant to

report and shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.”).

¹⁶⁵ See Lord *supra* note 14, at 77.

¹⁶⁶ *Id.* (citing GOODWIN-GILL, *supra* note 101) (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”).

¹⁶⁷ *Id.* (citing The Committee against Torture has on occasion reviewed communications involving expulsion and deportation in the context of the anti-torture framework of the CAT). See, e.g., Agiza v. Sweden, Decision of the Comm. Against Torture, Commc’n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005), available at <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html>.

¹⁶⁸ Lord, *supra* note 14, at 77 (citing Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994)).

any analysis, including the risk of gender-based violence which may aggravate existing disabilities or result in secondary disabilities.¹⁶⁹

According to the U.S. Department of Justice's EOIR, the U.S. is obligated under Article 3 of the CAT to

protect aliens from being returned to countries where they would more likely than not face torture. Torture is defined, in part, as severe pain or suffering (physical or mental) that is intentionally inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity.

Under the Immigration and Naturalization Act (INA) §§ 101(a)(42), 208(b), 8 U.S.C. §§ 1101(a)(42), 1158(b), “applicants must establish that it is more likely than not that they would be tortured if removed to a specific country, noting that not all types of harm that qualify as persecution necessarily qualify as torture,” but are not required to establish any nexus with the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion), as is required for asylum or withholding of removal under the INA. Furthermore, CAT protection may be granted to criminals, terrorists, and persecutors unlike asylum or withholding from removal under the INA.

In determining whether grounds exist to believe an individual would be in danger of being subjected to torture, state parties must consider “all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”¹⁷⁰

The ECHR, which seems to have the most extensive case law on states' anti-torture obligations under Article 3 of the European Convention on

¹⁶⁹ *Id.* (describing how gender-based violence impacting the risk of return would include, among others, rape and other forms of sexual violence, such as female genital mutilation, forced abortion, and forced sterilization). See Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 32, U.N. Doc. A/HRC/7/3 ¶¶ 59–60 (2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf>; see also *Mentally Disabled Women's Rights Reviewed*, *supra* note 159 (on the forced sterilization of disabled women to prevent conception following molestation).

¹⁷⁰ CAT, *supra* note 18, art. 3. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 3 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32276.pdf> (“The [United States] State Department has interpreted the words ‘where applicable’ to indicate that competent authorities must decide whether and to what extent these considerations are a relevant factor in a particular case.”).

Human Rights (relating to torture and non-refoulement), has widely diverging decisions.¹⁷¹ For example, in *D. v. United Kingdom*, the ECHR found that deporting a man in advanced stages of AIDS to his home in St. Kitts constituted inhuman treatment on the basis of substandard medical resources accessible to him there. However, in *Salkic v. Sweden* the ECHR held that only exceptional humanitarian circumstances would entitle persons otherwise subject to expulsion orders to continue benefitting from social, medical and other services.¹⁷²

However, using the CRPD, namely Article 15, a person with disability (particularly a psychosocial disability) likely to “face involuntary treatment, confinement, institutionalization or an equivalent medical practice in his/her home country” can argue that removal will amount to torture, cruel and inhuman treatment and a deprivation of fundamental rights in violation of Articles 3 and 8 of the European Convention on Human Rights.¹⁷³

D. The Role of “Reasonable Accommodation” in Identifying Persecution

The main question for adjudicators to address is whether the harmful conduct in question arises from more than a general lack of resources.¹⁷⁴ In implementing a human rights treaty, a budget analysis is required by the committee enforcing and monitoring compliance with the treaty.¹⁷⁵ For example, the U.N. Economic and Social Council must perform a budgetary analysis in the context of State reporting obligations on the implementation of economic, social, and cultural rights in conjunction with the ICESCR.¹⁷⁶

¹⁷¹ See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 127, art. 3.

¹⁷² Lord, *supra* note 14, at 77–78 (in the latter case it was deemed that the Salkic family could also have received treatment in their home country).

¹⁷³ See *id.* at 78.

¹⁷⁴ See INTERNATIONAL BUDGET PROJECT, DIGNITY COUNTS: A GUIDE TO USING BUDGET ANALYSIS TO ADVANCE HUMAN RIGHTS 1 (2004), available at <http://internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights-English.pdf>. Budget analysis refers to a process by which State allocation of resources are scrutinized and assessed, for example, to identify sufficiency of resource allocation in the attempt to secure the rights of a particularly disadvantaged group. See Maria Socorro I. Diokno, *A Rights-Based Approach to Budget Analysis* 8 (1999), available at <http://www.crin.org/docs/resources/publications/hrbap/RBABudgetAnalysis.pdf>.

¹⁷⁵ INTERNATIONAL BUDGET PROJECT, *supra* note 174.

¹⁷⁶ *Id.*; see U.N. Econ. & Soc. Council, *Limburg Principles on the Implementation of Economic, Social and Cultural Rights*, No. 79, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987) (“Quantitative information should be included in the reports of States Parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to

The committee which enforces the CRPD will likely be charged with performing a similar analysis which a domestic court can borrow from in adjudicating asylum claims.

The CRPD defines a failure to make a reasonable accommodation as a form of discrimination.¹⁷⁷ The concept of reasonable accommodation did not originate in the context of disability. The term reasonable accommodation was originally employed in the United States, in the Civil Rights Act of 1968 in reference to discrimination on the grounds of religious practice. The Civil Rights Act requires employers to “reasonably accommodate” an employee or potential employee’s religious observance or practice unless an accommodation would cause undue hardship on the employer’s business.¹⁷⁸ The concept of reasonable accommodation was first applied to the disability context in the United States Rehabilitation Act of 1973.¹⁷⁹

Reasonable accommodation in the CRPD includes access to courts and the ability for persons with disabilities to seek redress. The United Nations High Commissioner for Human Rights states:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the context of the other major human rights treaties. Administrative remedies might in certain cases be adequate to vindicate rights. In other cases, judicial protection of rights appears indispensable in order to satisfy the requirement of the Convention, and should

facilitate the assessment of the compliance with Covenant obligations. States Parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant.”)

¹⁷⁷ Lisa Waddington, *The Concepts of Disability and Reasonable Accommodation* (Mar. 2010) (unpublished paper prepared for Maastricht University).

¹⁷⁸ 42 U.S.C. § 2000e(j). The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.

¹⁷⁹ U.N. General Assembly Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, 7th Sess., Jan. 16–Feb. 3, 2006, U.N. Doc. A/AC.265/2006/CRP.1 available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgndra.htm>.

extend to economic, social and cultural rights, besides civil and political rights.¹⁸⁰

In the European Union, “reasonable accommodation recognizes the relevance of ‘impairment’ — if one ignores the impact of an impairment, and treats a person with a disability in exactly the same way as one treats a person without a disability, a *de facto* situation of inequality will arise.”¹⁸¹ According to Sandra Fredman, “instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”¹⁸² Therefore adjudicators should take account of the characteristics related to disability and accommodate them.¹⁸³ While this is not limited to adapting a physical environment for the needs of disabled persons, like physical adaptations, a balancing should be done by adjudicators and courts to determine what costs and burdens will be involved and to ensure that they are not disproportionate.¹⁸⁴

Recital 21 of the EU’s Employment Equality Directive (2000/78) describes the balancing test as follows: “To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaken and the possibility of obtaining public funding or any other assistance.”¹⁸⁵

American courts have long since acknowledged the importance of access to courts for persons with disabilities. In *Tennessee v. Lane*, the U.S. Supreme Court held that under the Eighth Amendment “it is the responsibility of the state to ensure access to the courts for people with disabilities.”¹⁸⁶ The case involved two paraplegics seeking damages and equitable relief, “alleging that Tennessee and a number of its counties had

¹⁸⁰ U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* ¶ 10, Dec. 3, 1999, E/C.12/1998/24, available at <http://www.refworld.org/docid/47a7079d6.html>.

¹⁸¹ Waddington, *supra* note 177.

¹⁸² Sandra Fredman, *Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* (Anna Lawson & Caroline Gooding eds., 2005).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Waddington, *supra* note 177. See Council Directive 2000/78/EC, art. 12, 2000 O.J. (L 303) 17 (EU) (prohibiting discrimination in employment on the basis of disability); see also Fredman, *supra* note 182.

¹⁸⁶ *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990 (ADA). . . .¹⁸⁷

Before *Tennessee v. Lane*, the Supreme Court decided, in *Alabama v. Garrett*, that "Congress had acted unconstitutionally in granting citizens the right to sue states for disability discrimination (such as the denial of employment) under the 14th Amendment's equal protection clause."¹⁸⁸ However, the Court reasoned that *Garrett* did not apply to *Lane* because Title II of the ADA dealt with the due process clause of the Fourteenth Amendment, not the equal protection clause.¹⁸⁹ Therefore, the Court found that while Congress may not have had enough evidence of disability discrimination to abrogate state sovereign immunity and allow suits against states for equal protection claims, it did have enough evidence of due process violations (such as non-handicap-accessible courthouses) to waive the sovereign immunity doctrine in *Lane*.¹⁹⁰ "The Court also emphasized that the remedies required from the states were not unreasonable — they just had to make reasonable accommodations to allow disabled persons to exercise their fundamental rights."¹⁹¹ Because Title II was a "reasonable prophylactic measure, reasonably targeted to a legitimate end," and because Congress had the authority under the Fourteenth Amendment to regulate the actions of the states to accomplish that end, the law was constitutional.¹⁹²

There, the individual plaintiff was not required to

‘overcome’ the alleged violations on their own, as the medical model of disability (discussed below) would dictate; rather, to the extent that society has established barriers preventing each of the plaintiffs from realizing their rights, it became the responsibility of society and ultimately the state to remove such barriers and provide a remedy for violations of law.¹⁹³

¹⁸⁷ *Id.* at 509.

¹⁸⁸ *Bd. of Trs. of the Univ. of Al. v. Garrett*, 531 U.S. 356 (2001).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Tennessee v. Lane*, 541 U.S. 509, 530 (2004). Although the Court held that "one particular individual had a right to physically access one particular court," it left open "the question of whether any other persons with disabilities could gain relief when denied access to other justice elements, for example, as witnesses or jurors." Janet E. Lord & Michael Ashley Stine, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 479 (2008).

¹⁹³ Kanter, *supra* note 58, at 460.

The CRPD bolsters the U.S. Supreme Court's decision on accommodation and "requires State Parties to identify and eliminate obstacles and barriers, in order to ensure that persons with disabilities may access their environment, transportation, public facilities, services, information, and communications."¹⁹⁴

Procedures for identifying persons with disabilities must be sufficiently flexible to accommodate the diversity of experiences where the definition of disability is construed broadly.¹⁹⁵ Crock, McCallum, and Ernst turn to the International Association of Refugee Law Judges and its Judicial Guidelines on Procedures with Respect to Vulnerable Persons (IARLJ Guidelines).¹⁹⁶ According to the IARLJ Guidelines, "applicants or their representatives should be given the opportunity to make submissions as to the nature of their disability and its impact on the procedural and/or substantive aspects of their claim," including efforts for early identification and the openness to late identification of disability in a case.¹⁹⁷

Furthermore, given the high deference which adjudicators provide for governmental decisions in resource-allocation, adjudicators should pay close attention to governmental intent or the actual impact of governmental decisions. In other words they should continue to "look beyond a State's notional willingness to protect persons with disabilities — expressed, for example, through official policy—in order to assess whether effective accommodations are made in practice."¹⁹⁸

Crock, McCallum, and Ernst cite a case concerning a Polish child with a disability, where the Canadian Immigration and Refugee Board looked beyond documentary evidence to find that government intent and actions were in fact lacking in providing adequate protection for children with disability.¹⁹⁹ In the absence of any mandatory child abuse reporting law it was determined that the applicant had little recourse to protect himself in his home state and therefore it was appropriate to rely on the protection of international refugee law.²⁰⁰ This case illustrates the nature of state protection, the failure of which is a necessary prerequisite to finding persecution. If this standard had been used in the previously discussed case of a deaf Liberian national, perhaps the U.K. adjudicators would not have

¹⁹⁴ CRPD, *supra* note 17, art. 9.

¹⁹⁵ Crock, Ernst & McCallum, *supra* note 30, at 5.

¹⁹⁶ *Id.* at 6 (citing International Association of Refugee Law Judges, *Judicial Guidelines on Procedures with Respect to Vulnerable Persons: Physical disability*, Guidance Note 9, September 2008, ¶ 14).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 16.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (citing LXC (*Re*), No. TAO-05472, CRRD No. 96 at 12 (May 30, 2001)).

found that the mere documentary evidence and past records prove the existence of available assistance to deaf persons in Liberia.

An alternative to the human rights approach, is the CRPD's social construction of disability. The utility of this approach falls somewhere between the medical and human rights approaches to understanding disability. The social approach frames the applicant's disability in terms of how it impacts his/her civil and political rights, such as the right to be free of discrimination or torture and also provides a ready link with one of the five nexus grounds, membership in a particular social group (discussed below). Threats to civil and political rights have historically secured more sympathetic treatment in the hands of asylum adjudicators than socio-economic rights such as the right to health or employment. The reason stems from the prevalent idea that applicants who suffer at the hands of state or non-state actors because of some innate condition are more deserving of refugee status.²⁰¹ Pursuant to this idea, such applicants are the proper recipients of refugee protection, which is a measure of last resort.²⁰² When civil or political rights are threatened, the hardship involved is likely to be deemed more than a mere lack of access to socio-economic resources, such as adequate education or professional employment. Ultimately, however, the social approach is better suited to showing the link between persecution and membership in a particular social group. This is discussed further below.

V. PERSONS WITH DISABILITIES USING THE CRPD CLEARLY COMPRISE A PARTICULAR SOCIAL GROUP UNDER THE REFUGEE DEFINITION

First is a description of various interpretations of "membership in a particular social group," followed by a closer look at a contemporary interpretation, the "social visibility test." Next is a discussion of the social approach to disability and the role of the CRPD in complementing the social visibility test.

A. Analyzing "Particular Social Group" Under Evolving Theories of International Refugee Law

Considering an asylum applicant's membership in a particular social group is a relatively new idea in refugee and asylum law and is most often seen in the common law jurisprudence of the United States, Australia, Canada, and the

²⁰¹ HATHAWAY, *supra* note 111, at 104–05.

²⁰² *Id.*

United Kingdom.²⁰³ Such membership as a reason for persecution was added after the initial four grounds for seeking refugee status. Based on the *travaux préparatoires* of the Refugee Convention the category of “particular social group” was the last of the enumerated grounds, added, presumably with the intent to broaden the scope of the other four grounds.²⁰⁴

There are multiple definitions of “particular social group” used by courts and the Canadian Supreme Court in *Canada v. Ward* outlines the five main approaches.²⁰⁵ The most restrictive, initially put forth by Guy Goodwin-Gill in 1983, states that an individual’s membership in a “particular social group” must be united by some religious, political, or national affiliation. This essentially eliminates any broadening of the refugee definition from the existing grounds of religion, nationality, or political opinion.

Arthur Helton proposed a less restrictive reading of “particular social group” as a safety net that “could include all the bases for and types of persecution which an imaginative despot might conjure up,” and in particular anything that did not already fit under the existing four grounds.²⁰⁶ Critics and courts discounted this reading as over-inclusive²⁰⁷ and tautological.²⁰⁸

A third conceptualization of social group is an intuitive approach that urges against “attempts to formulate abstract definitions” and advocates the recognition of particular social groups on a case by case basis instead.²⁰⁹ This approach relies on the experience of administrators and adjudicators to

²⁰³ *Matter of Acosta*, 19 I&N Dec. 211 (B.I.A. 1985); *Applicant “A.” and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, 1997. 190 CLR 225; 142 ALR 331; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R., File No.: 21937, March 25, 1993; *Shah & Islam v. Home Department*, [1999] 2 A.C. 629 (U.K. House of Lords).

²⁰⁴ *Applicant “A.” and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, 1997. 190 CLR 225; 142 ALR 331 (per Justice McHugh).

²⁰⁵ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

²⁰⁶ Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 242 (1995) (citing Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983)).

²⁰⁷ *Applicant “A.” and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, 1997. 190 CLR 225; 142 ALR 331 (“If they had intended to provide a ‘catch-all . . .’ it is more likely than not that they would have amended the draft treaty by eliminating the specified grounds of persecution. Indeed, if the drafters had intended the term ‘a particular social group’ to act as a ‘catch-all’, it is surprising that they did not amend the Convention to provide that any person who had a well-founded fear of persecution was a refugee.”).

²⁰⁸ An “association of people as a ‘particular social group’ merely by virtue of their common victimization as the objects of persecution, rendering any additional grounds for persecution useless.” *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

²⁰⁹ *Applicant “A.” and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, 1997. 190 CLR 225; 142 ALR 331 (opinion of J. Kirby).

guide the decision making process and help identify persecution when they see it.²¹⁰ Consequently, this approach is criticized for its lack of common and consistent standards and for the potential margin for error in judicial review and legal adjudication.²¹¹

The most common and universal means for identifying a social group is the doctrine of *ejusdem generis*,²¹² or ‘immutable characteristics,’ approach—first described in the U.S. Board of Immigration Appeals (BIA)’s landmark decision *Matter of Acosta* and later elucidated by James Hathaway.²¹³ The doctrine finds an immutable common characteristic as the basis of membership in a social group. It was first adopted by the United States, and subsequently by several other common law jurisdictions. Applied to interpret the phrase “persecution on account of membership in a particular social group,” the doctrine refers to treatment of an individual member of a group of persons who share a common, immutable characteristic (which in turn defines that group), and whose group members cannot or should not change that trait because of its fundamental relationship to their individual identities or conscience.²¹⁴ The immutable characteristics approach to social group analysis can be problematic in the disability context where persons with certain physical or mental impairments do not self-identify as “disabled.” However, with the addition of the “social perception” or “social visibility” requirement, persons with disabilities who do not identify as such may still satisfy the doctrinal requirements for membership in a particular social group, as will be seen in subsequent discussion.

Using the underlying theme of non-discrimination and respect for human rights, courts further subdivide three possible categories of social groups based on the *ejusdem generis* principle. The first category is defined by an innate or unchangeable characteristic; courts have considered gender, sexual orientation, linguistic background, and family ties as examples. Second are groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.

²¹⁰ *Id.*

²¹¹ *Id.* (opinion of J. Gummow) (“Such propositions appear to abandon the quest for standards by which administrative decisions may determine the fate of individuals and in respect of the application of which there is judicial review for error or law.”).

²¹² HATHAWAY, *supra* note 111, at 104–05 (“General words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”). Here *ejusdem generis* is used to describe what others may refer to as immutable characteristics approach or protected characteristics.

²¹³ *Matter of Acosta*, 19 I&N Dec. 211 (B.I.A. 1985); HATHAWAY, *supra* note 111, at 104–05.

²¹⁴ *Matter of Acosta*, 19 I&N Dec. 211 (B.I.A. 1985); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R., File No.: 21937 (Mar. 25, 1993).

One example are groups united by cultural affiliation or union membership. The third category includes groups associated by a former voluntary status that the group's members cannot alter due to their historical permanence. This would include social origin or "past status," such as Holocaust survivors, for example.²¹⁵

Groups that are excluded from the *ejusdem generis* classification are groups defined by characteristics which are changeable or from which disassociation is possible as long it does not require renunciation of basic human rights (typically groups based on occupation or profession, such as teachers or scientists).²¹⁶ Although socio-economic class seems to fall outside the *aegis* of particular social group, poverty may qualify because poverty cannot always voluntarily be given up. For example, "where the poor are forced to remain poor by the state or particular system, thereby suffering 'substantial economic disadvantage' there may be exceptions to the general exclusion of economically motivated groups."²¹⁷ Situations where "an individual's 'job' is based on his or her membership in a particular 'caste' (a concept which blurs the traditional distinctions between religion, social mores and economic classes) would also challenge a strict and narrow interpretation of the terms immutable or voluntary."²¹⁸

In recent times a new approach termed "social visibility" has been introduced in U.S. jurisprudence and has been the basis of some debate.²¹⁹ This new trend may have far-reaching consequences for applicants with disabilities and will be examined in further detail in subsequent sections.

A precursor of the social visibility standard, another popular conceptualization for social group was pioneered by the Australian Federal Court, described in *Ward* as one of the five original constructions of "particular social group," and termed the "social perception" test:

To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or fear of it cannot be a defining feature of the

²¹⁵ Canada (Attorney General) v. Ward, [1993] 2 S.C.R., File No.: 21937 (Mar. 25, 1993).

²¹⁶ Cheung v. M.E.I., [1993] 2 F.C. 314 (C.A.).

²¹⁷ HATHAWAY, *supra* note 111, at 104–05.

²¹⁸ *Id.*

²¹⁹ Kristin A. Bresnahan, Note, *The Board of Immigration Appeals's New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 650 (2011).

group. Second, the characteristic must set the group apart, as a social group, from the rest of the community. Third, there must be recognition within the society that the collection of individuals is a group set apart from the rest of the community.²²⁰

The general principle is not that the group must be recognized or perceived within the society, but rather that the group must be distinguished from the rest of society, and this serves as evidence.²²¹ Another way to construe the social perception concept is to see it as a means to restrict the scope of the groups described if the *ejusdem generis* doctrine were used exclusively. For example, based on the immutable characteristic of being female, women would readily comprise a particular social group under the *ejusdem generis* approach. However, when social perception is introduced into the equation, women on the whole are less likely to be set apart from the rest of the community and even if they were, society at large is not likely to perceive them as a distinct and different entity. Some courts adopt the immutable characteristics approach found in *Acosta* and reject the cohesiveness requirement while warning that the group cannot be defined solely by the fact that they are persecuted.²²² However, the actions of persecutors may serve to identify or even cause the creation of a particular social group—for example left handed people who are persecuted form a group because of their left-hand commonality.²²³ Despite the *Acosta* opinion, the U.S. stance on social perception remained unclear, with the Ninth Circuit continuing to require cohesiveness, cooperation, or interdependence in order to find the existence of a social group.²²⁴

The fifth and final approach outlined by *Ward* was essentially the UNHRC's solution to conceptualizing membership in a particular social

²²⁰ *Minister for Immigration and Multicultural Affairs v. Zamora* (1998) 51 ALD 1 (Austl.) (interpreting test earlier defined the by the High Court of Australia in *Applicant "A." and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 190 CLR 225 (Austl.)).

²²¹ *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25 (Austl.).

²²² *Acosta* seems to accept the immutable characteristics or “a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed” to demonstrate that an applicant is a “member of a group of persons all of whom share a common immutable characteristic” (impliedly) do not need cohesiveness. 19 I&N Dec. 211.

²²³ *Shah & Islam v. Home Department*, [1999] 2 A.C. 629 (U.K. House of Lords).

²²⁴ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

group was to reconcile the two dominant global approaches and combine the immutable characteristics doctrine and the social perception test.²²⁵

B. A Closer Look at the Social Visibility Test and Its Impact on Applicants With Disabilities

For persons with disabilities, a common problem arises from defining the nexus ground using the persecution which he/she faced, which leads to a circular definition (e.g., applicant is persecuted because of his disability and therefore the nexus ground is membership in a particular social group that is defined in terms of the persecution) rather than simply linking the two.²²⁶ This section will argue that the new social visibility test which has been criticized by jurists for its departure from precedent without explanation and by human rights activists as increasing the burden on asylum seekers, will actually serve the interests of persons with disabilities seeking asylum due to the CRPD's conceptualization of disability as a social phenomenon.

The social visibility test originated in the BIA, the "highest administrative body for interpreting and applying immigration laws," whose word binds all immigration judges unless overruled by the Attorney General or a federal court.²²⁷ In the past few years, the BIA has altered its long-standing stance on recognizing particular social group on the basis of immutable characteristics by introducing the requirement for group characteristics to be socially visible. While the BIA is well within its mandate to amend its definition of particular social group, as the Third Circuit Court of Appeals has stated, it may not act "arbitrarily" by departing from "its established precedents without announcing a principled reason for its decision."²²⁸ However, there continues to be a split of authority amongst federal courts of appeal in the United States as to the social visibility test.

²²⁵ UNHCR Guidelines on Membership in a Particular Social Group, HCR/GIP/02/02, May 7, 2002 [UNHCR Guidelines], ¶¶ 9–11 ("Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class. . . ." The UNHCR Guidelines goes on to define particular social group as: "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.").

²²⁶ *Id.*

²²⁷ See generally *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/board-of-immigration-appeals> (last visited Mar. 12, 2014).

²²⁸ *Valdiviezo-Galdamez v. Attn'y Gen.*, 663 F.3d 582 (3d Cir. 2011).

Between 1985 and 2006, most U.S. asylum adjudicators used *Acosta*'s immutable characteristic approach as the primary test for deciding asylum claims based on membership of a particular social group.²²⁹ In *Acosta* the Second Circuit stated that in order for membership in a particular social group to exist:

An individual must be a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.²³⁰

Tellingly, there is no requirement that the shared characteristic (whether innate or otherwise) be outwardly visible to society at large. In *Acosta*, the Second Circuit found that the applicant, whose claim was based on his membership in the group of taxi drivers who refused to comply with guerrilla-led work stoppages in San Salvador, was undeserving of refugee status because he could change and could be required to change his profession or non-conformist behavior.²³¹ In other words his shared characteristic was not deemed fundamental.

Since *Acosta*, the BIA has introduced the social visibility requirement in *In re C-A-* and *In re A-M-E-*. In *C-A-* the BIA addressed the question of whether “noncriminal informants constitute a ‘particular social group’ ” and found that the applicants, who were voluntary informants and feared harm at the hands of the Cali cartel, did not comprise a particular social group

²²⁹ Bresnahan, *supra* note 219, at 661.

²³⁰ *Acosta*, 19 I&N Dec. 211, 235 (B.I.A. 1985) (internal quotations omitted).

²³¹ *Id.*

because “an informant against the Cali cartel intends to remain unknown and undiscovered,” and “when considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view.”²³² Therefore, the applicants failed the social visibility test that is an important element in identifying the existence of a particular social group. In this way the BIA implies that it is not enough for an individual to self-identify but that his/her membership needs social endorsement; similarly it is not enough for society to recognize the existence of a group but rather it must recognize the existence of the group *and* an individual’s membership within it.²³³

Although the BIA describes the social visibility test as stemming from the UNHCR and Refugee Convention and Protocol, it is arguably inconsistent with existing law.²³⁴ The UNHCR Guidelines prescribe an either/or approach to demonstrating membership in a particular social group²³⁵ while the BIA conflates the two approaches and requires a two-part showing of membership in a particular social group (part one being the existence of an immutable characteristic and part two being the visibility of that immutable characteristic).²³⁶

Yet, the test would not necessarily preclude applicants with disabilities from seeking asylum on the basis of their membership in a particular social group. For instance, using the social definition of disability, even the strictest adherents of the social visibility requirement would be satisfied because the very existence of the disability is understood and characterized in societal terms, or in terms of what it means to society, and how others react to it. Short of being card-carrying members of the social group, such individuals would satisfy the tests laid out in both BIA decisions, *In re C-A-* and *In re A-M-E-*. However, using the medical definition of disability could create difficulty in showing the existence of a social group using the social visibility test since the medical needs of the individual, while being clearly identifiable, and documented (by doctors, psychiatrists, employers etc.) may not be readily apparent to others. Examining the BIA’s list of examples in which the social visibility test was satisfied, it seems to conflate the innate characteristics test with social visibility. For instance, in *Matter of Kasinga*,²³⁷ the BIA found that women in the “Tchamba-Kunsuntu tribe of

²³² 23 I&N Dec. 951 (B.I.A. 2006).

²³³ Bresnahan, *supra* note 219, at 660.

²³⁴ *In re C-A-*, 23 I&N Dec. 951, 960 (B.I.A. 2006).

²³⁵ UNHCR Guidelines, *supra* note 225.

²³⁶ Bresnahan, *supra* note 219, at 661.

²³⁷ *In re Kasinga*, 21 I&N Dec. 357 (B.I.A. 1996).

northern Togo who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice” comprised a particular social group—it can be argued that individuals with non-physical disabilities are just as “visible” as a woman who has resisted genital mutilation in Togo.²³⁸ In that instance, even the medical definition of disability could aid in proving social group membership. In *Matter of Toboso-Alfonso*, the BIA recognized homosexuals in Cuba to comprise a particular social group despite the deliberate lack of social visibility of such individuals in their home country.²³⁹ Similarly, in *Matter of Fuentes* the BIA recognized that former taxi drivers comprised a particular social group, although such a group lacked “particularity” and “social visibility” in society.²⁴⁰

In *A-M-E-*, the BIA held that the applicants failed to “establish that their status as affluent Guatemalans gave them sufficient social visibility to be perceived as a group by society or that the group was defined with adequate particularity to constitute a particular social group,” and stated that the Immigration Judge “correctly applied the *Matter of Acosta* framework . . . in determining that the proposed group of ‘wealthy’ Guatemalans is not so readily ‘identifiable’ . . . as to meet the requirements of a *particular* social group within the meaning of the refugee definition.” However, the *Acosta* framework did not include the “identifiable” requirement. The BIA notes that

in appropriate circumstances, “wealth” may be a shared characteristic of a social group. For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group,²⁴¹

but even in that instance there is no ready explanation as to *how* an individual member of the “class of wealthy persons, as defined by the government,” would be identified by the average person in society

²³⁸ *In re C-A-*, 23 I&N Dec. 951, 955 (B.I.A.).

²³⁹ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (B.I.A. 1990).

²⁴⁰ *Matter of Fuentes*, 20 I&N Dec. 227 (B.I.A. 1991).

²⁴¹ *In re A-M-E & J-G-U-*, 24 I&N Dec. 69, 75 (B.I.A. 2007).

In 2008, the BIA took the suggestions outlined in *In re C-A-* and made them requirements in a gang-related asylum claim.²⁴² Several U.S. circuit courts have applied the two-pronged test laid out in *Matter of S-E-G-* looking for “social visibility” and “particularity.”²⁴³ Amidst a split of authority between circuits, and a challenge before the Supreme Court, it remains to be seen whether the BIA’s new requirements and the departure from the *Acosta* standard should be afforded deference by U.S. courts.

C. Using the CRPD’s Social Model of Defining Disability to Show Membership in a “Particular Social Group”

Whether the adjudicating body relies on the immutable characteristics approach, the social perception test, social visibility or a combination thereof, the CRPD’s conceptual and practical treatment of the term “disability” will enable persons with disability to demonstrate their membership in a particular social group with greater ease.

1. Historic Debate

Article 1 which proclaims the purpose of the CRPD states that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁴⁴ Whether disability is properly viewed as an “innate or unchangeable characteristic” is an issue that is open to debate. In the case of *X v. Canada*,²⁴⁵ Canadian adjudicators granted the claim of a disabled Polish child who could not “communicate effectively except through sign language” and whose condition was deemed “permanent and unchangeable,” and thus consistent with *Ward’s* conceptualization of particular social

²⁴² *Matter of S-E-G-*, 24 I&N Dec. 579 (B.I.A. 2008) (rejecting proposed groups of “Salvadorean youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” and “the family members of such Salvadorean youth”).

²⁴³ The social visibility requirement has been rejected by some appellate courts since *Matter of S-E-G-*, 24 I&N Dec. 579 (B.I.A. 2008). See *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Valdiviezo-Galdamez v. Attn’y Gen.*, 663 F.3d 582 (3d Cir. 2011).

²⁴⁴ CRPD, *supra* note 17, art. 1.

²⁴⁵ *Crock, Ernst & McCallum, supra* note 30, at 16–17 (citing *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB), available at <http://www.canlii.org/en/ca/irb/doc/2001/2001canlii26953/2001canlii26953.html>).

group.²⁴⁶ Relying on the (arguably dated) medical approach to disability, “it reasoned that, since the relevant disability was an “innate or unchangeable characteristic,” the boy fell within the first of the three categories of particular social group set out in *Canada v. Ward*.”²⁴⁷ Interestingly, the Immigration and Refugee Board stated that the child’s disability was “publicly obvious since he is unable to control the XXXX,²⁴⁸ which afflict him,” but seems to have noted this fact as means of bolstering the credibility of the child’s claim and as an evidentiary tool rather than as an element that must be satisfied for a showing of membership in a social group.²⁴⁹ In other words, the Board was not looking to satisfy a social visibility test.

As discussed previously, the various conceptualizations of disability (e.g., medical, social) may have an impact on the viability of a claim brought on the basis of membership in a particular social group involving disability. The CRPD defines persons with disabilities as including those who have impairments that are “long-term.”²⁵⁰ Using the CRPD and viewing impairment in societal terms, the immutable characteristics or *ejusdem generis* test previously described, would be satisfied in showing membership in a particular social group. Using the social approach suggests that it is the impairment, not the disability, that is properly characterized as immutable, regardless of whether it is short-term or permanent. This model distances disability from stigma while still satisfying the particular social group requirement of refugee law. Furthermore, this model allows adjudicators to automatically read in an external behavioral element (whether it is mere discrimination, serious harm or persecution), that converts impairment into disability. Thus, identifying a person as disabled, effectively identifies both an immutable characteristic that forms the basis of his/her membership in a particular social group *and* has the potential to simultaneously identify persecution.

²⁴⁶ *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB), available at <http://www.canlii.org/en/ca/irb/doc/2001/2001canlii26953/2001canlii26953.html>.

²⁴⁷ Crock, Ernst & McCallum, *supra* note 30, at 16 (citing *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689, 739, 744).

²⁴⁸ The opinion uses this designation to protect the applicant’s privacy.

²⁴⁹ *X v Canada* (Immigration and Refugee Board) (2001) CanLII 26953 (IRB), available at <http://www.canlii.org/en/ca/irb/doc/2001/2001canlii26953/2001canlii26953.html>.

²⁵⁰ CRPD, *supra* note 17, art. 1.

2. *Showing Nexus Between Persecution and Membership in a Particular Social Group*

In an Australian case of a Mongolian national the adjudicator accepted that “‘people with disabilities’ constitute a ‘particular social group’ in Mongolia for the purposes of the Refugee Convention,” and relied upon “all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country,” and materials such as the U.S. State Department Country Reports on Human Rights Practices for any given country.²⁵¹ Yet in many instances the difficulty in showing membership in a particular social group and in showing how persecution arises from membership in a particular social group can prove insurmountable.

How does disability relate to the social visibility test? While some argue that persons with disability are deemed to be non-contributing members of society and thus forced into the outside fringes and treated as second-class citizens, it is that very marginalization which causes them to comprise a particular social group. In other words, the “invisibility of disabled people as subjects of human rights and equality law” is what enables them to pass the test of social visibility.²⁵² Under the social approach to understanding disability, society’s response (in the form of discrimination, marginalization, abuse, cruel or degrading treatment, and in some instances even death) to an individual’s impairment is the focus rather than the impairment itself. The main issue then becomes how to show particularity, or that the individual fears persecution that is somehow specific to him/herself and not one that is generally feared by all members or the majority of society.

In the case of a Jordanian national, the application was rejected by the Refugee Review Tribunal of Australia because, although disability services in Jordan were “poor,” “limited,” “negligent” and discriminatory, it was the product of limited government resources, which would affect all citizens and was not unique to the applicant.²⁵³

²⁵¹ RRT Case No. 1002307, [2010] RRTA 532 (July 5, 2010), available at <http://www.unhcr.org/refworld/docid/4c84c7a72.html>.

²⁵² Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 584 (2007).

²⁵³ Crock, Ernst & McCallum, *supra* note 77, at 17 (citing 0907687, [2010] RRTA 45, ¶¶ 87–91, 93 (Member Leehy)).

VI. CONCLUSION

Using a human rights framework to adjudicate asylum claims offers many benefits, including greater uniformity and consistency of outcomes across jurisdictions. Within the human rights framework, the CRPD provides crucial guidance for adjudicators on applications concerning persons with disabilities. The CRPD offers applicants with disabilities a more precise and clear map with which to navigate the complexities of the asylum process in a given state. First, the CRPD makes the showing of a well-founded fear of persecution more accessible to persons who may otherwise have faced unfair and unique challenges to such an evidentiary standard. Second, the CRPD allows applicants with disabilities to more easily identify as a particular social group, and to mitigate some of the challenges presented by cultural variations in perception. This also allows them to link the persecution they experience to a Refugee Convention category.

Fear of “opening the floodgates” to a deluge of new applicants seeking asylum on the basis of suffering persecution for their disabilities is an unfounded policy concern. Indeed, as Michelle Foster points out, such an argument lacks any legal basis and several common law jurisdictions make it clear that the administrative problem presented by increased applications cannot justify adopting “artificial and inhuman criteria in an attempt to solve it.”²⁵⁴ Furthermore, in the absence of a drastic modification of the Refugee Convention, a successful applicant must demonstrate a sufficiently serious harm that amounts to persecution, and must link that harm to a Refugee Convention ground—neither are easy feats. Foster argues that this will continue to exclude a broad range of claims, “most obviously where the applicant cannot differentiate his or her situation from that of the general population in the home state.”²⁵⁵ Thus the distinction between refugee and migrant remains secure.

The “floodgates” argument assumes that all those who satisfy the Refugee Convention definition will actually flee their home states to seek protection elsewhere.²⁵⁶ Statistics show that relatively few people do so in reality.²⁵⁷

²⁵⁴ Michelle Foster, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGEE FROM DEPRIVATION* 344 (2011) (citing *R v. Secretary of State for the Home Department, Ex parte Jeyakumaran*, [1994] Imm. AR 45 at 48; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995; Applicant “A.” and Another v. Minister for Immigration and Ethnic Affairs and Another, High Court of Australia, 1997. 190 CLR 225; 142 ALR 331 (opinion of Gummow, J.)).

²⁵⁵ *Id.* at 345.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

For example, the same concern was raised by asylum adjudicators and sovereign states when the global community formally began recognizing gender-related persecution (such as female genital mutilation, forced marriage, and domestic and sexual violence) as a legitimate basis for asylum.²⁵⁸ Despite the fact that half the global population is female and a significant percentage of women are oppressed, only a small population seeks asylum overseas—even in the face of highly publicized protections for refugees fleeing gender-based persecution.²⁵⁹

The U.S. Department of Homeland Security noted in 2009 that accepting the possible existence of a “particular social group” that could render some victims of domestic violence eligible for asylum “does not mean, however, that every victim of domestic violence would be eligible for asylum. As with any asylum claim, the full range of generally applicable requirements for asylum must be satisfied.”²⁶⁰ Like the United States, other states that grant asylum to women fleeing gender-related persecution “report similar experiences: low numbers, small percentages, and no surge of claims.”²⁶¹

It is therefore unlikely that using a human rights framework and the CRPD in the asylum process and recognizing persons with disabilities as a discrete and particular social group, will have an unduly burdensome effect on the number of applications from persons with disabilities.²⁶²

²⁵⁸ *Id.*

²⁵⁹ Jeanne Smoot, *The Truth Trickles Out: There’s No Reason to Fear a “Flood” of Women Asylum-seekers* (unpublished paper prepared for Tahirih Justice Center, April 2010) (on file with author) (citing Questions and Answers on the *R-A-* Rule, U.S. Dep’t of Justice, INS, 4 (Dec. 7, 2000), available at http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf (“Although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM [(female genital mutilation)] since such claims were first recognized as a legitimate basis for asylum in 1996” and also anticipating that “recognizing domestic violence as a possible basis for asylum would not result in a surge of such claims”).

²⁶⁰ *Id.* (citing DHS Supplemental Brief, *Matter of Anon 12–13* (Apr. 13, 2009)).

²⁶¹ Smoot, *supra* note 259 (citations omitted).

²⁶² Further discussion on the concerns over increased applications as a result of recognizing persons with disabilities as a particular social group in forthcoming article.