

# The Persecution of Disabled Persons and the Duty of Reasonable Accommodation

*An Analysis under International Refugee Law, the EU Recast Qualification Directive and the ECHR*

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## 1 Introduction

In recent years there has been a growing recognition of the need for a disability-sensitive refugee definition, particularly since the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) on 13 December 2006.<sup>2</sup> One question that must be considered in the refugee context is whether violations of the rights enshrined in the CRPD can be drawn upon in interpreting the notion of persecution. In particular, it is yet to be fully explored whether a violation of a core principle of the CRPD, the duty to make necessary and appropriate adjustments for disabled persons (the duty of reasonable accommodation, Article 2 CRPD), may amount to persecution.<sup>3</sup>

In this chapter I will examine how courts and tribunals have assessed the asylum claims of disabled persons and the extent to which the CRPD has been turned to when assessing persecution. In particular, I will analyse in what situations violations of the duty of reasonable accommodation may amount to

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<sup>1</sup> The author would like to thank Vincent Chetail and the reviewers for their helpful comments on an earlier draft. All remaining errors are those of the author.

<sup>2</sup> CRPD, 2515 UNTS 3, 13 December 2006 (entry into force 3 May 2008). This is particularly so amongst scholars, see e.g. C. Straimer, 'Vulnerable or Invisible? Asylum Seekers with Disabilities in Europe' (2010) 194 UNHCR New Issues in Refugee Research Series; M. Crock, C. Ernst and R. McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24 IJRL 735. See also J.C. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn CUP 2014) 201, 205, 451–452, and the United Nations High Commissioner for Refugees (UNHCR), UNHCR Executive Committee (ExCom), Conclusion No 110 (LXI) of 2010.

<sup>3</sup> I will refer to 'disabled persons' rather than 'persons with disability' for reasons of style, but I do not wish to stress the membership of the disabled community (disabled person) rather than the human condition (person with disability), see further A. Hendriks, M. Ventegodt Liisberg, 'Disability Rights – Overview' in D.P. Forsythe (ed), *Encyclopedia of Human Rights* (vol 2 OUP 2009) 34.

persecution in international refugee law and under the 2011 Recast Qualification Directive of the European Union (EU) as well as the European Convention on Human Rights (ECHR).<sup>4</sup>

In Section 2, I will provide a brief overview of the CRPD, focusing particularly on the novel aspects of the human rights approach enshrined in the Convention, including the duty of reasonable accommodation, the denial of which constitutes discrimination pursuant to Article 2 CRPD. In Section 3, I will consider the relevance of the CRPD to the notion of persecution within the broader context of the human rights paradigm in international refugee law. My focus will lie on the case law of Australia, New Zealand, Canada and the United Kingdom (UK). In Section 4, I will analyse existing case law on disabled asylum seekers through the lens of the CRPD and the duty of reasonable accommodation. Section 5 will focus on the extent to which a disability-sensitive definition of persecution is compatible with, or even required by, EU asylum law. Finally I will look at the approach taken to the *refoulement* claims of disabled persons by the European Court of Human Rights (ECtHR). I will conclude that a denial of reasonable accommodation has so far been found to amount to persecution only if the case involved either cumulative forms of harm or cumulative vulnerabilities. However, a more inclusive approach would be appropriate in that this would not only be in accordance with the Handbook of the United Nations High Commissioner for Refugees (UNHCR), but is also required of EU Member States by virtue of EU law.

## 2 An Overview of the United Nations Convention on the Rights of Disabled Persons

### 2.1 *Rationale and Adoption of the Convention on the Rights of Persons with Disabilities*

The CRPD is the most recent group-rights treaty in international human rights law. The late adoption of this treaty is in part due to the formerly prevailing assumption that the human rights of disabled persons were sufficiently protected under existing human rights treaties, particularly the International

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4 See respectively Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), OJ L 337/9, 20 December 2011; and ECHR, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).