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Revisiting Persecution due to Socio- Economic Deprivation

A Reading of the Refugee Definition in light of the CRPD

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Table of Contents

Summary	i
Preface	ii
Abbreviations	iii
1. Introduction	1
1.1 Setting the scene	1
1.2 Identification of the problem	3
1.3 Aim and Research Question	5
<i>1.3.1 Aim</i>	5
<i>1.3.2 Research Question</i>	6
1.4 Methodological Considerations	6
1.5 Literature Review and Contribution	8
1.6 Delimitations	10
1.7 Outline	10
2. Unpacking the human rights approach to the refugee definition	12
2.1 Who is a refugee: the core elements of the refugee definition	12
<i>2.1.1 Well-founded fear</i>	15
<i>2.1.2 Persecution and lack of protection</i>	16
<i>2.1.3 Nexus requirement: is intention needed?</i>	20
2.2 The conceptual relationship between International Human Rights Law and International Refugee Law	22
2.3 The Refugee Convention’s object and purpose as a justification for a human rights approach to the refugee definition.....	25
2.4 Concluding remarks.....	29

3. The relevance of disability-specific standards to the refugee definition.....	31
3.1 The added value of the Convention on the Rights of Persons with Disabilities in International Human Rights Law	31
3.1.1 <i>The Convention’s object and purpose</i>	31
3.1.2 <i>The social model of disability: the conceptual foundation of the CRPD</i>	34
3.2 The Convention’s on the Rights of Persons with Disabilities main features	37
3.2.1 <i>A holistic approach to rights and its implication to the concept of progressive realization</i>	38
3.2.2 <i>Denial of reasonable accommodation as discrimination</i>	39
3.2.3 <i>The right to accessibility</i>	41
3.3 Deprivation of socio-economic rights as discrimination for persons with disabilities	42
3.4 Concluding remarks.....	45
4. Revisiting the refugee definition from a disability-specific approach	47
4.1 Well-founded fear for persons with disabilities	47
4.2 Being persecuted: what constitutes serious harm for persons with disabilities....	49
4.3 Disability as ‘Membership of a Particular Social Group’	54
4.4 Nexus Requirement	56
4.5 Challenges following a disability-specific approach in light of common perceptions of socio-economic claims.....	57
5. Conclusion	61
Bibliography.....	66

Summary

The discussion of what the notion of ‘persecution’ entails seems to be evergreen during a time when people are more and more on the move fleeing deprivation of socio-economic rights. A ‘human rights approach’ to the refugee definition, namely an interpretation by reference to human rights standards, is now endorsed in relevant scholarship. This thesis explores how the disability-specific standards deriving from the Convention on the Rights of Persons with Disabilities (CRPD) can flesh out this approach. In doing so, it navigates through the theoretical underpinnings of the ‘human rights approach’ to the refugee definition in order to frame a nuanced disability-specific understanding of ‘persecution’ that bears the prohibition of discrimination at its core. The thesis examines thoroughly the main features of the CRPD, which center around the prohibition of discrimination, and focuses on their implications towards the assessment of the impact of socio-economic deprivation specifically to persons with disabilities. The conclusions drawn constitute a systematic human rights approach to the refugee definition that frames a disability-specific understanding of its constituent elements. Ultimately, the thesis proposes that in order for the Refugee Convention to fulfil its objective, the assessment of ‘persecution’ that results from socio-economic deprivation, as well as other elements of the refugee definition, need to be conducted in a disability-sensitive fashion in the case of applicants with disabilities.

Key terms

Persecution, refugee definition, persons with disabilities, disability-specific, socio-economic deprivation

Preface

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Abbreviations

CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIRB	Canadian Immigration and Refugee Board
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
IRL	International Refugee Law
MPSG	Membership of a Particular Social Group
Refugee Convention	1951 Convention Relating to the Status of Refugees (unless otherwise specified, references to the Refugee Convention include the 1967 Protocol on the Rights Relating to the Status of Refugees)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1. Introduction

'So, to be capable of functioning as an equal citizen involves not just the ability to effectively exercise specifically political rights, but also to participate in the various activities of civil society more broadly [...] And functioning in these ways presupposes functioning as a human being [which] requires effective access to the means of sustaining one's biological existence—food, shelter, clothing, medical care [...] This also entails the social conditions of being accepted by others, such as the ability to appear in public without shame, and not being ascribed outcast status'.¹

1.1 Setting the scene

Over the past decade, the global population of forcibly displaced people reached unprecedented levels.² In a nutshell, forcible migration can be described as a 'migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes'.³ Nevertheless, the understanding of what the notion of 'forcible' displacement entails is sometimes blurred, resulting in a predominant dichotomy between, on the one hand, 'voluntary' movements that arise from a combination of 'push' and 'pull' factors, which include economic, political and social forces and on the other hand 'involuntary' movements responding solely to 'push' factors.⁴

This dichotomy creates two categories of persons: refugees deserving international protection, and economic migrants who do not. The construction of 'genuine humanitarian refugees' versus 'fraudulent economic migrants' has been used rhetorically for the purpose of justifying denial of refugee status to persons who also

¹ Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 *Ethics* 287, 317–318.

² UNHCR, 'Global Trends Forced Displacement in 2018' <<https://www.unhcr.org/globaltrends2018/>> accessed 21 May 2020.

³ International Organization for Migration, 'Key Migration Terms' <<https://bangladesh.iom.int/key-migration-terms>> accessed 21 May 2020.

⁴ Anthony H Richmond, 'Reactive Migration: Sociological Perspectives on Refugee Movements' (1993) 6 *Journal of Refugee Studies* 7, 7; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 7.

have socio-economic motives.⁵ However, it is based on the shaky assumption that economic migration is always a matter of voluntary choice in pursuit of a better life. What this oversimplification disregards is that, unless an individual is literally subject to expulsion from her country of origin, there is always a margin of choice.⁶ In this sense, distinguishing between ‘forced’ and ‘adventurous’ motives is rarely clear-cut and is therefore an ill-suited tool in the refugee context.

In a way, having an economic motive for fleeing is regarded as a suspicious attempt to deceive the system; as a result, persons basing their refugee claims on violations of socio-economic rights risk being regarded as ‘economic migrants’ and therefore undeserving of international protection. The underlying reason for this lies on the perceived normative superiority of civil and political rights in comparison to socio-economic rights, which makes it harder to establish that the alleged harm, which results from socio-economic deprivation,⁷ amounts to persecution. After all, this dichotomous approach is hardly helpful in a refugee analysis, where claims are rarely based on neat categories and types of rights.⁸

In fact, it is now established that relying on a normative hierarchy between groups of rights is fundamentally flawed. This is particularly relevant when considering the developments in international human rights law and especially the principle reflected in the Vienna Declaration and Programme of Action, which was approved at the World Conference on Human Rights in 1993, and views human rights as:

⁵ Jennifer A Klinck, ‘Recognizing Socio-Economic Refugees in South Africa: Principled and Rights-Based Approach to Section 3(b) of the Refugees Act’ (2009) 21 *International Journal of Refugee Law* 653, 665.

⁶ As Richmond puts it ‘theoretical explanations are necessarily probabilistic, not deterministic. Human agency implies an element of choice and ensures that some degree of uncertainty is always present, even when the choices in question are severely constrained by external conditions. There is no simple cause and effect relationship between a specific event and its consequences’, see Richmond (n 4) 9.

⁷ The term ‘socio-economic deprivation’ is used by Foster and refers to deprivation of socio-economic rights, see Foster (n 4).

⁸ Michelle Foster, ‘Economic Migrant or Person in Need of Protection?’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Martinus Nijhoff Publishers 2016) 248.

universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁹

In light of this, any argument on normative hierarchy is no longer sustainable, since ‘it is now accurate to describe the predominant approach as a unified one’.¹⁰

On reflection, the enjoyment of most rights is indeed consecutive. Human rights are interconnected in a way that a certain action might as well constitute a violation of both types of rights, since it is not always possible, or useful, to compartmentalize a right into ‘two broad and neatly distinguishable categories’.¹¹ In effect, a civil and political right’s enjoyment is considerably more dependent on the enjoyment of a socio-economic right than on the legal and policy-related steps towards its enforcement. Therefore, if the concept of interdependence and indivisibility of rights is, in the words of Cassese, more than ‘a convenient catchphrase’,¹² it should be reflected in the way human rights concepts are approached both in a theoretical level and in decision making.

1.2 Identification of the problem

Against this background, this thesis places its focus on the situation of persons with disabilities who are more likely to experience socio-economic deprivation due to discriminatory practices. The World Health Organization (WHO) has estimated that there are more than a billion persons with disabilities in the world today, a number that represents almost fifteen per cent of the world’s total population, or one in seven people;¹³ seventy per cent of the total number are estimated to have either limited or

⁹ UN General Assembly, ‘Vienna Declaration and Programme of Action’ (UN General Assembly 12 July 1993 Doc No A/CONF.157/23), para 5

¹⁰ Foster (n 4) 166.

¹¹ *ibid* 181; as noted by Turner, even the political right to vote, which is seemingly of immediate effect and therefore readily realizable, is dependent on the economic right to housing, in the sense that homelessness affects greatly one’s access to political channels, see Suzie Turner, ‘Recognition of the Voting Rights of the Homeless Note’ (1986) 3 *Journal of Law & Politics* 103, 103.

¹² Antonio Cassese, ‘Are Human Rights Truly Universal?’ in Belgrade Circle Staff (ed), *The Politics of Human Rights* (Verso 1999) 159.

¹³ World Health Organization, *WHO Global Disability Action Plan, 2014-2021: Better Health for All People with Disability* (2015) para 6
<http://apps.who.int/iris/bitstream/10665/199544/1/9789241509619_eng.pdf> accessed 21 May 2020.

no access to the services they need.¹⁴ Unsurprisingly, disability disproportionately affects poor people, who have to overcome a variety of policy-related barriers in accessing services linked to the fulfilment of their socio-economic rights, such as those to health care, education, employment and social services, including housing and transport.¹⁵

Until relatively recently, persons with disabilities remained invisible in the human rights discourse, since, virtually, they were protected by the existing international human rights framework and it was presumed that there was no need for special provisions that would guarantee their protection. The landscape has changed in the past few decades, primarily due to the adoption of the 2006 Convention on the Rights of Persons with Disabilities (CRPD)¹⁶ and the paradigm shift it introduces, by relying on a social model of disability rather than on a medical one in order to describe the term.¹⁷ Conceptually, the social model of disability, in contrast to the medical model, dissociates an impairment from an illness, therefore delineating disability as a social construction, where negative social factors external to the individual render her disabled. The introduction of a social model of disability moves towards a conceptual fusion of social, economic and cultural rights with civil and political rights, therefore distancing the CRPD from the principle of progressive realization that is traditionally coupled with socio-economic rights.¹⁸

Assuming obligations vis-à-vis persons with disabilities includes taking measures ‘to reduce structural disadvantages and to give [them] appropriate preferential treatment [...] in order to achieve the objectives of full participation and equality within society for all persons with disabilities’.¹⁹ Should a State fail to employ inclusive policies to tackle discrimination and ensure the realization of their socio-economic rights, persons with disabilities are highly likely to experience a degraded

¹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 5: Persons with Disabilities’, Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights (9 December 1994 Doc No E/1995/22) para 8.

¹⁵ World Health Organization (n 13) para 8.

¹⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3.

¹⁷ Don MacKay, ‘The United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law & Commerce* 323, 323.

¹⁸ Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2. ed., OUP 2000) 275.

¹⁹ CESCR, General Comment No. 5 (n 14), para 9.

standard of living, which might include limited or no access to health services, unemployment, societal exclusion and destitution – factors which synthesize the profile of what is commonly perceived as a prospective migrant. However, the phenomenon of fleeing socio-economic deprivation has been increasingly challenging the way such movements are perceived: is flight from poverty actually a voluntary decision to pursue a better life, or is it a forced one imposed by external factors, that should therefore dictate an individual's international protection? Indeed, the distinction between a 'voluntary migrant' and an 'involuntary refugee' is not always clear-cut, in the sense that, to begin with, freewill motives are hardly ever distinguishable; even more importantly, socio-economic deprivation has been growingly accepted as capable of constituting 'persecution'²⁰ for the purposes of the 1951 Convention Relating to the Status of Refugees (Refugee Convention).²¹

In the light of the foregoing, the underlying hypothesis guiding this thesis is that persons with disabilities who experience socio-economic deprivation can, under certain circumstances, fall within the ambit of the Refugee Convention, if it can be established that this deprivation derives from discriminatory practices amounting to persecution.

1.3 Aim and Research Question

1.3.1 Aim

The thesis takes as its point of departure the premise that even though a person with disabilities might flee penury and therefore have an 'economic' profile, this penury might have resulted from discriminatory deprivation of socio-economic rights amounting to persecution. Although there is no universally accepted definition of the 'persecution' element contained in the refugee definition of Article 1(A)(2) of the Refugee Convention, its interpretation by reference to human rights standards is now endorsed in relevant scholarship and in a number of jurisdictions. However, there are ongoing challenges in the interpretive interaction between refugee law and human

²⁰ Foster (n 4) 90.

²¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art. 1(A)(2).

rights law, since the meaning of ‘human rights standards’ is itself ill-defined: which set of human rights standards can help define persecution and why?

In this connection, this thesis aims at undertaking a principled human rights approach to the Refugee Convention, in order to revisit the notion of ‘persecution’. To that end, it is specifically concerned with the issue of whether, and if so, how the human rights standards deriving from a disability-specific treaty such as the CRPD can help define the scope of persecution due to socio-economic deprivation in the case of persons with disabilities.

1.3.2 Research Question

In order to achieve its aim, the thesis poses a focal research question, which is as follows: *‘When, if at all, does the deprivation of socio-economic rights of persons with disabilities in their country of origin amount to persecution under the Refugee Convention?’*.

In pursuit of an answer, the thesis will be concerned with three sub-questions that will synthesize the outcome of the main research question:

1. How does the current interplay between international refugee law and international human rights law shape the human rights approach to the refugee definition?
2. What is the relevance of the Convention on the Rights of Persons with Disabilities to international human rights law and international refugee law, especially in light of the implications of its main approaches to socio-economic rights?
3. How could the refugee definition be reconceptualized in the light of the CRPD human rights standards?

1.4 Methodological Considerations

The research question necessitates the examination of the three sub-questions from a *de lege lata* perspective, in the sense that the law is analyzed and interpreted as it is, according to normative interpretative principles. To that end, the thesis follows the legal doctrinal method. Where interpretation of the law fails to deliver precise answers,

subsidiary sources, such as existing literature, will be consulted upon, only to elucidate how the law should be interpreted. That being said, it is submitted that any suggestions made hereby in respect of a ‘correct’ interpretation of a concept will adhere to reliable interpretative criteria and are not intended to add a *de lege ferenda* element on this research.

In pursuit of an answer to the research question posed, the thesis will focus on international refugee law legal framework, literature and jurisprudence. Chapter 2 draws mainly on existing literature and the examination of the refugee definition contained in Article 1(A)(2) of the 1951 Refugee Convention, which is pivotal for the interpretation of the notion of ‘persecution’. Even though there are various theoretical underpinnings of a ‘human rights approach’ or ‘human rights paradigm’, they will not be addressed; this thesis draws from Hathaway’s model of ‘surrogate protection’ and its subsequent developments in order to explore the conceptual foundations of a human rights approach and adopts Cantor’s model, which places the principle of non-discrimination at the core of the refugee definition. Chapter 3 seeks insight from the human rights standards contained in the 2006 Convention on the Rights of Persons with Disabilities, which will be considered in detail in order to explore how they can shape the notion of ‘persecution’ in the case of persons with disabilities. Limited scholarly work from the field of sociology will also be used to offer a better perception of the ‘social model’ of disability.

The Vienna Convention on the Law of Treaties²² will serve as an authoritative guide for the interpretation of the aforementioned legal instruments, which will be examined according to their ordinary meaning, scope and purpose.²³ Relevant secondary sources, such as guidelines of the United Nations High Commissioner for Refugees (UNHCR), will also be consulted upon to shed light on practical matters. Scholarly work of several authors will also be used to underpin argumentation.

²² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, (entry into force 27 January 1980), United Nations, *Treaty Series*, vol. 1155, p. 331.

²³ *ibid*, Arts. 31-33; the fact that under Art. 4 of the VCLT ‘the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention’ should not be taken to preclude its application to predated treaties such as the Refugee Convention and its Protocol, since it is widely accepted that the VCLT constitutes customary international law in relation to treaty interpretation (see, indicatively: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, para 41).

1.5 Literature Review and Contribution

The distinct elements of this topic have been subject to extensive research. To begin with, legal scholars have engaged in research concerning the definition of ‘persecution’ from a human rights approach over the past thirty years, with Goodwin-Gill suggesting a definition of ‘persecution’ by reference to human rights standards in 1983.²⁴ The most seminal contribution on this concept was articulated in Hathaway’s study in 1991, who framed persecution as ‘the sustained or systemic violation of basic human rights resulting from a failure of State protection’.²⁵ In this regard, Hathaway proposed a ‘four-tier hierarchy’, where human rights violations should be ranked according to their degree of importance, with the lower tiers requiring further sustained violence than the top one in order to constitute ‘persecution’.²⁶ Even though this approach has not remained undisputed,²⁷ it has been widely adopted by scholars such as McAdam, Zimmermann, Storey and others²⁸ and has had important implications with regards to the refugee definition in a number of jurisdictions.²⁹

²⁴ Guy S Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1983).

²⁵ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 101. Hathaway argues that international human rights law is vital in interpreting the Refugee Convention, since it can substitute the authoritative gap that derives from the absence of a treaty body that would provide interpretation to the Convention’s terminology.

²⁶ *ibid* 108–112. By the same token, Hathaway and his co-author Michelle Foster suggest a human rights based approach in interpreting the notion of persecution, holding that ‘international human rights law positions refugee decision-makers to take a non-absolutist yet principled approach to the identification of serious harm’, although the ‘four-tier hierarchy’ is abandoned: James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed., CUP 2014) 203–207.

²⁷ Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (CUP 2009). Price argues that asylum should be seen as a political instrument, since ‘a humanitarian view of asylum is classified as a “conceptual error”’, and that asylum ‘responds to the distinctive situation of persecuted people, who have been expelled from their political communities, by expressing condemnation of persecutory regimes - that matches the special harm they have suffered’ (p. 13).

²⁸ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed., OUP 2007) 131–133; Andreas Zimmermann and Claudia Mahler, ‘Article 1A, Para. 2 (Definition of the Term “Refugee”)’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 345; Hugo Storey, ‘Persecution: Towards a Working Definition’ in Vincent Chetail and Céline Bauoz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 459; Hélène Lambert, ‘International Refugee Law: Dominant and Emerging Approaches’ in David Armstrong (ed), *Routledge handbook of international law* (Routledge 2008) 344; Karen Musalo, ‘Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms’ (1993) 15 *Michigan Journal of International Law* 1179; Jean-Yves Carlier, ‘General Report’ in Jean-Yves Carlier (ed), *Who is a Refugee: A Comparative Case Law Study* (Kluwer Law International 1997) 685.

²⁹ Bruce Burson and David James Cantor, ‘Introduction: Interpreting the Refugee Definition via Human Rights Standards’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 7. Also, a human rights approach to persecution is reflected in Art. 9 (1) of the EU Qualification Directive, which requires that

The suggestion that claims with a socio-economic element also have a ground on the Refugee Convention was articulated very soon after the adoption of the Refugee Convention by Grahl-Madsen, in case the harm suffered lead to denial of ‘every possibility for earning a livelihood’.³⁰ Foster in turn advanced Hathaway’s original ‘four-tier’ assertion, framing persecution as deriving from violations of the core of *all* human rights, thus including socio-economic rights. Foster challenged the dichotomy between ‘economic migrants’ and ‘refugees’ and contended that the Refugee Convention ‘is capable of accommodating a more complex and nuanced analysis’ that recognizes different types of refugee claims with an ‘economic element’.³¹ Even though this approach is no longer considered a radical construction and has influenced decision making in broadening the scope of ‘persecution’ with regards to socio-economic violations, an answer on whether a superior status is attached to civil and political rights remains elusive.

Upon combination, the elements of ‘persecution’, ‘due to socio-economic deprivation’ in relation to ‘persons with disabilities’ have been subject to limited research. Some authors have addressed the legal protection of persons with disabilities in the host country,³² while Motz and Dimopoulos have addressed the issue of persecution of persons with disabilities in light of the CRPD,³³ but have not examined in depth the Refugee Convention’s constituents in this regard.

This thesis seeks to contribute with a systematic analysis of the particular situation of persons with disabilities as beneficiaries of the Refugee Convention from

an act of persecution must ‘(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)’. Yet, prominence is given to non-derogable rights, such as the prohibition of torture or slavery.

³⁰ Atle Grahl-Madsen, *The Status of Refugees in International Law* (A W Sijthoff 1966) 86.

³¹ Foster (n 4) 1.

³² Mary Elizabeth Crock and others, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Edward Elgar Pub 2017).

³³ Stephanie Motz, ‘The Persecution of Disabled Persons and the Duty of Reasonable Accommodation: An Analysis under International Refugee Law, the EU Recast Qualification Directive and the ECHR’ in Céline Bauloz and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015); Andreas Dimopoulos, ‘An Enabling Interpretation of the Refugee Convention: Determination of Refugee Status in Light of the Convention on the Rights of Persons with Disabilities’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016).

a refugee law perspective, by reconceptualizing the notion of ‘persecution’ in the context of a human rights approach that will incorporate the CRPD.

1.6 Delimitations

The scope of this thesis is limited in many respects, since it is concerned with wide topics, not every aspect of which can be analyzed due to scope, time and space constraints. The research focuses on how the Convention on the Rights of Persons with Disabilities can shape the interpretation of the refugee definition contained in the Refugee Convention. It is therefore only concerned with refugee status and not with exploring whether complementary forms of protection - such as subsidiary protection or protection on humanitarian grounds - can be afforded as an alternative. Similarly, it also does not engage with exploring obligations arising solely from the principle of *non-refoulement* or examining the implications of the possibility of internal relocation. On that note, the term ‘refugee’ will be used as an umbrella term throughout this thesis.

Moreover, without excluding the possibility of a person with disability belonging to each of the persecution grounds enumerated in the refugee definition, the thesis will only examine the ground of ‘membership of a particular social group’ as the one most manifestly befitting persons with disabilities.

Lastly, recourse to refugee law jurisprudence comprises the major common law jurisdictions - the United States, the United Kingdom, Canada, New Zealand and Australia - which are accessible due to the language employed and prior engagement of leading authors in refugee law scholarship. This inevitably limits the extent to which respective developments or challenges have been exposed.

1.7 Outline

Chapter 2 discusses the conceptual interplay between international human rights law and international refugee law. In particular, the chapter explores the dimensions in which the two regimes interact and how the human rights approach to the refugee definition is framed. After demonstrating the conceptual affinity of the two regimes, the chapter unpacks the core elements of the refugee definition in order to show how they are presently understood by reference to a human rights approach.

Chapter 3 is dedicated to introducing the Convention on the Rights of Persons with Disabilities, by discussing the implications of its adoption in the international human rights framework and how this in turn influences the conceptualization of the refugee definition. To this end, it explores the main features of the CRPD on the way to framing a disability-specific approach to the refugee definition, placing its approach to socio-economic rights on its focus.

Chapter 4 deploys the findings of the foregoing chapters in order to revisit the refugee definition. In particular, the disability-specific standards endorsed in the CRPD are employed in order to reconceptualize the elements of refugee definition. Lastly, the chapter seeks to identify the challenges that may be posed by virtue of such an interpretation.

All chapters end with concluding remarks, for the purpose of pin-pointing the main considerations. The final conclusion wraps up this thesis, where the overall findings are displayed and discussed.

2. Unpacking the human rights approach to the refugee definition

*‘To paint with a broad brush, the international community created two regimes to address human rights abuses: one, the human rights regime, to monitor and deter abuse, and the other, the refugee regime, to provide surrogate protection to some of those who are able to cross borders’.*³⁴

The refugee definition contained in Article 1(A)(2) of the Refugee Convention is currently interpreted by reference to human rights standards – which is usually described in the abstract as a ‘human rights approach’ or a ‘human rights paradigm’. Whereas such an approach is widely accepted in relevant scholarship and in a number of jurisdictions, what is understood when referring to ‘human rights standards’ is often unclear. At the most basic level, it is ambiguous which sets of human rights standards are to be employed and also, even if a certain set was agreed on, it would be challenging to achieve its cohesive interpretation internationally. This Chapter seeks to address these issues by discussing the interplay between international refugee law (IRL) and international human rights law (IHRL), in order to explore the controversial issue of whether and in what ways international human rights law can shape the interpretation of the refugee definition. Before launching this discussion, it is crucial to first examine the content of the refugee definition, which is the main objective of the present study.

2.1 Who is a refugee: the core elements of the refugee definition

The cornerstone of international refugee law is the 1951 Refugee Convention, an international treaty that was adopted under the auspices of the United Nations. The Convention was subsequently modified with its 1967 Protocol, which removes the temporal limitation to persons made refugees as a result of ‘events occurring before 1 January 1951’.³⁵ A preliminary indication of the interconnection between IHRL and IRL draws from the fact that the fundamental rights enshrined in the Refugee

³⁴ Deborah E Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 Harvard Human Rights Journal 133, 135.

³⁵ Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967), Article 1(2).

Convention³⁶ derive from the League of Nations' preceding 1933 Refugee Convention,³⁷ after which the Refugee Convention was modelled, but also from the UDHR.³⁸

A unique feature of refugee law is that refugee status is of declaratory nature:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee'.³⁹

Therefore, the international legal status of the refugee is followed by a set of legal entitlements, including a variety of civil and political and socio-economic rights, unless the individual is found not to be a refugee.⁴⁰ Perhaps the most important of these is the prohibition of *refoulement* which is enshrined in Article 33(1) and stipulates that an aspect of the refugee protection is the right not to be returned to a country where one will be subjected to serious harm.

In order for a refugee to benefit from the Convention rights, she should be recognized as fulfilling the criteria set forth by the definition of a refugee, as it is codified in Article 1(A)(2) and be granted refugee status. According to this definition, the term 'refugee' shall apply to any person who:

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

³⁶ These include, *inter alia*, the right to non-discrimination (Art. 3), to religious freedom (Art. 4), to access to Courts (Art. 16), to housing (Art. 21), to public education (Art. 22) and to naturalization (Art. 34).

³⁷ Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663.

³⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 93–94.

³⁹ UNHCR 'Handbook', *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 4 (2019) 28.

⁴⁰ Hathaway and Foster (n 26) 1; Hathaway (n 38) 11; Zimmermann and Mahler (n 28) 299.

outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The interpretation of the refugee definition constitutes one of the major debates in refugee law and has raised a lot of complex questions, since there is no authoritative body with the task to resolve interpretative issues once they occur.⁴¹ As a result, the interpretation of Article 1(A)(2) lies on national, international or regional courts and relevant authorities, something that has led to inconsistent interpretations among different legal systems.

Roughly,⁴² refugees should cumulatively possess five characteristics in order to benefit from the rights guaranteed by the Convention: (1) be outside their country of nationality or habitual residence; (2) being unable or unwilling to seek the protection of that country, or to return there; (3) this inability or unwillingness is owing to a well-founded fear (4) of being persecuted; (5) a nexus is established between the fear and one of the five grounds enumerated in the Convention.⁴³ Whereas the first two elements might spark interest in the context of a different discussion, they are considered self-explanatory for our analysis and will therefore not be examined in detail. On the other hand, the elements of ‘well-founded fear’, ‘persecution’ and the ‘nexus requirement’ will be examined in the following sections, since their interpretation is essential for our analysis in light of a disability-specific approach in the following chapters.

⁴¹ Unlike other international treaties, the Refugee Convention does not provide for the establishment of a specialized treaty body that would resolve divergencies between states-parties’ interpretations. Article 38 provides that ‘[a]ny dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute’. However, firstly, this provision has never been invoked and secondly, it restricts recourse to inter-state disputes. As a result, the International Court of Justice cannot serve as an authoritative supervisory mechanism to guarantee homogenous standards of protection between states-parties. Also, even though under Article 35(1) the UNHCR has the ‘duty of supervising the application of the provisions of this Convention’, it is not mandated to issue binding rulings or opinions, but only provide interpretative guidance.

⁴² The enumeration of characteristics varies in literature, depending on the weight attached to each of them or whether one characteristic can be regarded as one or two distinct elements. However, in one form or another, the ones described in this thesis are the main elements of the definition.

⁴³ Goodwin-Gill and McAdam (n 28) 37.

2.1.1 Well-founded fear

In order for a person to qualify as a refugee, she needs to prove that her inability or unwillingness to return to her country of origin is owing to a ‘well-founded fear of being persecuted’. The element of ‘fear’ is a state of mind that reflects a subjective understanding of how a prospective return to the country of origin will be experienced, whereas the qualification ‘well-founded’ implies that the state of mind should also be supported by objective criteria.⁴⁴

The UNHCR’s guidelines attach particular importance to the element of subjectivity, in the sense that the way the applicant experiences a situation may vary depending on one’s personality and individual background and therefore attest to a ‘reasonable fear’, which might not be sufficiently supported by objective circumstances.⁴⁵ However, this approach has generated a debate in scholarship, with leading scholars rejecting the subjective approach,⁴⁶ arguing that there is no room for subjectivity in what essentially is an objective assessment of the conditions in the applicant’s country of origin.

On the other hand, and in line with this thesis’s standpoint, it is also argued that the subjective view of the applicant is of great importance, since the way a person responds to a situation depends on a wide range of individual features. Thus, for instance, a religious person might feel anguish to a restriction of her freedom of religion, contrary to a less religious person, which means that the importance to be attached to the subjective element should be determined on a case-by-case basis.⁴⁷ In this sense, the vulnerabilities of the applicant as well as her particular situation should also be part of the equation when assessing how fear is experienced.

⁴⁴ UNHCR ‘Handbook’ (n 39) 38.

⁴⁵ *ibid* 37–41.

⁴⁶ James C Hathaway and William S Hicks, ‘Is There A Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?’ (2005) 26 *Michigan Journal of International Law* 505, 505; Hathaway and Foster (n 26) ch 2.

⁴⁷ Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Iustus 1989) 64; also, Noll argues that ‘fear’ should be regarded as a ‘procedural safeguard’, in the sense that the applicant, who has an experiential understanding of the situation in her home country, is invited to make an assessment through her personal lens and subsequently the decision maker will seek objective information other than the applicant’s statements, see Gregor Noll, ‘Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear’ in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Brill 2005) 143–144.

2.1.2 Persecution and lack of protection

There is no universally accepted definition of the term ‘persecution’. The Refugee Convention and the *travaux préparatoires* do not delineate the term, neither do they clarify what meaning should be attached to it.⁴⁸ The vagueness of the concept is generally attributed to the drafters’ intention ‘to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men’.⁴⁹ Whatever the motive, the assessment of persecution is conducted on a case-by-case basis. At a minimum, a serious threat of one’s life or liberty is generally accepted to constitute persecution.⁵⁰

In recent decades, there has been a shift towards the understanding of ‘persecution’, as well as other elements of the refugee definition, via human rights standards. Hathaway’s 1991 study offers the first principled human rights approach to the Refugee Convention, originally proposing that the ‘International Bill of Rights’ could provide a means to evaluate the nature and seriousness of a harm that may amount to persecution.⁵¹ This development, although not universally accepted, has been a breakthrough for interpreting the Refugee Convention in a progressive manner that incorporates contemporary developments of human rights law, such as gender-based claims.⁵²

Later on, Hathaway and Foster refer to persecution as ‘serious harm’⁵³ and adopt Lord Hoffmann’s delineation that ‘persecution = serious harm + failure of state protection’.⁵⁴ According to this approach, persecution is understood as a violation of human rights enshrined in instruments that have been ratified by a wide majority of politically and geographically diverse states.⁵⁵ Even though it was originally suggested

⁴⁸ Hathaway and Foster (n 26) 182; UNHCR ‘Handbook’ (n 39) 51.

⁴⁹ Grahl-Madsen (n 30) 193.

⁵⁰ Goodwin-Gill and McAdam (n 28) 94.

⁵¹ Hathaway (n 25) 104–105; the International Bill of Rights includes the UDHR, the ICCPR and the ICESCR.

⁵² Anker (n 34) 138.

⁵³ Hathaway and Foster (n 26) 182–183.

⁵⁴ *R v. Immigration Appeal Tribunal and Another; Ex parte Shah*, [1992] 2 AC 629 (UKHL, Mar. 25, 1999), at 653 (per Lord Hoffmann), 655 (per Lord Hope of Craighead) and 658 (per Lord Hutton) (as cited in *ibid* 185).

⁵⁵ *ibid* 1; Hathaway (n 38) 205.

that these rights include the ones protected under the International Bill of Rights, it was subsequently accepted that other widely ratified specialized treaties, such as the Convention on the Rights of the Child (CRC),⁵⁶ the Convention on the Elimination of Racial Discrimination (CERD)⁵⁷ and, of particular importance to this study, the Convention on the Rights of Persons with Disabilities, may also be used to delineate what kind of human rights violations constitute serious harm.⁵⁸

However, an approach that equates ‘serious harm’ with ‘serious human rights violations’ does not necessarily reflect that, in certain instances, the seriousness of the harm should be assessed in light of the seriousness of the *predicament* which may or may not amount to a breach of a human rights norm. Interestingly, the UNHCR has also criticized a human rights approach *as such*, suggesting that such a definition of persecution can prove restrictive and therefore exclude arising forms of harm. In the words of Erika Feller,

Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.⁵⁹

Therefore, persecution should be understood as accommodating various forms of serious predicaments that may not necessarily and by themselves amount to violations of human rights norms. In this regard, particular consideration should be given to discriminatory measures that the individual is subjected to and that may not in themselves amount to persecution but may as well qualify as persecution on ‘cumulative grounds’.⁶⁰

⁵⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁵⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

⁵⁸ Hathaway and Foster (n 26) 1.

⁵⁹ Cited in Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 62.

⁶⁰ UNHCR ‘Handbook’ (n 39) 51–53.

Drawing from Hathaway's theoretical underpinnings, this thesis adopts Cantor's approach to the interpretation of the refugee definition, who adds an interesting proposition in this connection. He suggests departing from Hathaway's 'persecution-centric approach' and placing the principle of non-discrimination at the center when interpreting the refugee definition. He argues:

Rather than being a human rights violation that certain groups of putative refugees cannot remedy in the country of origin, persecution is instead viewed as an exacerbated form of discrimination that follows from the making of unjust distinctions recognized by the Convention grounds.⁶¹

Cantor's discrimination-based theoretical model resembles the UNHCR's proposition which disconnects human rights abuses from the interpretation of persecution. Indeed, and of particular relevance to this thesis, one cannot help but notice the resemblance of the persecution grounds in the Refugee Convention to the discrimination grounds in general IHRL.⁶² There is an apparent parallelism between discrimination and the persecution grounds, since, as already noted, a specific human rights violation might or might not amount to persecution, depending on whether there is a link to a Convention ground. In this sense, refugee protection is not reserved for all victims of

⁶¹ David James Cantor, 'Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 393.

⁶² The right to equality and non-discrimination is guaranteed in all the general human rights instruments such as the UN Charter (it is implicit in Article 1(3), that states that one of the main purposes of the UN is to promote equal guarantee of human rights without distinction), the ICCPR (Articles 2(1), 3 and 26), the ICESCR (Articles 2(2) and 3) and the UDHR (Articles 1, 2(1) and 7). In addition, among the specialized human rights treaties, there are some entirely devoted to addressing discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) also contain explicit provisions on equality and non-discrimination. Non-discrimination provisions are also found in all the major regional human rights treaties, such as the ECHR (Article 14 and Protocol No 12), the Charter of Fundamental Rights of the European Union (Articles 20, 21(1) and 23), the ACHR (Articles 1 and 24), the ACHPR (Articles 2, 3, 18(3)-(4) and 28), the Arab Charter of Human Rights (Articles 2, 9 and 35) and the ASEAN Human Rights Declaration (Articles 1, 2, 3 and 9). There is no absolute consensus regarding the discriminatory grounds in general international law, since the prohibited grounds vary among the different Conventions. However, it is widely acknowledged that, at the very least, discrimination on the grounds of race, sex and religion are part of customary law: see Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Third edition, Oxford University Press 2018) 152.

human rights violations, but only for those falling within one of the Convention grounds enumerated in Article 1(A)(2), namely the individuals that are ‘excluded from the national community’ and who due to this ‘fundamental marginalization’ find it impossible ‘to work within or even restructure the national community of which they are nominally a part in order to exercise those human rights’.⁶³ Hence, considering that a certain harm will amount to persecution only if it is directed towards a person fitting in a Convention ground, it can be argued that discrimination is inherent in the ‘persecution’ element.⁶⁴

In addition, the reference to the non-discrimination principle in the first preambular paragraph of the Refugee Convention indicates that it constitutes part of its context and it is therefore instrumental in the interpretation of the refugee definition. Furthermore, the fact that the prohibition of discrimination is central in numerous treaties and it is accepted to constitute a norm of customary law,⁶⁵ coupled with the fact that it is part of the Convention’s context, signifies that it constitutes a relevant rule of international law applicable in the relations between the parties, in keeping with Article 31(3)(c) of the VCLT, and should therefore be taken into account when interpreting the Convention. In this regard, even though such an approach draws from Hathaway’s model in the sense that it adopts the relevance of human rights law in informing the interpretation of the refugee definition, it takes discrimination as a starting point for identifying persecution, rather than placing its focus on harm. That is to say, an interpretation of ‘persecution’ that fails to accommodate forms of discrimination that are recognized in IHRL is distancing from the Refugee Convention’s context and

⁶³ Hathaway (n 25) 135–137.

⁶⁴ Some scholars attach particular weight on this view: Chetail acknowledges that ‘[...] the other [grounds]- race, nationality, and membership of a particular social group- are anchored within the principle of non-discrimination’, see Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 27. Whereas it is unclear why Chetail disconnects the grounds of political opinion and religion from the non-discrimination principle, he clearly sees an association between discrimination and some of the Convention grounds. Goodwin-Gill rejects the suggestion that discrimination is inherent in the persecution element, arguing, *inter alia*, that the drafters’ intention was to “set out what were then understood to be the common ‘reasons’ for persecution”, and they were not specifically preoccupied with ‘any discriminatory denial of human rights’ in the country of origin, see Guy S Goodwin-Gill, ‘Judicial Reasoning and “Social Group” after Islam and Shah’ (1999) 11 *International Journal of Refugee Law* 537, 538; however, he still recognizes that “[h]uman rights and discrimination remain relevant to the question of well-founded fear of persecution’.

⁶⁵ See supra n 62; see also Ian Brownlie, *Principles of Public International Law* (6th edition, Oxford University Press 2003) 489.

ordinary meaning and is not faithful to a human rights approach that incorporates widely accepted standards.

On a final note, the aforementioned delineation of ‘persecution’ portrays the failure of a state to protect the rights of persons under its jurisdiction as being an integral part of the refugee definition.⁶⁶ Neither the Refugee Convention nor the *travaux préparatoires* specify whether a state actor must be the source of persecution, therefore ‘no necessary linkage between persecution and governmental authority is formally required’.⁶⁷ Nevertheless, the refugee definition does require a link between fear of persecution and lack of protection, requiring that a person is ‘unable or [...] unwilling to avail himself of the protection of that country’.

In this regard, when government or state agents themselves inflict harm, it can be safely argued that there is a failure of the state to protect the individual. It is nevertheless widely accepted that persecution may also result from private actors, when it is instigated, condoned or tolerated by the state, when non-state agents act as *de facto* authorities, or when the state is unable to provide protection against non-state agents’ persecutory measures.⁶⁸ Similarly, Grahl-Madsen describes persecution as referring to ‘acts or circumstances’ for which the government is somehow responsible for, either because the acts were committed by the government itself or organs at its disposal, or due to ‘behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State’.⁶⁹ Thus, persecution may also be inflicted by private actors, not only when the state explicitly *denies* to provide protection vis-à-vis the individual, but also when it fails to afford *effective* protection.⁷⁰

2.1.3 Nexus requirement: is intention needed?

Lastly, the Refugee Convention requires establishing a nexus between the applicant’s well-founded fear of being persecuted with one of the five grounds enumerated therein: a person’s race, religion, nationality, membership of a particular social group or political opinion. Arguably, these grounds revolve around civil and political status and

⁶⁶ Goodwin-Gill and McAdam (n 28) 10.

⁶⁷ *ibid* 98.

⁶⁸ Walter Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’ (2001) 15 *Georgetown Immigration Law Journal* 415.

⁶⁹ Grahl-Madsen (n 21) 189; similarly, Hathaway (n 16) 125–133.

⁷⁰ Hathaway and Foster (n 26) 315–319.

do not encompass claims of everyone who suffers serious human rights violations, but only the situations that are linked with one of the grounds.⁷¹

What is evasive with regards to the nexus requirement is the relevance of the state's of origin or the perpetrator's motivation to inflict harm. In other words, it is ambiguous whether intention is needed in order to establish a nexus between the harm feared and a Convention ground. Two approaches are predominant in jurisprudence: the first one necessitates the demonstration of a Convention-related motivation of the persecutor.⁷² Except for the apparent evidentiary constraints in establishing the persecutor's motives, this approach has also been criticized for ignoring the wider societal circumstances in which the fear of persecution develops⁷³ and for disregarding the Refugee Convention's object and purpose, which is to protect those in need, irrespective of the subjective motivation of the persecutor.⁷⁴

The second approach, which is endorsed in this thesis, places the focus on the predicament experienced by the individual. Therefore, the intention of the persecutor may be indicative that a person's fear of being persecuted ensues from a Convention ground, but the kind of circumstances under which the person might be persecuted are broader, encompassing, at a minimum, situations 'where the state fails to protect the individual and this failure can be linked to a Convention ground'.⁷⁵ As a result, this approach suggests that the nexus should be established between a Convention ground and the predicament of the applicant, and not the motivation of the actor who inflicts harm.

⁷¹ Foster (n 4) 237.

⁷² *Immigration and Naturalization Service v Elias Zacarias* (1992) 502 US 478; see also Foster (n 11) 264.

⁷³ Goodwin-Gill and McAdam (n 28) 101; Hathaway and Foster (n 26) 368–372.

⁷⁴ Zimmermann and Mahler (n 28) 373.

⁷⁵ Scott (n 29) 59; Judge Hoffman provides a pertinent example in this connection: '[s]uppose that the Nazi government in those early days did not actively organise violence against Jews but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew', see *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v* [1999] UKHL 20 18.

2.2 The conceptual relationship between International Human Rights Law and International Refugee Law

The relevance of international human rights law when interpreting the Refugee Convention has been growingly supported in recent decades. Logically, the question ensuing this proposition is ‘why use an external branch of law in order to interpret the Refugee Convention?’. As a point of departure, it is important to first explore the conceptual relationship between the two regimes, in order to understand the relevance of IHRL when interpreting the Refugee Convention.

First of all, international human rights law is concerned with monitoring abuses of states’ obligations to respect, protect and fulfil human rights stipulated in treaties they have ratified, that are entrenched in international customary law or constitute peremptory norms of international law. Furthermore, various human rights instruments establish monitoring mechanisms that can hold states accountable through judicial or quasi-judicial judgements, either through non-binding recommendations or through binding and enforceable decisions. At the other end of the spectrum, international refugee law is concerned with granting protection to a subset of persons who fulfill certain criteria: refugees. It is not concerned with regulating states’ human rights obligations and their enforcement or hold them accountable, but it reflects the will of the international community to redress the lack of protection in the refugee’s country of origin. Therefore, the doctrine of surrogate protection which encompasses the Convention dictates that its purpose is to provide protection when there is a failure of the country of origin to fulfill fundamental obligations vis-à-vis the refugee.⁷⁶

In many respects, the refugee law regime presents some distinct features – at least superficially. The most manifest difference is that, unlike human rights instruments, the Refugee Convention lacks a supervisory mechanism that will monitor states’ compliance with their obligations. In addition, the implementation of the Refugee Convention initially took place in isolation from the developing body of international human rights law, which becomes apparent by the way the UNHCR used to perform its functions with little collaboration with human rights bodies.⁷⁷

⁷⁶ James C Hathaway and Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 359.

⁷⁷ Foster (n 11) 50-51.

Increasingly though, and especially during the recent decades, there has been a growing understanding of the role of refugee law within the broader human rights framework, both in relevant scholarship, but also on a practical level, with UNHCR recognizing their unavoidable collaboration:

The refugee problem is in many respects an issue of human rights [...] Ultimately, the entire refugee experience, from forcible displacement, through the search for asylum, to the securing of a durable solution, is an important indication of the respect accorded to basic human rights principles worldwide. The by now extensive array of international human rights instruments, together with their monitoring mechanisms, offer important complementary tools for enhancing refugee protection. At the international level, UN human rights treaty bodies have adopted numerous conclusions touching upon refugee protection issues [...] In addition to continuing cooperation with these bodies, UNHCR also worked at the regional level during the reporting period to strengthen its relations with various regional human rights bodies ...⁷⁸

In effect, the refugee definition has undergone noticeable transformation through its interrelation with human rights law, so as to progressively expand the situations it encompasses; for instance, refugee law has followed along developments in international human rights law regarding issues of gender and sexual orientation, which are now recognized as potentially constituting persecution grounds. In this connection, the scope of ‘serious harm’ has also expanded so as to include rape and sexual violence, female genital surgery and family violence.⁷⁹

The two regimes’ interaction and complementarity are evident in various occasions. In fact, the permeation of human rights norms in the sphere of refugee protection is such that, as Chetail puts it, ‘human rights law has radically informed and transformed the distinctive tenets of the [Refugee] Convention to such an extent that the normative frame of forced migration has displaced from refugee law to human

⁷⁸ UNHCR, ‘Note on International Protection’ (2004) 16 *International Journal of Refugee Law* 124, 141.

⁷⁹ Deborah E Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133, 138; see also Deborah E Anker and Paul T Lufkin, ‘Gender and the Symbiosis Between Refugee Law and Human Rights Law’ (2003) <<https://www.migrationpolicy.org/article/gender-and-symbiosis-between-refugee-law-and-human-rights-law>> accessed 21 May 2020.

rights law’, resulting in ‘human rights law [being] *the* primary source of refugee protection, while the [Refugee] Convention is bound to play a complementary and secondary role’.⁸⁰ Chetail argues, *inter alia*, that the developments in the interpretation of human rights norms by treaty bodies counterbalance restrictive interpretations of the Refugee Convention by individual states, which further attests to the fact that human rights law is the primary source of protection. While this view disregards that, on certain occasions, relying primarily on IHRL protection can act to the detriment of the refugee, since, for example, the Refugee Convention guarantees a range of civil and socio-economic rights to refugees that international human rights law does not afford to non-nationals,⁸¹ it is nevertheless a standpoint that reflects the considerable amount of overlap between the two regimes – an observation that showcases that their distinctiveness is in fact blurred.

Tellingly, there are parallels that can be drawn between the two regimes; conceptually, they are both part of the same legal schema and tradition,⁸² and they both have human rights protection as their ultimate object. In principle, the model of surrogate protection underpins the relevance of human rights law in *informing* the interpretation of the refugee definition.⁸³ Thus, international human rights standards benefit the task of delineating the scope of ‘risks that involve unacceptable forms of serious harm’ in a manner that offers normative legitimacy, since these mere standards have been adopted by states themselves ‘to define impermissibly serious harms’ through human rights treaties.⁸⁴ In addition, recourse to human rights law can offer a set of widely accepted standards of what constitutes acceptable treatment that are ‘essential for adapting the Geneva Convention to the ever changing reality of forced migration’,⁸⁵ thus making the Convention a living instrument that evolves in tandem

⁸⁰ Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 22 (original emphasis).

⁸¹ Hathaway (n 38) 94–95.

⁸² Alice Edwards, ‘Human Rights, Refugees and the Right to “Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 297, 299.

⁸³ Hathaway and Foster (n 16) 200 (original emphasis); David James Cantor, ‘Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016) 376.

⁸⁴ Hathaway and Foster (n 26) 194.

⁸⁵ Chetail (n 64) 25–26.

with contemporary developments of what this ‘acceptable treatment’ might entail. This in turn makes the determination of refugee status a more objective procedure; as Storey points out, ‘the human rights approach is the only one that affords a real possibility of achieving a common international understanding [of persecution] [...] based on objective criteria’.⁸⁶

Even though the extent to which the two bodies of law are distinct is unclear, one cannot deny their close interconnection. Noteworthy, this interconnection promotes the approach of ‘systemic integration’ that responds to the inherent fragmentation of international law and reminds us that the question of the relationship between rights and norms ‘can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole’.⁸⁷ On the contrary, compartmentalizing norms into broad categories tends to ‘mask the overlap and similarities’ between rights⁸⁸ and therefore undermines their conceptual integrity.⁸⁹ To this extent, relying on an approach that views international norms as part of a whole is in line with contemporary developments and enables a principled and progressive interpretation of concepts – something that can in turn be useful when integrating human rights into the persecution analysis.

2.3 The Refugee Convention’s object and purpose as a justification for a human rights approach to the refugee definition

Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) set out the general rules for interpreting the meaning of provisions in international instruments.

⁸⁶ Storey (n 28) 468. Of course, the extent to which such an objectivity can be achieved is a different discussion; for instance, arguments on cultural relativism have been generating conflicts between the two regimes, especially in gender-based claims, based on the fact that mostly Western states decide on refugee claims, implementing ‘international’ human rights standards as a form of cultural imperialism. This goes back to the discussion of homogeneity in IHRL in general, which is however beyond the scope of this thesis. It should nevertheless be noted that, even though objective standards cannot be entirely agreed upon universally, they form a common basis for interpretation, in the absence of which, each state party to the Refugee Convention would develop its own standards, which would substantially undermine the role of *international* protection.

⁸⁷ Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 2006) para 414.

⁸⁸ Foster (n 4) 189.

⁸⁹ Craig Scott and Philip Alston, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’ (2000) 16 *South African Journal on Human Rights* 206, 228.

Even though the Refugee Convention was concluded before the entry into force of the VCLT, the latter is widely accepted to constitute customary international law in relation to treaty interpretation⁹⁰ and is therefore applicable to that extent.⁹¹

According to Article 31(1) of the VCLT '[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'. It is established that there is no hierarchy between the elements of 'context', 'object' and 'purpose', in the sense that no literalist or contextual approach is favoured over the other,⁹² but rather that the ordinary meaning should be deduced 'only in the *context* of the treaty and in the light of its *object and purpose*'.⁹³ Although concluding the object and purpose of a treaty cannot always be objectively verifiable,⁹⁴ reliance on the Preamble is generally considered as a reliable method of illustrating a treaty's object and purpose, especially within the field of human rights law.⁹⁵

In this connection, Hathaway and Foster maintain that a human-rights approach to the Refugee Convention reflects its context, object and purpose, given the prominent position human rights possess in the first paragraphs of its Preamble.⁹⁶ In this respect, it is also argued that the reference to human rights instruments in the Preamble reinforces the Refugee Convention's contextual affinity to the 'developing body of

⁹⁰ See, indicatively: *Territorial Dispute* (n 23) para 41.

⁹¹ Foster (n 4) 40.

⁹² *ibid* 41; Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating To the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 83; Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000) 234; the ICJ has also in several cases affirmed that the term 'ordinary meaning' should not be read in isolation, but in conjunction with the treaty's context, object and purpose, see ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, Sep. Op. Judge Torres Bernárdez, ICJ Reports (1992), p. 719; ICJ, *Certain Expenses of the United Nations, Advisory Opinion*, Sep. Op. Judge Spender, ICJ Reports (1962), p. 184; ICJ, *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, Advisory Opinion*, ICJ Reports (1960), p. 158.

⁹³ Aust (n 92) 188.

⁹⁴ Isabelle Buffard and Karl Zemanek, 'The Object and Purpose of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311.

⁹⁵ Foster (n 21) 42.

⁹⁶ See Refugee Convention (n 21), Preamble: 'CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms...'; Hathaway and Foster (n 29) 393.

international human rights law'.⁹⁷ The UNHCR interprets the human rights language in the Preamble as 'indicat[ing] the aim of the drafters to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Treaty Convention, of the provisions of the 1951 Convention'.⁹⁸ A similar position that the Refugee Convention was 'written against the background of international human rights law' has also been upheld by senior courts in common law jurisdictions.⁹⁹

Hathaway, relying on the Preamble, proposed a seminal model of 'surrogate protection'¹⁰⁰ which has influenced refugee law scholarship and jurisprudence.¹⁰¹ According to this model, refugee law functions as a subsidiary system of international protection, in the sense that it is 'a response to disfranchisement from the usual benefits of nationality'.¹⁰² In particular, refugee protection serves as a substitute when the state of origin fails to provide internal protection to the detriment of the refugee.¹⁰³

By and large, what Hathaway's original model suggests is that refugee law comes into play when the state of origin fails to guarantee fundamental human rights vis-à-vis the refugee. However, this statement is not accurate; firstly, not all human rights violations trigger the protection of refugee law, but only a 'sustained or systematic violation of basic human rights demonstrative of a failure of state protection'.¹⁰⁴ Interestingly, the term 'violation' is replaced by the term 'denial' in the second edition of the book with Michelle Foster.¹⁰⁵ Although the reasons for this replacement are not explained, it seems like the term 'denial' demonstrates a focus on

⁹⁷ Foster (n 4) 49.

⁹⁸ UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', (2001) para 4 <<https://www.refworld.org/docid/3b20a3914.html>> accessed 21 May 2020.

⁹⁹ Hathaway and Foster (n 26) nn 69–70; Foster (n 4) n 56.

¹⁰⁰ Unless otherwise specified, general reference to 'Hathaway's model' or 'original' model pertains to the first model Hathaway introduced, see Hathaway (n 15) where he undertook a more doctrinal approach to the Refugee Convention, contrary to the more principled, relying on VCLT treaty interpretation one that he adopted in the second edition with Michelle Foster, see Hathaway and Foster (n 16).

¹⁰¹ Hathaway (n 25) 124.

¹⁰² *ibid.*

¹⁰³ The traditional distinction sees 'internal' protection as the protection afforded by law vis-à-vis individuals under the state's territorial jurisdiction, while 'external' refers to diplomatic protection and consular assistance for nationals abroad, see Grahl-Madsen (n 30).

¹⁰⁴ Hathaway (n 15) 104–105.

¹⁰⁵ Hathaway and Foster (n 26) 197.

the lack of enjoyment of basic human rights by the individual – or, otherwise put, on the predicament experienced - rather than on whether there is an intentional breach of a human rights norm. Secondly, this surrogate protection is not granted to every individual whose country of origin cannot protect their rights, but only to a certain group of people: refugees. Thus, surrogate protection is reserved only for those victims of human rights violations who, because they fall within one of the Convention grounds enumerated in Article 1(A)(2), are marginalized and find it impossible to exercise their rights.

Even though the Preamble is expressly regarded as part of the treaty's context under Article 31(2) VCLT, reliance on these first preambular paragraphs does not necessarily offer a solid basis for a human rights interpretation of persecution. At the outset, it is deceptive to isolate the first two paragraphs from the following three.¹⁰⁶ Unlike the first two paragraphs, the subsequent ones directly refer to the Convention's object and purpose, which seems to be oriented towards states' cooperation for the stabilization of the refugee in the host country.¹⁰⁷ Moreover, it is suggested that the refugee problem is addressed by a revision of the existing refugee framework and not by the nascent human rights framework, while refugees are referred to constitute a 'social and humanitarian' problem and not a human rights one.¹⁰⁸ Therefore, at a closer look, what the reference to human rights in the Preamble is primarily concerned with is that refugees enjoy fundamental rights and freedoms without discrimination in the country of refuge, while the link between human rights violations in the country of origin and refugee status remains unaddressed.

Overall, the Preamble underpins the Convention's contextual relationship with the human rights framework; however, it seems that recourse to human rights law in order to interpret the persecution element of Article 1(A)(2) is not necessarily supported by it. That being said, it is not suggested that the human rights approach in

¹⁰⁶ See Refugee Convention (n 21), Preamble: 'CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement, CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation, EXPRESSING the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States'.

¹⁰⁷ Cantor (n 61) 375.

¹⁰⁸ *ibid.*

general should be rejected, but that its validity cannot be entirely entrenched on the Preamble. Rather, Article 31(3)(c) of the VCLT, which requires that an interpretation takes under consideration ‘any relevant rules of international law applicable in the relations between the parties’, offers a solid foundation for developing a model of surrogate protection. This provision reflects the principle of ‘systemic integration’ of the international law system which, in Koskenniemi’s words, dictates that a tribunal ‘must always interpret and apply that instrument in its relationship to its normative environment - that is to say “other” international law’.¹⁰⁹ In terms of relevance, international human rights law constitutes a pertinent point of reference with regards to interpretation of key elements of the Refugee Convention, since, notwithstanding the question of whether they are distinct branches of law, their object is roughly related to human rights protection. In this sense, an approach to the refugee definition that does not take into account contemporary developments in international human rights law contributes further to the fragmentation of international law.¹¹⁰ On the contrary, a unified approach has already advanced developments, such as that, although there is no provision that guarantees the right to family life in the Refugee Convention, recourse to human rights standards has led to a wide acceptance that ‘[t]he object and purpose of the 1951 Convention implies that its rights are in principle extended to the family members of refugees’,¹¹¹ which subsequently warrants respective guarantees such as the right to family reunification.¹¹²

2.4 Concluding remarks

This chapter aimed at exploring the way in which the current interplay between international human rights law and international refugee law shapes the human rights approach to the refugee definition. It was demonstrated that, in the absence of a supervisory mechanism that would assist in the homogenous interpretation of the refugee definition, widely accepted human rights standards are the most relevant ones

¹⁰⁹ Koskenniemi (n 87) 209, 213.

¹¹⁰ Foster (n 8) 230.

¹¹¹ UNHCR, ‘Summary Conclusions on Family Unity’, Global Consultations on International Protection, Geneva Expert Roundtable 8–9 Nov. 2001, organized by the UNHCR and the Graduate Institute of International Studies, para 7.

¹¹² For an extensive analysis on the development of the refugee law regime with regards to the right to family life and the right to work, see Edwards (n 82).

to inform its interpretation. Therefore, a human rights approach for the purposes of this thesis is understood as taking into account international human rights treaties which are widely accepted by states parties to the Refugee Convention and that may therefore be used to interpret the refugee definition. In connection to our analysis, this finding implies that the standards included in the Convention on the Rights of Persons with Disabilities may be used to conceptualize the refugee definition in the case of a refugee with disability. Overall, it was shown that a ‘one size fits all’ approach to the refugee definition is inconsistent with the human rights approach advanced in this thesis. With these remarks, the next chapter will explore the relevance of the disability-specific standards included in Convention on the Rights of Persons with Disabilities to interpreting the refugee definition.

3. The relevance of disability-specific standards to the refugee definition

'Subjective measures of people's condition generate either pity for the disabled or reluctance to consider their claims of justice. The way to escape this dilemma is to take seriously what the disabled are actually complaining about. They do not ask that they be compensated for the disability itself. Rather, they ask that the social disadvantages others impose on them for having the disability be removed'.¹¹³

As established in chapter 2, this thesis adopts the position that a human rights-based interpretation of the refugee definition should also take under consideration disability-specific standards included in the Convention on the Rights of Persons with Disabilities in case of a refugee with disability. In this connection, the adoption of the CRPD raises the question of how the disability-specific human rights standards put forth therein can inform the interpretation of persecution, especially with regards to socio-economic claims. This chapter is a stepping-stone in answering this question. It discusses the ramifications of the adoption of the CRPD in international human rights law and how these further impact on the conceptualization of the refugee definition. In particular, it explores the main features of the CRPD on the way to assessing how they can help conceptualize socio-economic deprivation for persons with disabilities.

3.1 The added value of the Convention on the Rights of Persons with Disabilities in International Human Rights Law

3.1.1 The Convention's object and purpose

The 2009 Convention on the Rights of Persons with Disabilities (CRPD) is a disability-specific human rights treaty which was adopted under the auspices of the United Nations and as of now has 181 states parties. Prior to its adoption, a person with disability would be protected like any other individual by the general international and regional human rights framework. Since civil and political rights, on the one hand, and social, economic and cultural rights, on the other, are dealt with by separate treaties

¹¹³ Anderson (n 1) 334.

within the UN human rights framework, disability advocates have been challenging the effectiveness of the UN framework to address the rights of persons with disabilities, arguing that unless the interdependence and indivisibility of both types of rights are recognized, the fulfilment of their rights will not be feasible.¹¹⁴

In a similar vein, even though the rights of specific groups of people have been addressed very early in the international human rights framework,¹¹⁵ something that mirrors the recognition that certain groups are in need of particularized provisions to ensure their rights' enjoyment on an equal basis with others, persons with disabilities were not regarded as constituting such a group. Therefore, besides the overlong absence of a specialized treaty within the nearly six decades old human rights framework, there is also very scarce reference to persons with disabilities in the existing framework, something that demonstrates a rejection of their hindered access to rights being equality related. The only provision within the UN human rights framework that identifies persons with disabilities as a group that must not be discriminated against is Article 2 of the Convention on the Rights of the Child. Apart from this provision, disability is not enumerated among the discriminatory grounds in the equality provisions of the ICCPR and the ICESCR,¹¹⁶ albeit it is accepted as falling within the 'catch-all' phrase 'other status'. Nevertheless, the Committee on Economic, Social and Cultural Rights (CESCR) has specified that disability is clearly a ground for discrimination under

¹¹⁴ Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 *Syracuse Journal of International Law and Commerce* 563, 575; see also *ibid.*, pp. 583-585, where Lawson argues in favor of a disability-specific convention on three main grounds: to tackle the invisibility of disabled people as 'subjects of human rights law' which is the main explanation for their inability to 'take full advantage of their system'; to address the issue that the general human rights treaties lack specificity, namely clarity and focus in the context of disability; lastly, since prior to a disability-specific instrument there was very limited data for the circumstances of disabled people, the adoption of a relevant treaty, supported by an effective monitoring body, would oblige states to collect relevant data and documentation.

¹¹⁵ See, indicatively, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (n 57), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) and the 1989 Convention on the Rights of the Child (CRC) (n 56).

¹¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 2(2) ICESCR, even though it is not expressly mentioned.¹¹⁷ To that end, the Committee explained that disability-based discrimination includes ‘any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights’.¹¹⁸

Notwithstanding this development, according to the Quinn and Degener review - a major study with regards to the human rights of persons with disabilities within the UN system- the key findings of General Comment No. 5 regarding equal participation to society and non-discrimination for persons with disabilities remained rather disregarded by states.¹¹⁹ No matter what inclusive interpretations were made in general treaties, for lack of a specialized instrument that would address their particular situation, persons with disabilities still remained invisible in the human rights framework and had difficulty with benefiting from the existing system of protection.

The above indicate that, until the adoption of the CRPD, persons with disabilities were conferred rights that are ‘universal’ in nature and are therefore granted to persons with disabilities, to the extent that they are granted to everybody else.¹²⁰ Apparently, in the absence of specialized provisions that ensure persons’ with disabilities equal enjoyment of rights, the protection afforded by the international human rights framework was not sufficient; this is particularly obvious in relation to socio-economic rights, where discriminatory practices and societal exclusion directly affect their enjoyment for persons with disabilities.

Against this backdrop, the CRPD assumes a very clear purpose: ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.¹²¹ The concept of equality is therefore pivotal in the Convention, featuring in multiple paragraphs of the Preamble¹²² and in all the substantive articles, which

¹¹⁷ CESCR, General Comment No. 5 (n 14) para 5.

¹¹⁸ *ibid*, para 15.

¹¹⁹ Anna Bruce and et al., ‘Disability and Social Justice: The International Covenant on Economic, Social and Cultural Rights’ in Gerard Quinn and Theresia Degener (eds), *Human rights and disability: the current use and future potential of United Nations human rights instruments* (Office of the High Commissioner for Human Rights 2002) 82.

¹²⁰ Lawson (n 114) 577.

¹²¹ CRPD (n 16) Art. 1.

¹²² See, indicatively, CRPD (n 16) Preamble, No. 1: ‘...recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family...’; No. 2: ‘...everyone is entitled to all

constantly employ the wording ‘on an equal basis with others’. Notably, the Preamble makes specific reference to the aim of redressing the ‘profound social disadvantage’ that hinders persons’ with disabilities equal enjoyment of rights,¹²³ highlighting the interdependence between one’s active participation to society and her enjoyment of rights. In this sense, the principal object of the Convention is ‘to secure the full enjoyment of human rights by disabled people on an “equal” basis with non-disabled people’.¹²⁴

Mainly, the inability of the general human rights framework to tackle the challenges faced by persons with disabilities stems both from the invisibility of this group in the wording of human rights conventions, but more importantly by the way that disability has traditionally been viewed; namely, not as an equality issue, but as a medical situation. As long as disability is perceived as an illness, it is the individual that needs to be ‘fixed’ in order to adapt to its environment and not the opposite. This paradigm, referred to as the ‘medical model of disability’, is the first misconception that needed to be addressed on the way to adopting any set of specific rules on disability rights. In line with this imperative, the CRPD abandons the ‘medical model’ and introduces the ‘social model’ of disability, which will be examined in the following section.

3.1.2 The social model of disability: the conceptual foundation of the CRPD

Essentially, the rights included in the CRPD form a set of disability-sensitive adaptations of the general human rights articulated in ICCPR and ICESCR.¹²⁵ The novelty of the CRPD is that it is conceptually developed on a ‘social model of

the rights and freedoms set forth therein, without distinction of any kind’; No. 3: ‘... discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person’; No. 16: ‘*Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination...’.

¹²³ CRPD (n 16) Preamble, No. 25.

¹²⁴ Lawson (n 114) 590.

¹²⁵ Dimopoulos (n 33) 255.

disability'¹²⁶ rather than on a medical one, starting with the way disability is described in Article 1:

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.

The medical model of disability delineates disability as an expression of illness and therefore attributes the limitations experienced to the individual. The problem with policies that are developed on the medical model is that they disregard that a person with disability is capable of living a fulfilling life, but rather they focus on “improv[ing]” a person’s physical or mental state rather than focusing on other important public issues such as the removal of environmental barriers in society or providing support to enable the person to exercise other rights’.¹²⁷

On the contrary, the social model¹²⁸ presents disability as a social construction which marginalizes persons with impairments and hinders their equal participation in socio-economic and political life.¹²⁹ The keynote of this model, which is more popular with disability scholars, is the distinction between impairment and disability, in the

¹²⁶ For an analysis of the 'original' or 'classic' formulation of what later became the 'social model of disability' see: Anna Bruce, *Which Entitlements and for Whom? : The Convention on the Rights of Persons with Disabilities and Its Ideological Antecedents* (Faculty of Law, Lund University 2014).

¹²⁷ Paul Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability & Society* 1, 2.

¹²⁸ The 'social model' of disability has not gone unchallenged: Hughes and Paterson criticized it for not having 'entertained debates that problematize the body', see Bill Hughes and Kevin Paterson, 'The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment' (1997) 12 *Disability & Society* 325, 326–330; Edwards and Taylor have criticized it for focusing more on physical impairments, thus privileging one form of impairment over another, see SD Edwards, 'The Impairment/Disability Distinction: A Response to Shakespeare' (2008) 34 *Journal of Medical Ethics* 26, 26; Renee R Taylor, 'Can the Social Model Explain All of Disability Experience? Perspectives of Persons With Chronic Fatigue Syndrome' (2005) 59 *American Journal of Occupational Therapy* 497, 505; Oliver discards the critique that 'the social model ignores or is unable to deal adequately with the realities of impairment' and that 'it is only fit, white men in wheelchairs who are able to ignore their impairments' (see Michael Oliver, 'The Social Model in Action: If I Had a Hammer' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability : Theory and Research* (Disability Press 2004) 22) arguing that 'the denial of the pain of impairment has not been a denial' but rather 'it has been a pragmatic attempt to identify and address issues that can be changed through collective action rather than by medical or other professional treatment', see Michael Oliver, 'A Sociology of Disability or a Disablist Sociology?' in Len Barton (ed), *Disability and Society : Emerging Issues and Insights* (New York : Longman 1996) 48.

¹²⁹ Dimopoulos (n 33) 255.

sense that the impairment becomes disabling because of how society is structured.¹³⁰ As Harpur aptly explains ‘a person would have impairment if they had no eyesight or was in a wheelchair. The disability is caused when society elects not to permit books in accessible digital formats to be available on the Internet or decides to put steps outside a building rather than a ramp’.¹³¹ In this regard, disability-specific rights are designed to address the need for equality and equal participation and remove society-related barriers that render disability into a negative characteristic.¹³²

Goggin and Newell in their book explored ‘whether the continuing oppression of people with disabilities, the fundamental injustice, exclusion and marginalisation [they] daily experience, is a form of “apartheid” – an apartheid that knows no name’.¹³³ Even though there is no uniformly accepted term to describe this ‘social apartheid’, namely the negative attitudes that cause disability, e.g. that persons with disabilities are often objects of pity, stereotypes and prejudice,¹³⁴ the terms ‘ableism’ and ‘disableism’ are used interchangeably to describe this phenomenon by various authors.¹³⁵ Harpur concludes that ‘disableism and ableism could be defined as discriminatory or abusive conduct towards people based upon their physical or cognitive abilities’.¹³⁶

¹³⁰ Michael Oliver, *The Politics of Disablement* (Macmillan 1990) 11.

¹³¹ Harpur, ‘Embracing the New Disability Rights Paradigm’ (n 127) 3.

¹³² In social theory, Shakespeare and Watson base this concept on an egalitarian approach to impairment which recognizes no difference between disabled and non-disabled people, since ‘we are all impaired’ in the sense that ‘everyone has limitations, and that everyone is vulnerable to more limitations and will, through the ageing process, inevitably experience functional loss and morbidity’, see Tom Shakespeare and Nicholas Watson, ‘The Social Model of Disability: An Outdated Ideology?’ (2002) 2 *Research in Social Science and Disability* 9, 27; Hughes refutes this approach as failing ‘to recognize that disabled bodies embody potential and possibility’ and that, by ‘appealing to a universal human subject th[is] approach ... annihilates disability as an identity and conceals the discrimination and exclusion that is the ubiquitous experience of people who embrace disability as a subject position’, see Bill Hughes, ‘Being Disabled: Towards a Critical Social Ontology for Disability Studies’ (2007) 22 *Disability & Society* 673, 682.

¹³³ Gerard Goggin and Christopher Newell, *Disability in Australia: Exposing a Social Apartheid* (University of New South Wales Press 2003) 16.

¹³⁴ Paul Harpur, ‘From Disability to Ability: Changing the Phrasing of the Debate’ (2012) 27 *Disability & Society* 325, 328.

¹³⁵ Indicatively, the term ‘ableism’ has been used by Bolt, see David Bolt, ‘From Blindness to Visual Impairment: Terminological Typology and the Social Model of Disability’ (2005) 20 *Disability & Society* 539, by Campbell, see Fiona A Kumari Campbell, ‘Exploring Internalized Ableism Using Critical Race Theory’ (2008) 23 *Disability & Society* 151 and Harpur, see Harpur (n 84), while the term ‘disableism’ has been used by Shakespeare, see Tom Shakespeare, *Disability Rights and Wrongs* (Routledge Ltd 2006) and Thomas, see Carol Thomas, ‘Developing the Social Relational in the Social Model of Disability: A Theoretical Agenda’ in Colin Barnes and Geof Mercer (eds), *Implementing the social model of disability: Theory and research* (Disability Press 2004).

¹³⁶ Harpur, ‘Sexism and Racism, Why Not Ableism?’ (n 135) 329.

Shakespeare has stressed the disablist function of oppression in society, arguing that ‘[...] people with impairment are disabled, not just by material discrimination, but also by prejudice’ which is ‘implicit in cultural representation, in language and in socialization’.¹³⁷ The ‘social model’ introduced by the CRPD aspires to tackle this phenomenon, acknowledging that not only society, but maybe more importantly state policies can be disablist, should they fail to grant equal participation to society for persons with disabilities. Hence, an allocation of resources that does not take into account the rights of persons with disabilities is considered disablist for the purposes of the CRPD.¹³⁸

3.2 The Convention’s on the Rights of Persons with Disabilities main features

*‘When people earn money through work, they are in a much better position to get access to food, medical care, housing and education. Income generated through work is instrumental in acquiring property such as housing or land. In addition, decent work, not any kind of work, and just and favourable working conditions contribute to living in dignity’.*¹³⁹

The preceding discussion explored the rationale behind the need for a disability-specific treaty, which was essentially the inadequacy of generically formulated human rights obligations to address the specific concerns of persons with disabilities. For the purposes of our enquiry into whether a similar rationale can be applied *mutatis mutandis* in the discussion of how disability-specific standards develop our understanding of what constitutes ‘persecution due to socio-economic deprivation’, it is important to dwell on what is one of the most important features of the CRPD and its implications to socio-economic refugee claims: the fact that the CRPD constitutes a hybrid instrument that abandons any hierarchy between groups of rights. To that end, this chapter explores the CRPD approach to socio-economic rights, in order to identify any relevant implications for socio-economic refugee claims.

¹³⁷ Shakespeare Tom (n 128) 296.

¹³⁸ Dimopoulos (n 33) 257.

¹³⁹ Fons Coomans, ‘Education and Work’ in Daniel Moeckli and others (eds), *International Human Rights Law* (Third edition, Oxford University Press 2010) 301.

3.2.1 A holistic approach to rights and its implication to the concept of progressive realization

The CRPD offers some features that problematize the traditional understanding of rights' hierarchy. Firstly, it adopts an 'integrated approach' to the protected rights, in the sense that every general human right is reformulated so as to comprise negative obligations (non-interference), positive obligations and a disability-specific setting that includes non-exhaustive measures for the realization of the right.¹⁴⁰ Secondly, its Preamble reaffirms the indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,¹⁴¹ something that is generally reflected in the text; many provisions enshrine aspects of both civil and political rights and socio-economic rights, and also the rights are not categorized in types so as 'to avoid creating any hierarchy of rights'.¹⁴² This holistic approach with regards to groups of rights has been commented to be 'sitting uneasily' within the standard human rights paradigm that insists on the 'deeply entrenched divide between civil and political rights, which are actionable, and socio-economic rights, which are not'.¹⁴³

As a result, the Convention promotes a nuanced understanding of the concept of progressive realization, by entrenching obligations of immediate result towards the realization of socio-economic rights. Nevertheless, this does not mean that the notion of progressive realization is completely abandoned. The Convention seems to endorse 'the overall skepticism towards giving socio-economic rights the same protection as civil and political rights'¹⁴⁴ and therefore maintains the traditional distinction between obligations that are immediately applicable and those that are subject to progressive realization. However, progressive realization is only required for the socio-economic aspect of the right that is up to availability of resources.¹⁴⁵ In addition, the obligation

¹⁴⁰ Dimopoulos (n 33) 258.

¹⁴¹ CRPD (n 16) Preamble, No. 3.

¹⁴² MacKay (n 17) 330.

¹⁴³ Dimopoulos (n 33) 269.

¹⁴⁴ Ida Elisabeth Koch, 'From Invisibility to Indivisibility: The International Convention On The Rights Of Persons With Disabilities' in Oddny Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill Nijhoff 2009) 69.

¹⁴⁵ See Article 4(2) CRPD, which provides that: 'With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the

to ‘take steps’¹⁴⁶ does not invalidate the importance of socio-economic rights whatsoever, nor should it be used as an excuse for inaction or postponement of the implementation of rights. Instead, taking appropriate steps towards the full realization of the rights is *itself* an immediate obligation, in the sense that states must demonstrate that, irrespective of availability of resources, they make every possible effort to improve the enjoyment of these rights.¹⁴⁷ In this regard, there are still enforceable aspects of the socio-economic rights enshrined in the CRPD, such as the obligation to apply the rights on a non-discriminatory basis and to undertake concrete measures to implement them.¹⁴⁸ In fact, the prohibition of discrimination is an immediate obligation that is ‘subject to neither progressive realization nor the availability of resources.’¹⁴⁹ Therefore, any argument that conditions the breach of a socio-economic right on the duty of progressive realization is moot, to the extent that there has been discriminatory withdrawal, deprivation or withholding of a right to particular segments of the population.¹⁵⁰

3.2.2 Denial of reasonable accommodation as discrimination

On this note, the CRPD Committee has stressed that equality and non-discrimination lie at the heart of the Convention, since all the substantive articles are linked to the non-discrimination principle through the constant use of the wording ‘on an equal basis

full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law’.

¹⁴⁶ Amartya Sen offers an interesting perspective on rights the realization of which is described *in abstracto*: he talks about *metarights*, and explains that ‘[a] *metaright* to something x can be defined as the right to have policies p(x) that genuinely pursue the objective of making the right to x realisable’; [...] If this right were accepted, then the effect will not be to make the ‘right to an adequate means of livelihood’ real - even as an abstract, background right - but to give a person the right to demand that policy be directed towards securing the objective of making the right to adequate means a realisable right, even if that objective cannot be immediately achieved. It is a right of a different kind: not to x but to p (x). I propose to call a right to p(x) a metaright to x’, Amartya Sen, ‘The Right Not to Be Hungry’ in Guttorm Floistad (ed), *Contemporary philosophy: A New Survey*, vol 2 (The Hague: Nijhoff 1982) 345.

¹⁴⁷ UN Office of the High Commissioner for Refugees, *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights* (2008) 14 <<https://www.refworld.org/docid/499176e62.html>> accessed 21 May 2020.

¹⁴⁸ See Article 4(1) CRPD.

¹⁴⁹ CESCR, ‘General Comment No. 13: The Right to Education’, Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights (CESCR 8 December 1999 Doc No E/C.12/1999/10), para 31.

¹⁵⁰ Hathaway and Foster (n 26) 203.

with others'.¹⁵¹ The reformulation of rights with the aim of combatting discrimination is perhaps the most crucial feature of the CRPD, something that is also reflected by the addition of a broadened understanding of 'discrimination'. In addition to recognizing traditional forms of direct and indirect discrimination, in line with the CESCRC Committee,¹⁵² Article 2 CRPD recognizes that denial of reasonable accommodation also constitutes a form of discrimination:

Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation...

Hence, the concept of reasonable accommodation is an overarching duty in the CRPD, which applies in relation to all its substantive rights: it is explicitly mentioned in the Articles dealing with education,¹⁵³ employment,¹⁵⁴ liberty and security of person,¹⁵⁵ while it is also implicit in every other substantive Article, as a result of Articles 2 and 5.¹⁵⁶ Article 2 defines the duty of 'reasonable accommodation' as:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms...

¹⁵¹ UN Committee on the Rights of Persons with Disabilities, 'General comment No. 6 (2018) on equality and non-discrimination', Adopted by the Committee at its nineteenth session (14 February–9 March 2018) (CRPD 26 April 2018 Doc No CRPD/C/GC/6) para 7.

¹⁵² CESCRC, General Comment No. 5 (n 14) para 15.

¹⁵³ See Articles 24(2)(c) and 24(5) CRPD.

¹⁵⁴ See Article 27(1)(i) CRPD.

¹⁵⁵ See Article 14(2) CRPD.

¹⁵⁶ Anna Lawson, 'The UN Convention on The Rights of Persons with Disabilities and European Disability Law: a Catalyst for Cohesion?' in Oddny Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009) 103.

The duty to provide reasonable accommodation is not subject to progressive realization, even when it is invoked in the context of socio-economic rights.¹⁵⁷ Rather, it imposes positive obligations on States ‘to identify barriers in the way of a disabled person's enjoyment of their human rights and to take appropriate steps to remove them. [...]The solutions required must be appropriate to that person and may involve changing practices or spending money on additional equipment or support or on the installation of improved physical access’.¹⁵⁸ Denial of reasonable accommodation would constitute an act of discrimination and is therefore prohibited with immediate effect.¹⁵⁹ In this connection, the socio-economic rights entrenched in the CRPD do not remain mere aspirations but include enforceable obligations and are only subject to progressive realization to a certain extent.

3.2.3 The right to accessibility

Likewise, the CRPD Committee has confirmed that the right to accessibility enshrined in Article 9, even though it is a socio-economic right, is enforceable and that respective violations by private agents are attributable to the State.¹⁶⁰ The importance attached to the right to accessibility reflects the fact that, for persons with disabilities, accessibility is a precondition ‘to live independently, participate fully and equally in society, and have unrestricted enjoyment of all their human rights and fundamental freedoms on an equal basis with others’.¹⁶¹ Therefore, the right to accessibility lies at the core of disability rights, whilst its violation, even though it is a socio-economic right, can have a domino effect for the enjoyment of other human rights, irrespective of their typology.

¹⁵⁷ Motz (n 33) 148.

¹⁵⁸ Lawson (n 114) 598.

¹⁵⁹ Lawson (n 156) 103.

¹⁶⁰ *Szilvia Nyusti, Péter Takács and Tamás Fazekas v Hungary* (CRPD Committee, 16 April 2013).

¹⁶¹ UN Committee on the Rights of Persons with Disabilities, ‘General comment No. 2 (2014) on Article 9: Accessibility’, Adopted by the Committee at its Eleventh session 31 March–11 April 2014 (CRPD 22 May 2014 Doc No CRPD/C/GC/2) para 14.

3.3 Deprivation of socio-economic rights as discrimination for persons with disabilities

'The inequality of people mobilizing in wheelchairs [...] manifests itself not in the inability to walk but in exclusion from bathrooms, theaters, transportation, places of work, [and] life-saving medical treatment'.¹⁶²

Having explored the main features of the CRPD with regards to socio-economic rights, this section addresses the issue of how socio-economic deprivation is integrally linked with discrimination for persons with disabilities. At the outset, persons with disabilities are more likely to experience adverse socio-economic outcomes than persons without disabilities,¹⁶³ as they are subject to various forms of discrimination embedded in society and reflected in state policy. Many of them do not have access to health care, education, and employment opportunities and experience exclusion from everyday life activities.¹⁶⁴ The CESCR Committee has described the forms of discrimination persons with disabilities experience very aptly:

They range from invidious discrimination, such as the denial of educational opportunities, to more “subtle” forms of discrimination, such as segregation and isolation of physical and social barriers. [...] Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities.¹⁶⁵

By virtue of deep-rooted discriminatory patterns, it is not surprising that, according to the World Bank, poverty and disability go hand-in-hand: poverty may increase the risk of disability through malnutrition, unsafe working conditions, a polluted environment,

¹⁶² Anita Silvers, ‘Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities’ (1995) 10 *Hypatia* 30, 48.

¹⁶³ Anderson (n 112).

¹⁶⁴ *ibid.*

¹⁶⁵ CESCR, General Comment No. 5 (n 14) para 15.

limited or no access to safe water, sanitation and health care; in turn, disability may increase the risk of poverty through lack of education and employment opportunities, lower wages and increased cost of living with a disability.¹⁶⁶ In the words of Ingstad and Eide,

The uniqueness of the disability perspective is that it has to do with poverty within poverty. In low-income countries and areas people with disabilities are among the most vulnerable. They are often the first to die when sanitary and food conditions become critical. They do not get to the hospital because transportation cannot be paid for. They are the last to get jobs when employment is scarce. They are often the last in a group of siblings to be sent to school if the parents can only afford shoes and school uniforms for some of their children, or they may simply be blocked from any education due to lack of resources in the schools or other poverty-related barriers in their environment.¹⁶⁷

A significant number of persons with disabilities receive no formal education in many countries.¹⁶⁸ This lack of accessibility to education is mostly owing to physical, social and attitudinal environments which are often the cause for exclusion from education. For example, even if a certain school facility is accessible to people with physical impairments, it may be impossible to reach due to the inaccessible construction of streets and transportation systems.¹⁶⁹ Or, when the format of the learning material is not delivered in sign language or Braille, it is inaccessible to a person with a sensory impairment. Similarly, for a person with an intellectual impairment, who can reach the facility, access to education may be hindered due to the complexity of the learning material. In addition to all the practical difficulties, the attitudes of teachers, school administrators, other children, and even family members also foster the societal exclusion of children with disabilities in schools.¹⁷⁰

¹⁶⁶ 'Disability Inclusion Overview' (*World Bank*) <<https://www.worldbank.org/en/topic/disability>> accessed 21 May 2020.

¹⁶⁷ Benedicte Ingstad and Arne H Eide, *Disability and Poverty: A Global Challenge* (Policy Press 2011) 3.

¹⁶⁸ Lawson (n 114) 566.

¹⁶⁹ *ibid* 567.

¹⁷⁰ World Health Organization and World Bank (n 126) 216; in some cultures people with disabilities are even seen as a form of divine punishment or as carriers of bad fortune, see: Cliona O'Sullivan and

In turn, limited access to education is integrally linked with employment prospects. A study from the Organization for Economic Co-operation and Development (OECD) shows that in 27 countries, the average employment rate of working-age persons with disabilities was 44%, while this rate for persons without disability was 75%.¹⁷¹ This employment rate also varies significantly depending on the type of disability, with individuals with mental health difficulties or intellectual impairments experiencing the lowest employment rates.¹⁷² However, even for those who do find employment, it is disproportionately likely that their job is lower paid and of lower status.¹⁷³ As a consequence, barriers in accessing education and employment are inextricably tied with a degraded standard of living.

Moreover, persons with disabilities often find it hard to access health services on an equal basis with others. Other than the physical and economical barriers already mentioned, persons with disabilities are generally less likely to receive screening and preventive services due to assumptions that they do not need access to health promotion and disease prevention.¹⁷⁴ This leads to general poorer health and an increased risk of developing secondary conditions, which again are followed by difficulty to treat.

In this connection, the social model of disability shapes the way discrimination is understood from a disability-specific lens; not only is the lack of legislation which specifically offers reasonable accommodation a form of indirect discrimination at a group level, but also any refusal of reasonable accommodation by state authorities is a form of direct discrimination at the individual level.¹⁷⁵ As explained in the CRPD Committee's General Comment No. 2 on Article 9, '[a]ccessibility is related to groups,

Malcolm MacLachlan, 'Childhood Disability in Burkina Faso and Sierra Leone: An Exploratory Analysis.' in Malcolm MacLachlan and Leslie Swartz (eds), *Disability & International Development: Towards Inclusive Global Health* (Springer-Verlag 2009) <<https://www.springer.com/gp/book/9780387938431>> accessed 21 May 2020; Benedicte Ingstad and Susan Reynolds Whyte (eds), *Disability and Culture* (2nd edn, University of California Press 2005).

¹⁷¹ OECD, 'Sickness, Disability and Work: Breaking the Barriers: A Synthesis of Findings across OECD Countries' (OECD Publishing 2010).

¹⁷² Graham Thornicroft, *Shunned: Discrimination against People with Mental Illness* (Oxford University Press 2006).

¹⁷³ Lawson (n 114) 566.

¹⁷⁴ World Health Organization and World Bank (n 126) 60; for example, women with disabilities receive less screening for breast and cervical cancer in comparison with women without disabilities, see: Disability Rights Commission, 'Equal Treatment: Closing the Gap: A Formal Investigation into Physical Health Inequalities Experienced by People with Learning Disabilities and/or Mental Health Problems' (Disability Rights Commission 2006).

¹⁷⁵ Dimopoulos (n 33) 269.

whereas reasonable accommodation is related to individuals’; hence, denial of reasonable accommodation at an individual level constitutes a violation of the right to accessibility.¹⁷⁶ Considerably, this applies regardless of resource scarcity:

[...] States parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities.¹⁷⁷

Therefore, the violation of the right to accessibility, which is at the core of disability rights under the CRPD, ripples through the enjoyment of other rights, in a way that causes a harm that only a disabled person can experience. For instance, if a person with a physical impairment is denied the right to accessibility by means of lack of infrastructure at schools, buildings, means of transportation and streets, the enjoyment of the respective rights to education, employment and personal mobility are affected directly.

The above remarks are important for the purposes of our analysis, since they make it clear that what constitutes ‘serious harm’ which amounts to persecution under general human rights standards does not necessarily reflect what this harm really stands for in case of a person with disabilities. It is therefore useful to reflect on them as indications of why persons with disabilities are highly likely to experience deprivation and that therefore the harm they are subject to can only be examined with regards to their own particular situation. In this regard, they will be useful when assessing the implications of these standards to the scope of the notion of ‘persecution’, as we proceed.

3.4 Concluding remarks

This chapter showed that the Convention was indeed a significant addition to the human rights system of protection, since the particular needs of persons with

¹⁷⁶ CRPD Committee, General Comment No. 2 (n 161) paras 25-26.

¹⁷⁷ *ibid*, para 25.

disabilities remained unaddressed by the existing framework. Four important features were identified for the purposes of our analysis: the CRPD is developed on a ‘social model’ of disability; it is a fusion of civil and political and socio-economic rights, therefore advancing a nuanced perception of the concept of progressive realization; it centers on the duty to provide reasonable accommodation and it stresses the importance of the right to accessibility as a precondition to live independently. In light of these features, the main proposition put forth in this chapter is that discrimination is an inextricable part of socio-economic deprivation of persons with disabilities.

In turn, this analysis equips us with the means to address the question of how the CRPD can help inform the interpretation of the refugee definition in the case of persons with disabilities. A preliminary examination revealed that the human rights standards in the CRPD are substantially different from the respective standards set in ICCPR and ICESCR, especially with regards to socio-economic rights and the right to non-discrimination. The subsequent examination of the particular socio-economic harm experienced by person with disabilities concluded this chapter, offering a first insight on how a disability-specific approach could shape the understanding of ‘serious harm’.

4. Revisiting the refugee definition from a disability-specific approach

'[F]inally, that a defence of rights must be based on the concrete needs of she who comes before the law. Human rights have no proper place, time or ideology, they cannot be assigned to any particular epoch or party. They are open to application to new areas and fields now following the logic of continuity and principled development and now the operations of rhetorical play that allows their unstoppable extension to contiguous fields'.¹⁷⁸

As we have seen in previous chapters, unless the refugee definition is approached in a disability-specific manner, claiming asylum based on socio-economic deprivation can prove challenging for a person with disabilities. At a basic level, a certain harm may be of different levels of severity, depending on the particular situation of the person it is experienced by. For this reason, it is not appropriate to uphold a 'one size fits all' approach to persecution.¹⁷⁹ It is therefore contended that, in defining persecution by reference to human rights standards, the rights put forth in the CRPD should play a central role in shaping the understanding of what kind of circumstances constitute harm for persons with disabilities and how this harm should be assessed. In the present chapter the refugee definition is revisited from a disability-specific human rights approach, which incorporates the standards endorsed in the CRPD and especially its approach to discrimination.

4.1 Well-founded fear for persons with disabilities

Article 1(A)(2) requires that the refugee's fear of persecution is 'well-founded'. As we discussed, the element of 'well-founded fear' contains both a substantive and an objective component: the refugee must 'show good reason why he individually fears persecution' and this fear must be supported by 'an objective situation' in the country

¹⁷⁸ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing 2000) 369.

¹⁷⁹ Mary Crock, Christine Ernst and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24 *International Journal of Refugee Law* 735, 744.

of origin.¹⁸⁰ This conceptualization of fear may raise issues for refugees with disabilities. At the most basic level, the ability to clearly demonstrate subjective fear may be challenging for persons with mental or intellectual impairments; at the same time, the ‘objective’ element can also pose challenges, since, on the one hand, persons with cognitive impairments may be unable to even comprehend fear, while on the other hand, some may be subject to feelings of fear that would not ordinarily cause fear to other persons.¹⁸¹ However, a person’s vulnerability to a certain type of treatment that may not be serious enough in order to cause fear to a person who does not share the same vulnerability should not nullify the reasonableness of one’s fear. On this point, the UNHCR recognizes that ‘exaggerated fear [...] may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified’.¹⁸²

With that in mind, a disability-sensitive interpretation of the ‘well-founded fear’ element should mean that the vulnerabilities deriving from a person’s with disabilities particular situation should be part of the equation when assessing the validity of fear. In this sense, a person without disability would generally need to establish a higher level of severity of the alleged socio-economic harm to justify fear compared to a person with disability who is systematically deprived of a socio-economic right and is therefore more likely to experience and overcome deprivation, due to embedded discriminatory patterns in society. For instance, denial of reasonable accommodation attests to the reasonableness of the fear to the extent that its lack results in protracted socio-economic deprivation. Lastly, consideration should also be given to the ability of a person with disability to overcome deprivation, which is often limited in comparison to persons without disabilities. Consequently, a disability-sensitive approach to fear should take under consideration the vulnerability of persons with disabilities, as well as the impact their disability has on the way they experience harm.¹⁸³

¹⁸⁰ UNHCR ‘Handbook’ (n 39) paras 38–45.

¹⁸¹ Dimopoulos (n 33) 270.

¹⁸² UNHCR ‘Handbook’ (n 39) para 41.

¹⁸³ Crock, Ernst and McCallum (n 179) 745.

4.2 Being persecuted: what constitutes serious harm for persons with disabilities

In order to define ‘persecution’ from a disability-specific approach, it is important to consider what kind of circumstances represent ‘harm’ for a person with disabilities. As it was shown in previous chapters, the CPRD should be treated ‘as an international law treaty which identifies forms of serious harm and failures of state protection for the purposes of refugee status determination’.¹⁸⁴ The CRPD introduces a ‘new human rights lexicon’ that focuses on the indivisibility of rights and aims at asserting persons’ with disabilities autonomy.¹⁸⁵ It contains hybrid rights, portraying that both positive and negative obligations are necessary in order to effectively afford protection to persons with disabilities. For instance, the civil right to freedom of speech would be meaningless for a person with a relevant sensory impairment unless it is combined with accessible forms of alternative communication. If we unpack this rationale, we identify two types of harm that can potentially be conceptualized as persecution.

The first way a disability-specific approach shapes the understanding of persecution draws from the fact that the principle of non-discrimination lies at the heart of protection. It is an inextricable part of every substantive right and it constitutes a prohibition of immediate effect. Understanding how discrimination is integrally linked to the enjoyment of persons’ with disabilities socio-economic rights is the first step towards a disability-specific conceptualization of harm; even though discrimination is in some cases inherent, or at least closely connected, to the Refugee Convention’s grounds of persecution, a discriminatory practice *as such* hardly ever equates to persecution; instead, there is a tendency to dismiss socio-economic claims by reason of them constituting ‘mere discrimination’.¹⁸⁶ However, in the case of persons with disabilities, the characterization of a situation as ‘merely discriminatory’ disregards how the rest of their rights are severely affected by discriminatory practices. To put it simply, a certain discriminatory act that might be a human rights violation not reaching the severity threshold to qualify as persecution for a person without disability might

¹⁸⁴ *AC (Egypt)* [2011] NZIPT 800015, New Zealand: Immigration and Protection Tribunal, 25 November 2011, para 70.

¹⁸⁵ Amita Dhanda, ‘Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities’ (2008) 8 *International Journal of Human Rights* 48.

¹⁸⁶ Foster (n 8) 244.

constitute serious harm amounting to persecution for a person with disability, when it severely aggravates the enjoyment of other rights. In this respect, the UNHCR recognizes that:

It is only in certain circumstances that discrimination will amount to persecution. This would be so *if measures of discrimination lead to consequences of a substantially prejudicial nature* for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.¹⁸⁷

Furthermore, the centrality of the non-discrimination principle requires that the impact discriminatory practices have on a person's with disabilities experience of harm is always taken into account. This is particularly important with regards to discriminatory practices which would ordinarily be considered 'mild' violations that do not reach the severity threshold but might as well amount to persecution when the person is discriminated against in multiple realms, such as employment, education and health.¹⁸⁸ The above is in fact the most significant implication of the centrality of the non-discrimination principle in the CRPD to the understanding of persecution: a sustained discriminatory deprivation of a socio-economic right is highly likely to affect the enjoyment of many more rights. While this is also true for socio-economic rights in general - since, for example, limited access to education directly affects one's right to employment, which in turn affects the right to an adequate standard of living and so on - what is distinct in the case of a disability-specific approach is the way discrimination should be assessed. This means that the criteria that determine the extent to which a person with disability is likely to experience discrimination, and subsequently serious harm, are separate from the ones employed when assessing the situation of a person without disability. This approach is consistent with the UNHCR Resettlement Handbook, which states that:

When assessing whether a particular treatment or measures amount to persecution, decision makers consider it/them in light of the opinions, feelings

¹⁸⁷ UNHCR 'Handbook' (n 38) para 54 (emphasis added).

¹⁸⁸ Crock, Ernst and McCallum (n 179) 748.

and psychological make-up of the applicant. The same act may affect people differently depending on their previous history, profile and vulnerability. In each case, decision makers must determine in light of all the specific individual circumstances whether or not the threshold of persecution is reached.¹⁸⁹

On this note, the Canadian Immigration and Refugee Board (CIRB) has issued a very interesting decision on a claim of a national of Burkina Faso which, even though precedes the adoption of the CRPD, offers an insight on what kind of factors should be lent weight to in a case of a person with disabilities: although it was found that the claimant, who was experiencing motor disorders due to poliomyelitis, had been able to obtain an education and find employment in the public service, the CIRB recognized that this was not due to his ability to live independently, since, had it not been for the claimant's family's connections and influence, he 'would have been destitute and unable to meet his most basic needs'.¹⁹⁰ In this connection, it was recognized that that the persistent and systematic prejudice against persons with physical disabilities ultimately undermined the enjoyment of his rights:

The repeated and persistent injury and annoyance suffered by the disabled persons of Burkina Faso [...] greatly undermine the fundamental rights of disabled persons, in particular their right to work to support themselves, thus potentially jeopardizing their survival in a country where medical care is not free of charge and where there is no system of state protection for those persons and they rely solely on the aid of their family or charities to survive. As the claimant showed that physically disabled persons in Burkina Faso suffer serious intellectual and economic hardship constituting persecution, the court concludes that the claimant [...] has a well-founded fear of persecution in his country if he should return there.

¹⁸⁹ UNHCR, *Resettlement Handbook* (UNHCR 2011) 84.

¹⁹⁰ *Decision MA1-08719 (In Camera)* Immigration and Refugee Board of Canada (16 April 2002) 3.

In this case, the inability to live independently was attached particular weight, in a way recognizing that a series of predicaments that are linked to prejudice, even though they may not necessarily and by themselves constitute human rights violations, have the potential of restricting intolerably the enjoyment of rights and therefore amount to persecution. This ruling illuminates how an understanding of harm should always be in light of the particular circumstances of the applicant since, if we removed the latter's impairment from the equation, it would be doubtful that the circumstances of having been able to obtain education and find employment would be downplayed by the fact that they occurred by virtue of family connections. This is explained by the fact that impairments are accompanied by disablist discrimination and oppression – and these circumstances are highly likely to constitute 'serious harm'.

In light of the above, there is no reason why, at least theoretically, systematic discrimination against persons with disabilities, even in the form of sustained prejudice in society, which is tolerated by the state, should not amount to persecution. Some examples of relevant conduct may be lack of accessibility to learning facilities, material and teaching tailored on individualized needs, segregation, differentiation in treatment between pupils with disabilities and pupils without disabilities, systematic physical violence, unreasonable denial of employment, inability to live independently, prejudicial attitudes in society and so on. Clearly, a relevant isolated incident will not amount to persecution; however, even one of the above, or many similar, forms of discriminatory practices that are performed on a systematic basis should be sufficient to reach the severity threshold of harm amounting to persecution, given its effect to spill over into the enjoyment of socio-economic rights.

Failure to provide reasonable accommodation should also fall under this category, given that it is recognized as a form of discrimination in the CRPD. Noteworthy, the CRPD Committee has explained that the concept of 'reasonableness' is not an indication that the costs of accommodation or availability of resources should be part of the assessment, but rather it refers to the relevance, appropriateness and effectiveness of the measure; therefore, an accommodation is reasonable as long as it is tailored to meet the requirements of the person with disability and it achieves the purpose for which it was made, irrespective of its cost.¹⁹¹ In this regard, the practical

¹⁹¹ CRPD Committee, General Comment No. 6 (n 151) para 25 (a).

reality of resource scarcity does not afford states a margin of appreciation for the implementation of the duty to provide reasonable accommodation and should therefore not be taken into account when assessing whether the right has been breached. By the same token, in assessing the reasonableness of accommodation, decision makers ‘should look beyond a state’s *notional* willingness to protect persons with disabilities – expressed, for example, through official policy’ in order to determine whether the accommodation provided is effective.¹⁹²

A second and closely correlated way in which harm can be conceptualized specifically for persons with disabilities is by way of socio-economic deprivation. As already explained, systematic discrimination and oppression in society are closely linked to deprivation of socio-economic rights. In this sense, socio-economic deprivation may in itself amount to persecution, since it presumably arises from discriminatory conduct and prejudicial attitudes in society. A clear manifestation of this would be a violation of the right to accessibility, framed as a failure to accommodate the right, given its importance to the enjoyment of all human rights of persons with disabilities. In fact, its violation is a manifestation of what the social model of disability wishes to tackle: lack of accessibility is what makes the person disabled. Therefore, considering that the violation of the right to accessibility generates a series of obstacles to the enjoyment of a plurality of other rights, it is capable of leading to socio-economic deprivation.

Clearly, the centrality of the duty to provide reasonable accommodation can operate to transform harm into persecution,¹⁹³ especially when the right to accessibility is not accommodated. However, notwithstanding its importance, the fact that reasonable accommodation is provided should not preclude the experience of harm. Yet, decision makers should always bear in mind that, for instance, an accessible building does not *on its own* suffice to ensure the enjoyment of the right to education. Prejudicial and discriminatory practices by teachers and fellow students have the effect to drastically hinder the enjoyment of rights and configure a harm only a person with disability can experience. A telling example in this direction is provided in AC (*Egypt*):¹⁹⁴ even though the albino applicant had access to formal education, the

¹⁹² Crock, Ernst and McCallum (n 218) 749 (original emphasis).

¹⁹³ *ibid* 748.

¹⁹⁴ AC (*Egypt*) (n 184) paras 6-12.

systematic discriminatory attitudes he had been experiencing by his teachers and fellow students diminished substantially his enjoyment of this right. For instance, although his albinism had given rise to a visual impairment, he was not allowed to sit in the front row in class, which made it impossible for him to read what was written on the blackboard. In addition, he was consistently called derogatory names by teachers, he lived in an isolated environment, he suffered occasional physical violence and harassment that created a hostile environment which drastically hindered the substantial enjoyment of his right to education. All similar circumstances have the effect of severely aggravating a person's with disability access to rights, even though, if examined in isolation, may not reach the severity threshold of persecution.

In this regard, the identification of harm should be considered in the light of a disability-sensitive approach that takes into account not only the state's of origin failure to ensure certain rights, but also the distinct vulnerabilities of a person with disabilities which occur from the interaction of his impairment with societal prejudice. Furthermore, particular weight should be attached on the fact that the predicaments experienced may not in themselves constitute persecutory conduct, but cumulatively they may amount to serious harm amounting to persecution.

In light of the above, even though the determination of persecution will eventually depend on the gravity of the breach, there is no obvious reason why, *prima facie*, systematic discrimination in terms of state practice, including any denial of the right to accessibility and failure to provide reasonable accommodation, does not amount to serious harm, given the severe consequences it generates to the enjoyment of socio-economic rights. Similarly, systematic discriminatory conduct in society which creates intolerable predicaments that in turn substantially hinder the enjoyment of socio-economic rights should also amount to persecution.

4.3 Disability as 'Membership of a Particular Social Group'

In addition to establishing a well-founded fear of being persecuted, refugees with disabilities need to show that the harm feared is owing to one of the Convention grounds. Without excluding the possibility of a person with disability falling within each of the grounds enumerated in Article 1(2)(A) of the Refugee Convention in case particular circumstances apply, the most suitable ground by virtue of disability *per se* seems to be membership of a particular social group (MPSG). While the possibility of

persons with disabilities constituting a particular social group is increasingly being accepted in common law jurisdictions,¹⁹⁵ it is not self-evident. In fact, there is no universally accepted definition of ‘particular social group’, something that necessitates the achievement of a balance between an overly expansive interpretation that basically accommodates every case that does not fall in one of the other grounds and a very restrictive approach that unduly excludes groups deserving protection.¹⁹⁶ The main tests employed in common law jurisdictions to identify a particular social group are developed along two tracks: first, the ‘social perception’ approach examines ‘whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large’.¹⁹⁷ This approach should be rejected for being too restrictive, since it presupposes the perceptibility of the impairment, which might pose challenges for persons whose impairments are not identifiable or perceived as disabling.

Secondly, the ‘protected characteristics’ (or ‘immutability’) approach examines ‘whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it’.¹⁹⁸ Notably, this approach is at odds with the social model of disability, which would suggest that it is the impairment that is immutable and not the disability. However, with this clarification, this approach seems to be more suitable by analogy, since the CRPD defines persons with disabilities as having long-term impairments¹⁹⁹ that could be considered immutable under refugee law.²⁰⁰ Since the CRPD does not explicitly exclude the possibility of persons having short-term impairments being regarded as persons with disabilities, it is unclear whether such impairments would classify as immutable characteristics under certain circumstances.

Following this line of thought, MPSG can be conceptualized in terms of the social model as follows: according to the CRPD, disability is a social construction that

¹⁹⁵ Foster (n 4) 318.

¹⁹⁶ *ibid* 293.

¹⁹⁷ UNHCR, ‘Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (7 May 2002 Doc No HCR/GIP/02/02) para 7.

¹⁹⁸ *ibid* para 6.

¹⁹⁹ See Article 1 CRPD.

²⁰⁰ Crock, Ernst and McCallum (n 179) 751.

arises from the interaction of impairments with various barriers in society. Persons with disabilities are therefore members of a social group *ipso facto*, because they have the immutable characteristic of their impairment and they are subject to disablist attitudes. In other words, were persons with impairments not targeted as a group by prejudicial and discriminatory practices, they would not be disabled. Since the social dimension of disability is not perceptible, refugees with impairments would belong to a social group as long as they are treated distinctively. In this case, it is not the impairment that should be attached weight to when determining whether the person belongs to a social group, but rather whether the society and/or state practices in the country of origin are disablist for a person with impairments. Country-of-origin information could shed light on this assessment, yet in their absence the evaluation should be made in light of the applicant's allegations and especially of whether reasonable accommodation has been provided.

4.4 Nexus Requirement

Setting aside the question of whether persons with disabilities fall under the MSPG ground, let us now turn to the requirement that the applicant establishes that the harm arises *owing to* this membership. The advantage of a disability-specific approach in establishing a nexus to state conduct is notable: portraying the failure to provide reasonable accommodation as disablist and providing for enforceable socio-economic rights of immediate effect, such as the right to accessibility, the CRPD adopts a predicament approach to the nexus requirement. Consequently, as long as the person experiences a predicament that is related to her impairment and the state of origin fails to redress it, she is a disabled person - and this is sufficient to show that she is excluded from mainstream society,²⁰¹ irrespective of the state's motives. Such an approach may seem too expansive since, essentially, it suggests that every disablist predicament will satisfy the nexus test. It is nevertheless supported by the fact that the CRPD recognizes that disability derives from disablist attitudes against impairments; as a result, the mere fact that a person has become disabled by virtue of predicaments corroborates the existence of a nexus with a Convention ground.

²⁰¹ Dimopoulos (n 33) 273.

Even when the person with disability can establish that the harm was inflicted by virtue of a Convention ground, it can be challenging to prove that her claim based on socio-economic harm is sufficiently individualized. This is particularly relevant in countries where socio-economic deprivation is experienced by a wide part of the population in the state of origin. In this instance, a general situation of destitution can pose challenges in identifying whether the harm feared is also feared indistinctively by an entire group of people who do not share a common characteristic; or, to put it simply, it is more complex to establish that one's socio-economic deprivation is owing to persecution as distinct from the deprivation of the general population. Once more, the aforementioned tests regarding the identification of discriminatory practices that may have contributed to socio-economic deprivation should be employed to determine the extent to which a person would have in any case been deprived. Similarly, the ability of the person with disability to overcome obstacles generally faced by the population could also shed light in the determination of whether the harm is targeted. For example, in a country where the unemployment rate is very high and many people live in destitution it would be revealing, first, to compare the unemployment rates of persons with disabilities and persons without disabilities and second, to examine the extent to which a person with disability has the same chances to contend for a job opening. In a similar vein, the identification of general discriminatory practices could as well serve as indications of persecutory conduct.

4.5 Challenges following a disability-specific approach in light of common perceptions of socio-economic claims

The foregoing discussion examined how the disability-specific standards set in the CRPD shape the understanding of the refugee definition, especially with regards to socio-economic claims. Even though such an approach may be tenable on a principled level, its application in practice may pose certain challenges. The present section seeks to address these constraints, most of which ensue from the manner in which socio-economic harm is approached in refugee law jurisprudence.

At the outset, it is important to make some general remarks with regards to how socio-economic claims are generally approached in the major common law

jurisdictions.²⁰² Even though claims based on socio-economic harm were understood as being *capable* of constituting persecution from the earliest operation of the Refugee Convention,²⁰³ the respective jurisprudence remained undeveloped and it is only in the past few decades that decision makers have been more receptive to such claims.²⁰⁴ Gradually, decision makers in common law jurisdictions became more and more receptive to socio-economic claims but although it is now recognized that socioeconomic harm can, in principle, give rise to persecution there are still some misconceptions that hinder the success of such claims.²⁰⁵

The first challenge with regards to the adjudication of socio-economic claims is the tendency to underestimate the importance of socio-economic deprivation and to treat threats of civil and political rights as more serious than threats to socio-economic rights.²⁰⁶ This could certainly pose challenges to a person with disability who experiences socio-economic deprivation by virtue of discrimination, especially in the absence of a disability-specific approach that recognizes the multifaceted impact of discrimination to the experience of harm. As a corollary consequence, socio-economic harm is often undervalued and construed as ‘mere discrimination’ rather than persecution.²⁰⁷ However, such a perception can act to the detriment of an applicant with

²⁰² Unfortunately, an extensive research on case-law is beyond the range of this thesis, due to time and space constraints. Therefore, for the purposes of this section, the analysis will be based on Foster’s 2007 study to provide an overview of the main challenges. Foster focused on the leading common law jurisdictions: Australia, Canada, New Zealand, the United Kingdom and the United States. She explains this choice as reflecting the appropriateness of the common law method for such a study, due to its inherent openness and analytical approach to reasoning. However, it is evident that the outcome of this research does not necessarily reflect the average approach to socio-economic claims. Civil law jurisdictions are innately more reluctant to perform progressive interpretations of the law and consequently, it appears that a consideration of civil law jurisprudence would most probably alter this balance and introduce new challenges in the discussion.

²⁰³ Foster (n 4) 90.

²⁰⁴ Foster (n 8) 233.

²⁰⁵ *ibid* 241.

²⁰⁶ *ibid* 244. The main arguments used to underpin the superior status of civil and political rights are, first, that from civil and political rights derive negative obligations, namely obligations to refrain from acts that would infringe them, whilst from socio-economic rights derive positive obligations, namely active steps that will ensure their realization. Since positive obligations require resources, the second distinction views the fulfilment of socio-economic rights as costly, and therefore dependent on availability of resources, whereas the fulfilment of civil and political rights is free of cost. When something is costly, it takes time to put in place; hence, the third distinction is that socio-economic rights are subject to progressive realization and do not include immediate obligations, while from civil and political rights derive obligations of immediate result. A further distinction results from the perception of civil and political rights as being capable of precise definition, and as a result justiciable and enforceable, whereas socio-economic rights are more complex and appear to be intractable to realize.

²⁰⁷ *ibid*.

disability, since it disregards that for her ‘mere discrimination’ does not have the same effect as to a person without disability.

One of the main reasons why socio-economic violations are considered less severe is the persistent understanding of the concept of progressive realization as a justification for the non-realization of socio-economic rights. This perception also has implications to the assessment of whether reasonable accommodation has been provided. Even though the right to reasonable accommodation is not subject to progressive realization, but rather its denial constitutes a form of discrimination, the fact that states are only obliged to provide accommodation to the extent that it does not impose ‘a disproportionate or undue burden’ on the state²⁰⁸ may be used as a justification, since arguments regarding resource scarcity are frequently employed to justify inaction.²⁰⁹ Such an understanding is certainly incompatible with the CRPD Committee’s interpretation of ‘reasonableness’, yet on a practical level it may be challenging to disentangle from deep-rooted understandings of socio-economic rights being costly.

Noteworthy, the concept of progressive realization is not always relevant when examining whether socio-economic deprivation amounts to persecution – even though it is indicative of discriminatory conduct. Instead, apart from assessing whether reasonable accommodation has been provided, the determination of whether the enjoyment of the socio-economic right is hindered by discriminatory practices is also key to such claims, even when the right in question is subject to progressive realization; for example, when a person with disability is deprived of access to a certain medicine that is in general available to the non-disabled population, any excuse based on availability of resources is irrelevant.²¹⁰

With regards to the nexus requirement, it may often be challenging to establish that the harm arises owing to this membership, since, in the highly likely scenario that decision makers do not adopt the predicament approach, the need to establish intention

²⁰⁸ See Article 2 CRPD.

²⁰⁹ For instance, the Refugee Review Tribunal of Australia rejected the case of a Jordanian asylum seeker on the ground that, even though disability services in Jordan were ‘poor’, ‘limited’, ‘negligent’ and discriminatory, and these deficiencies had ‘had a profound effect on the quality of life of all the members of the family’ concerned, it found that the inadequacy of services for children with disabilities was not grounded in a Convention reason but was instead the product of governmental resource limitations, see 0907687 [2010] RRTA 45, paras 87–91, 93, as cited in Crock, Ernst and McCallum (n 180) n 94.

²¹⁰ Foster (n 8) 242.

on the part of the persecutor may severely hinder the support of the claim. As a result, it can be truly challenging for a person with disability to show that her deprivation results from disablist practices and not resource limitations – especially since refugee generating states are often economically developing. In addition, the extent to which a state’s failure is owing to unwillingness to protect persons with disabilities is also contentious. What if the state has undertaken measures to provide accommodation that is not effective? Or what if the state has been taking steps towards the realization of the right capitalizing on the maximum of its available resources, but it is not sufficient? In such instances, unless there is a straightforward state practice in terms of positive acts, it is often hard to identify discriminatory motives behind omissions. In cases where the state has taken no steps to provide, for example, reasonable accommodation, it can be safely argued that this omission is discriminatory. On the contrary, where the state has indeed taken some steps but has failed to provide *effective* accommodation, identifying the motives is more precarious, since it is complex to find the line between inability to provide and mere disregard for the needs of persons with disabilities needs. Our preceding analysis showed that the predicament approach would resolve these conflicts, however in practice it is not always the predominant one.

5. Conclusion

The present thesis has addressed the question of when, if at all, the deprivation of socio-economic rights of persons with disabilities in their country of origin amounts to persecution, under the Refugee Convention. Since this question is rights-oriented, the research's point of departure was to explore the reasons why human rights standards are relevant to address this issue and, specifically, what kind of standards are to be employed.

In pursuit of an answer, the research began with exploring the conceptual interplay between international refugee law and international human rights law. It was shown that, notwithstanding their differences, the two regimes share a common object and purpose, which is human rights protection. This finding follows both from their context which was analyzed by reference to the Vienna Convention on the Law of Treaties, but also by the way they have been coalescing on a practical level, with human rights law constituting a transforming point of reference for refugee law concepts. Meanwhile, the considerable number of leading scholars and jurisprudence in refugee law that endorse the 'human rights approach' feeds into its consolidation as a point of reference when interpreting the refugee definition. Among its interpretative benefits, such an approach takes precedence since it offers a principled method of ascertaining the meaning of its definitional elements and provides consistency safeguards, therefore promoting the fairer administration of justice in practice.

The thesis navigated through the theoretical foundations of this approach, namely Hathaway's model of surrogate protection, in order to conclude that the approach which is more pertinent to address contemporary challenges in refugee status determination is not the one that focuses on 'persecution as a serious human rights violation', but rather a model that places the principle of non-discrimination at its heart, as Cantor suggests. Such an approach adopts the view that persecution is a manifestation of an exacerbated form of discrimination, which follows not only from the Refugee Convention's context, but also from the patent parallelism between discrimination and the Convention's grounds. Additionally, it was argued that the interpretation of refugee law concepts should draw from widely accepted standards of protection which derive from international human rights treaties that have been ratified by a wide majority of states; to that end, the ratifications of the Refugee Convention could serve as an illustrative but not determinative point of reference for this

evaluation. In this sense, it was revealed that the Convention on the Rights of Persons with Disabilities provides the most relevant standards for depicting ‘harm’ in the case of refugees with disabilities.

Having framed this thesis’s human rights approach, the research proceeded with exploring the relevance of the Convention on the Rights of Persons with Disabilities to international human rights law and international refugee law. On the one hand, it was shown that the CRPD was a requisite addition to the human rights regime, being the only disability-specific instrument in a framework that had been failing to address the specific needs of persons with disabilities. On the other hand, following the same train of thought, it is apparent that disability-specific standards are also necessary for addressing the needs of persons with disabilities in the refugee context.

Towards this assertion, the research necessitated the examination of what kind of standards can be drawn from the CRPD that can help conceptualize socio-economic deprivation for persons with disabilities. Four basic findings advanced this aim: first, the CRPD is developed on a ‘social model’ that delineates disability as an interaction of impairments with social barriers. Second, it adopts a holistic approach to rights that abandons a hierarchy between civil and political and socio-economic rights, which in turn promotes an understating that limits the effect of the concept of progressive realization to the enjoyment of socio-economic rights. Third, it is built around the duty to provide reasonable accommodation, which is understood as a core obligation that is not subject to progressive realization and the violation of which is a form of discrimination. Lastly, it recognizes the importance of the right to accessibility as a precondition to live independently, since its provision is a prerequisite for the enjoyment of other rights in the Convention. In light of these remarks, it was additionally shown that socio-economic deprivation for persons with disabilities is integrally linked with discrimination.

With these remarks in mind, the thesis moved forward to its final stage, where the previous findings were applied in order to answer the research question posed at the beginning. Even though the question seeks to identify what kind of circumstances constitute ‘persecution’, given the interdependence of the definitional elements to found a relevant claim, it was deemed necessary not to isolate the ‘persecution’ element, but rather to examine the overall implications of our analysis to the refugee definition as a whole.

As a first step, it was essential to identify what kind of circumstances of socio-economic deprivation constitute harm that may subsequently amount to persecution for persons with disabilities. The discrimination-based approach adopted at the outset of this research was found to be in line with the disability-specific standards entrenched in the CRPD, which place the prohibition of discrimination at the heart of protection.

A primary consideration of the role of the social model in the perception of harm reveals that one cannot equate the harm experienced by a person with disability and the harm experienced by a person without disability. Rather, a disability-specific understanding of harm can be conceptualized in two respects: first, it was shown that considering the indivisible link between discrimination and a person's with disabilities socio-economic deprivation, there is no reason why systematic discrimination, not only in terms of state policy – such as failure to provide reasonable accommodation - but also by reason of societal prejudice and oppression, should not amount to persecution. This means that persecution should arise from discriminatory conduct that may or may not constitute a 'serious human rights' violation, but which is rather capable of generating intolerable predicaments to the applicant, that substantially limit her enjoyment of socio-economic rights. This conduct does not have to be imposed by state actors, but it is sufficient that it is tolerated by the state. Moreover, the fact that it is performed on a systematic basis should suffice to reach the severity threshold of harm amounting to persecution, given the extent to which it engenders the enjoyment of socio-economic rights.

Arising from the first, the second manner in which persecution can be conceptualized in the case of persons with disabilities is by way of socio-economic deprivation itself, since in all likelihood it arises from discriminatory patterns and prejudicial attitudes. More specifically, the violation of the right to accessibility, in terms of failure to accommodate the right, is a manifestation of deprivation of socio-economic rights since, simply put, unless educational, employment opportunities and health services are accessible, the respective rights cannot otherwise be ensured.

In a nutshell, the research question 'when, if at all, does the deprivation of socio-economic rights of persons with disabilities in their country of origin amount to persecution under the Refugee Convention' can be answered as follows: for persons with disabilities, socio-economic deprivation amounts to persecution when it derives from discriminatory state practices, especially in terms of a violation of the duty to provide reasonable accommodation and the right to accessibility, as well as when there

is systematic discriminatory conduct in society which is fostered by prejudicial attitudes and oppression.

Having answered the main question of this research, the thesis addressed the implications of the disability-specific approach adopted in this research in the remaining elements of the refugee definition. Regarding the element of ‘well-founded’ fear, the main proposition advanced was that, once again, the experience of fear should be assessed in light of disability-sensitive criteria, that take into account the particular situation and vulnerabilities of the applicant with disability. Turning to the element of ‘membership of a particular social group’, it was found that, according to the social model of disability, coupled with the ‘protected characteristics’ approach, persons with disabilities are members of a particular social group by virtue of their immutable characteristic of their impairment and the fact that they are subject to disablist attitudes; therefore, as long as persons with impairments are targeted as a group by prejudicial and discriminatory practices that render them disabled, they form a particular social group. Lastly, with regards to the nexus requirement, this thesis adopts the predicament approach which dictates that as long as the person experiences a predicament that is related to her impairment and the state of origin fails to redress it, she becomes disabled, and this means that the nexus requirement is automatically satisfied.

The thesis concluded with exposing the main challenges that may arise from the above interpretative analysis. Even though more expansive human rights approaches to persecution are increasingly adopted in scholarship and fragmentarily in certain jurisdictions, reflecting on the practical reality of our propositions remains relevant at all times. In this sense, notwithstanding the fact that it is now in principle established that relying on a hierarchy between groups of rights is unsustainable, socio-economic refugee claims are still striving for substantive equality. As it was shown, not only is discrimination underestimated as a harm that does not reach the severity threshold, but also the concept of progressive realization inhibits the success of socio-economic claims, serving as a justification for inaction. In turn, arguments on resource limitations, especially when the country of origin is economically developing, can act to the detriment of a refugee with disability who may find it hard to establish that her disability results from disablist practices and not resource scarcity. Overall, such an approach is subject to a variety of relevant limitations in practice, where refugee status determination is not always conducted by reference to principled legal analyses, but political and economic dynamics are also in place and may sway protection standards.

Notwithstanding certain intractable complexities in benefiting from its protection, the Refugee Convention has proved capable of accommodating contemporary developments of what kind of situations constitute persecution. A similar development towards a disability-sensitive conceptualization of harm aims at fleshing out what essentially already is an instrument dedicated to human rights, for the sake of responding to the situations of those most in need of international protection.

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