

# Procedural rights of the asylum-seeking child with intellectual and/or psychosocial disabilities according to the Convention on the Rights of Persons with Disabilities.

## Background and purpose of the study

The Convention on the Rights of Persons with Disabilities (CRPD) is the latest UN human rights convention. Its strong and innovative standards has the potential to send ripples through all areas of rights protection for persons with disabilities, including the law on refugee status and other forms of international protection.

The target group of this study, asylum-seeking children with intellectual and/or psychosocial disabilities, actualises three inroads to international rights protection: the right to seek the protection of the international community, the rights of children and the rights of persons with disabilities. Various international instruments have addressed all or some of these inroads in passing. Being an asylum-seeker and being a child have long been devoted entire specialized instruments: the Refugee Convention from 1951 and the Convention of the Rights of the Child (CRC) from 1989. Since 2006 the CRPD fills this gap in relation to disability.

The target group of this study combines these three inroads to rights protection; a powerful flare signalling their exposed position for rights violations. In order to adequately address this exposure, these three dimensions must be addressed as they are in reality: not as separate entities but intrinsically embodied in each asylum-seeking child with intellectual and/or psychosocial disabilities.

It is crucial to the rights protection of the child with intellectual and/or psychosocial disabilities that the legal and factual responses to this exposedness amalgamate the different sources of rights. Taken that each instrument provide detail on different dimensions of *the singular situation* facing asylum-seeking children with intellectual and/or psychosocial disabilities, these instruments fill in each other's blanks. Consequently, they are indispensable tools in order to implement the rights and obligations in each instrument *for its entire constituency*. Put differently: asylum-seekers (the focus of the Refugee Convention) *include* children and persons with disabilities, children (the focus of the CRC) *include* asylum-seekers and persons with disabilities, and persons with disabilities (the focus of the CRPD) *include* asylum-seekers and children. In the face of this, the application of international law in good faith requires States to amalgamate the rights and obligations these instruments create.

To begin with, this merger of rights requires that we determine what standards each of these instruments set. To this end, this study establishes what procedural rights the CRPD grants asylum-seeking children with intellectual and/or psychosocial disabilities in the Refugee Status Determination (RSD) process.

## The main findings of the study

The research process translated into three overarching questions: 1) Does the CRPD cover the situation of seeking asylum?, 2) Who are included among persons with disabilities?, and 3) Which procedural right do those included among persons with disabilities have? Below, these questions are addressed in turn.

### The CRPD covers and makes far-reaching demands on the RSD process

Article 18 on Liberty of movement and nationality obliges States to “ensur[e]” that persons with disabilities “[a]re not deprived, on the basis of disability, of their ability to [...] utilize relevant processes such as immigration proceedings”. A contextual interpretation of the text of Article 18 according to the Vienna Convention on the Law of Treaties from 1969 (VCLT) with due regard to the object and purpose of the CRPD and corroborated by the preparatory works, yields that the reference to “immigration proceedings” encompasses the RSD process. Furthermore, while the obligations created by Article 18 are partly phrased in a negative manner (not to be “deprived”), States are also obliged to “ensur[e]” the “ability” to utilize immigration proceedings. The phrasing of Article 18 thus gives that the span of requirements includes both negative obligations (the avoidance of disadvantageous measures) and positive obligations (the taking of advantageous measures). Article 18 is thus a promise of an actual ability to benefit from the RSD process.

To ensure *actual ability* is the core purpose and function of the CRPD as a whole. It entails making sure that general frameworks created to ensure the enjoyment of rights are altered to make these rights *real* for persons with disabilities. Article 18 is thus an explicit demand upon States to ensure, through the taking of measures, that the process through which refugee status or other forms of international protection is sought does not disadvantage children with psychosocial and/or intellectual disabilities.

### The CRPD takes an inclusive approach towards who qualifies as a person with disabilities

In order to benefit from the rights in the CRPD, an asylum-seeking child with intellectual and/or psychosocial disabilities will often have to formally surmount the hurdle of being identified and recognised as a “[p]erson[.] with disabilities”. According to Article 1 on Purpose “[p]ersons 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”.

Important for the target group of this study, the two categories “mental” and “intellectual” are code for impairments which broadly relate to issues of mind and behaviour. Together they subsume categories such as ‘neurological’, ‘cognitive’, ‘developmental’ and ‘psychosocial’<sup>1</sup> as well as what is traditionally labelled ‘mental illness’.

The term “impairments” connotes a departure from some norm, expectation or ideal. A central criterion in Article 1 is that “impairments” be “long-term”. No specific timeframes are however discernible from the CRPD. A central point here is that Article 1 ties this temporal aspect to the social aspect of the definition. An impairment must, in tandem with barriers, lead to disadvantage in order for a person to qualify as a “[p]erson[.] with disabilities” under the CRPD. The social context we live in handles temporary lapses of functioning by possibilities to temporarily postpone roles and duties. Hence there was no intention for the CRPD to protect persons in these situations. However, if a condition is lasting enough to generally affect a person’s enjoyment of human rights, it will take a lot for the person not to qualify as a “[p]erson[.] with disabilities” under the CRPD. Consequently, the lack of accommodation of “impairments” falling somewhere between ‘short-term’ and ‘permanent’ will work towards them qualifying as “long-term” in the sense of Article 1.

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<sup>1</sup> I have chosen the term “psychosocial”, rather than “mental”, as this was the preferred term among representative organizations in the negotiations of the CRPD.

Since “impairments” are departures from a norm there is *a point* where such departures becomes “impairments”. The term as such gives no guidance where this point is, nor is this spelled out in Article 1 or elsewhere in the CRPD. Important here is that, just as the “long-term” requirement, this ‘level’ requirement inherent in “impairments” is to be read together with the social aspect of Article 1. In other words, if levels of departure from norms are not accommodated by the social context and this results in disadvantage, this speaks towards such departures qualifying as “impairments” in the sense of Article 1.

The depiction of “[p]ersons with disabilities” in Article 1 includes an environmental requisite. To qualify as covered by the CRPD barriers must exist and must, in connection with “impairments”, result in restricted “participation in society”. As the requirement of “barriers” is broadly phrased it is not likely to present any real obstacle to inclusion under Article 1. Similarly, the prerequisite of disadvantage only requires that such barriers “may” lead to restricted social participation, and so should be equally easy to satisfy.

Finally, it must be reminded of the non-exhaustive approach of the depiction of persons with disabilities in Article 1, beginning as this depiction does with the term “include”. This is echoed in key provisions such as Article 1 (1), emphasising as it does that the protection of the CRPD is for “all persons with disabilities”. To conclude, the depiction of “[p]ersons with disabilities” in Article 1 is explicitly open-ended, and was intended to be so. In addition, it has a built in social aspect to target *people at a disadvantage*, rather than people who are ‘suffisiently different’. All this indicates that the target group of this study, asylum-seeking children with intellectual and/or psychosocial disabilities, is inclusively understood by the CRPD.

#### The inclusion of children asylum-seekers with Post-traumatic Stress Disorder (PTSD)

An important point here is that the CRPD equally covers impairments which are unrelated to flight and the circumstances leading to flight *and* impairments which are intimately tied to being an asylum-seeker, such as PTSD. The main reason for the particular focus on children with PTSD in this study is the high prevalence and significant disadvantages of this condition. Research relied upon in the study sets the prevalence of PTSD among asylum-seekers generally as high as 62 %.<sup>2</sup>

Diagnostic frameworks do not mirror each other completely in the criteria they set for the diagnosis of PTSD, however the key features overlap.<sup>3</sup> A central requirement is that the child has been exposed to a traumatic event, a ‘stressor’. This in turn gives rise to symptoms such as having disturbing memories, dreams and flashbacks, behaviour and strategies which aim at avoiding being reminded of the stressor event, actual inability to remember key aspects of the stressor event, aggressiveness, reckless or self-destructive behaviour, sleep disturbances and hyper-vigilance.

The conclusion is that a diagnosis of PTSD is likely to warrant protection under the CRPD. These symptoms read as impairments according to Article 1 and it is easy to see how they, in tandem with social barriers, may result in the violation of human rights, including access to justice. As well, a diagnosis must be assumed to be based on identifiable symptoms that are neither brief nor negligible. Returning to the subject of this study, the RSD process, it is clear

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<sup>2</sup> See e.g. J. Hunter, L. Pearson, M. San Roque and Z. Steel, ‘Asylum Adjudication, Mental Health and Credibility Evaluation’ (2013) 41 Federal Law Review 116.

<sup>3</sup> See e.g. the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) from the American Psychiatric Association and the International Statistical Classification of Diseases and Related Health Problems in its 10<sup>th</sup> edition (ICD-10) by the World Health Organization.

that children with these symptoms will be at a disadvantage unless their specific requirements are accommodated. PTSD affects their ability to timely disclose information linked to the stressor, the consistency of their narrative as well as their general appearance as credible and cooperative. Indeed, research relied upon by this study indicate correlation between the display of these symptoms and a negative outcome of refugee status applications.<sup>4</sup>

Consequently, the cluster of persons protected by the CRPD include persons with PTSD which in turn should be expected to include half or more of all asylum-seekers, by virtue of this condition alone.

### Far-reaching procedural rights for children with intellectual and/or psychosocial disabilities in the CRPD

Article 13 on Access to justice is entirely devoted to administrative and legal proceedings:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The inclusive intention of Article 13 is evident as it states its area of application as “all legal proceedings”. Strongly corroborated by the preparatory works of the CRPD, this yields that Article 13 encompasses both legal processes as well as processes sometimes labelled ‘administrative’. In addition it is apparent that the entire RSD process is subject to the requirements of Article 13; from the “preliminary stages” to any execution of the last verdict of an appellate court by “police”.

The demands of Article 13 are about ensuring that persons with disabilities can benefit from the legal protection of rights “on an equal basis with others”. The use of the word “ensure” as well as the repeated use of the term “effective” to describe the kind of access to justice demanded, indicates that this entails both action and inaction on behalf of states; all depending on what is required to facilitate *effective access to justice*. Through the explicit obligation to provide “accommodations”, the article further underscores the necessity of active measures providing alternative solutions.

Two kinds of measures are explicit in the text: “procedural and age-appropriate accommodations” in Article 13 (1) and appropriate training for those working in the field of administration of justice in Article 13 (2). The latter requirement covers all personnel involved in the RSD process. The importance of training is thus underscored and the rest of the CRPD (particularly Article 8 on Awareness-raising and Article 3 on General principles) gives that such training includes the value basis of the CRPD: the crucial role of the environment in the creation of disability, the equal worth and rights of persons with disabilities, the autonomy of persons with disabilities and the capabilities of persons with disabilities. To give an example, the last point means not to presume a child’s requirements from a diagnosis, but to look at the individual requirements *and* abilities of each child.

Article 13 also makes an explicit demand for what is broadly phrased as “procedural and age-appropriate accommodations”. However, the purpose of Article 13 is “effective access to justice” for person with disabilities and the obligations towards this end is broader yet. This is

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<sup>4</sup> See e.g. J. Hunter, L. Pearson, M. San Roque and Z. Steel, ‘Asylum Adjudication, Mental Health and Credibility Evaluation’ (2013) 41 Federal Law Review 312.

so as Article 13 is phrased as that such accommodation are “includ[ed]” among those required to attain access to justice, but do not exhaust these.

An analysis of Article 13 yields the following broad categories of requirements on the RSD process for asylum-seeking children with intellectual and/or psychosocial disabilities:

Firstly, Article 13 demand an effective system for *identifying these children* among asylum-seekers and establishing their requirements. This obligations flows from the object and purpose of the CRPD (as a necessary condition for realising rights for all the persons depicted in Article 1 on Purpose as “[p]ersons with disabilities”) and from Article 25 on Health (through its requirement for “early identification and intervention”).

Secondly, Article 13 requires *the competence of all actors involved* with the child to understand the effect/non-effect of impairment on recollection and presentation of facts and on how the applicant is perceived (as credible, cooperative etc.) and to communicate with the child. This flows from the explicit requirement for training in 13 (2).

Thirdly, “procedural and age-appropriate accommodations” in the context of access to justice cover at least two central dimensions: Firstly, the purely legal accommodations of the child include predominantly *legal assistance* in the retrieving and presentation of information and evidence and making sure that the child understands the purpose and workings of the RSD process. Secondly, in order for these accommodation to be “appropriate”, they must cover also *non-legal personal assistance* ensuring that the child feels safe and can actively participate in the RSD process. Participation remains key in relation to procedural accommodations. Article 7 (2) on Children with disabilities requires that “the best interest of the child shall be a primary consideration” and Article 7 (3) makes it explicit that this entails ensuring “that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”. The paramount importance accorded participation is further evident from the fact that the one principled statement regarding children expressed in Article 3 on General principles is the right to express oneself and be heard rather than the principle of the best interest of the child. Furthermore, Article 7 makes considerable demands; “all necessary measures” are to be taken. A central dimension of legal and administrative proceedings is expression and communication, and here Article 21 on Freedom of expression and opinion, and access to information and Article 2 on Definitions (with its open-ended definition of “Communication”) gives further guidance on what such measures include.

Fourthly, “procedural and age-appropriate accommodations” include *the reform of evidentiary norms* which put children with intellectual and/or psychosocial disabilities at a disadvantage. This was a key theme in the negotiation of Article 13. Article 4 (1 a-b) on General obligations oblige States to “adopt all appropriate legislative, administrative and other measures” and to “modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

Fifthly, “effective access to justice” implicates generally the design and execution of the RSD process in terms of *time and space*. This implicates the standards in Article 9 on Accessibility which require States to address information and communication as well as the built and social environment.

Finally, Article 4 (1) on General obligations gives that these measures must be taken immediately, as access to justice is a civil right and not subject to progressive implementation. These measures must reach every level of the state apparatus, from law and policy making on

the government level to the conducting of an interview with the asylum-seeking child with an intellectual and/or psychosocial disability (Article 4 (1 c-d)). Crucially, organizations of person with disabilities, including children with intellectual and/or psychosocial disabilities, must be an active part of this process every step of the way (Article 4 (3)).

To conclude, the alterations called for by Article 13, alone and read in conjunction with the remainder of the CRPD, has *procedural* accommodations at its heart. They make it clear that legal and administrative procedures must be adapted to the point where they no longer put children with intellectual and/or psychosocial disabilities at a disadvantage.

### The importance of the logical progression from measures of Universal design and Accessibility to measures of Reasonable accommodation

In CRPD terms the obligations and measures just listed can amount to measures of “Universal design” (Article 2 on Definitions and Article 4 (1f) on General obligations), measures of “Accessibility” (Article 9 on Accessibility) and measures of “Reasonable accommodation” (Article 2 on Definitions and Article 5 on Equality and non-discrimination). The issue here is *which* of these forms measures should take.

The two former categories of measures are *pro-active*, in the sense that they are initiated before a particular individual with a particular set of requirements wants access to a particular context, such as the RSD process. Measures of Universal design is when *one solution* is crafted inclusive enough to cater for the needs of all. Measures of Accessibility can in addition include measures which create *parallel solutions* for persons with disabilities, when one solution cannot be made broad enough to encompass the requirements of everyone. From this follows that Accessibility measures, as opposed to measures of Universal design, can be made *available on request*, and may demand that it is formally established that one is a “[p]erson[.] with disabilities” according to Article 1. Finally, measures of Reasonable accommodation are alternations called for by the requirements of *a particular individual*. From this follows that the obligation to take measures of Reasonable accommodation can only arise *after* these requirements have been made known, accommodations are available only to the applicant, and only after qualifying as a “[p]erson[.] with disabilities”.

The goal is similar for all three categories of measures: equal enjoyment of human rights. In addition, they all set out to modify the current framework for realizing human rights in so far as these disadvantages persons with disabilities; they all demand *change*.

However, measures to address the requirements of asylum-seeking children with intellectual and/or psychosocial disabilities such as PTSD, *which are not rare but common as well as highly predictable*, must be proactive, systemic and made generally available rather than reactive, tied to the requirements of a particular individual and made available only after application and qualification as a “[p]erson[.] with disabilities”. In other words, the alterations the CRPD demands for the RSD process must be crafted in a manner which to the largest extent possible takes the form of “Universal design” and “Accessibility” rather than that of “Reasonable accommodation”. This order of logical progression from general alterations to individual solutions in the CRPD is evident in particular from the definition of Universal design in Article 2 on Definitions. It ends with the demand that once the potential of Universal design is emptied, other customized measures will still be required. Some requirements are rare, and here the obligation to provide Reasonable accommodation has an important role to play.

At least three additional arguments speak to this conclusion. Firstly, there are provisions in the CRPD which call for avoiding labelling and stigmatizing person with disabilities as

different through unnecessarily separating person with disabilities in a category apart from others. General principle 3 (d) calls for “acceptance of persons with disabilities as part of human diversity and humanity” and Article 8 on Awareness-raising has combatting stereotypes at its heart; stereotypes which feed on the creation of or emphasis on difference through separation into groups.

Secondly, unnecessarily hinging access to measures on a medical diagnosis amounts to improperly placing the medical profession in a position of gate keeping entitlements in areas of life outside of medicine, such as here in a legal or administrative procedure. Counteracting this runs through the CRPD entire; from the carefully crafted and predominantly social depiction of “[p]ersons with disabilities” in Article 1 on Purpose to the isolation of all questions of medicine in Articles 25 on Health and 26 on Habilitation and rehabilitation.

Finally, and most persuasively, making measures individual and subject to identification and categorization inevitably means that some children with intellectual and/or psychosocial disabilities will slip through this net of protection and come out the worse for it.

### Concluding

The question directing this study is what the CRPD can bring to the RSD process for children with intellectual and/or psychosocial disabilities. The answer is: a considerable deal. The CRPD successfully cuts through assumptions that legal and administrative processes regarding non-citizens are somehow, for whatever reason, outside the purview of access to justice. In addition, it lays to rest any assumptions of the satisfaction of justice through inaction and similar treatment only. In addition to demanding far-reaching alterations and accommodations, it stipulates principles about how access to justice is to be delivered in order to respect wider dimension of the human rights of persons (adults as well as children) with disabilities: a social understanding of the production of disability as well as how to practice equality, social recognition, autonomy, participation and inclusion. Most importantly, the reform of the RSD process that the CRPD demands must progress from a platform of proactive, generally available measures of Universal design and, only as allowed by the provisions discussed above, work its way towards other Accessibility measures. Only as a last resort, reactive measures of Reasonable accommodation must be taken in the cases of rare and unexpected requirements. To expect impairment and counteract disability is the ideological as well as the legal mission of the CRPD, irrespective of how this happens to fit with the existing ideological and legal framework of the RSD process.