CHAPTER 11

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

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Interpretation of the 1951 Convention relating to the Status of Refugees (Refugee Convention)1 and its 1967 Protocol2 has evolved to take into account the standards of human rights protection embedded in international human rights treaties.3 The theoretical underpinnings of this development were provided by Hathaway’s seminal work in this field, which proposed understanding ‘persecution’ as a sustained violation of human rights under the International Bill of Rights, comprised of the 1948 Universal Declaration of Human Rights,4 the 1966 International Covenant on Civil and Political Rights5 (ICCPR) and the 1966 International Covenant on Economic Social and Cultural Rights6 (ICESCR).7 Nonetheless, Hathaway subsequently accepted that other international human rights treaties which are widely accepted by States members to the Refugee Convention may be used to interpret what constitutes persecution.8

This raises the novel question of whether the 2006 Convention on the Rights of

3  M. Foster, International Refugee Law and Socio-Economic Rights (CUP 2007) 27.
Persons with Disabilities (CRPD), a recent addition to the body of United Nations treaties on human rights, can help us to understand the scope of the refugee concept in the case of persons with disability. Specifically, it creates an opening for considering whether or how the CRPD’s specific set of human rights standards, i.e. disability rights, impacts on our interpretation of the refugee concept in refugee law.

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

The relative novelty of the CRPD also means that no cohesive analysis yet exists to explain its implications for refugee law. The subsequent sections of this chapter represent an attempt to begin to address these questions directly. To do so, they contrast two distinct approaches to conceptualising the human rights of persons with disability in the context of international protection. The second section explores the manner in which disability has been addressed within existing broader human rights frameworks by the case law of regional courts in Europe, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in expulsion cases. This approach is then deliberately contrasted with the approach adopted in the leading New Zealand decision of AC (Egypt) that addresses such issues directly within the framework of refugee law. That decision forms the basis for the attempt by this chapter to identify, in light of the CRPD, an ‘enabling’ interpretation of the Refugee Convention for persons with disability.

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