

Legal capacity of and access to justice for refugees with disabilities in Africa

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SUMMARY

Although the UN Convention on the Rights of Persons with Disabilities (CRPD) has rendered persons with disabilities more visible, their struggles are still often overlooked. One of the contexts within which this occurs is during forced migration. This is because specific barriers that Persons with Disabilities face in accessing protection and assistance when seeking asylum are yet to be recognised under international and domestic law. Therefore, through a critical and comparative approach, this paper examines the normative content of article 12 (equal recognition before the law) and article 13 (access to justice) of the CPRD to ascertain how these provisions have influenced domestic refugee laws, policies and practices in Ghana and Uganda. Furthermore, this paper considers how refugees with disabilities in these countries are recognised before the law, as well as their ability to access justice within the refugee status determination and resettlement processes. Finally, this paper contends for reforms in the substantive and procedural refugee laws and policies in these countries in a bid to guarantee access to justice for refugees with disabilities.

1 Introduction

For many decades, disability and forced migration have been a human rights issue. In 2016, the United Nations High Commissioner for Refugees (UNHCR) reported that over 65.6 million persons were forcibly displaced worldwide due to persecution, conflict, violence, or human rights violations.¹ Sub-Saharan Africa hosts a large and growing number

1 UNHCR *Global Trends: Forced Displacement in 2016* (2017) 2.

of refugees,² mostly from Burundi, the Central African Republic, the Democratic Republic of the Congo, Eritrea, Somalia, South Sudan, and Sudan.³ For instance, there were 737 400 newly recognised refugees from South Sudan, followed by Burundi (121 700 newly recognised), Eritrea (69 600), and Nigeria (64 700).⁴ It has been observed that about 15 percent of the world's population has disabilities.⁵ Furthermore, it is contended that the occurrence of disability is higher among forced displaces fleeing violent conflicts, who are exposed to high risk situations resulting in serious injuries such as mental, physical and/or sensory impairments.⁶ Currently, there is a paucity of statistical data on disability among populations of displaced persons. The UNHCR estimates the number of forcibly displaced persons with disabilities at between 2.3 and 3.3 million, which represents between 7 and 10 per cent of forcibly displaced people; however, they often remain invisible within uprooted communities.⁷ The invisibility of refugees with disabilities is not surprising because many countries have effectively excluded disability from their refugee and migration systems.⁸

Despite the adoption of the CRPD in 2006,⁹ several studies have revealed that many countries have advanced disability exclusionary regimes in their refugee and migration systems.¹⁰ This reveals a range of

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- 2 The 1951 Convention defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country”. See art 1(A)(2) of the UN Convention Relating to the Status of Refugees, 28 July 1951. The 1969 OAU Convention offers an extended definition to include “people fleeing external aggression, occupation, foreign domination or events seriously disturbing public order”. See art 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) (adopted 10 September 1969), 1001 UNTS 45.
 - 3 UNHCR 14.
 - 4 UNHCR 14.
 - 5 WHO and World Bank *World Report on Disability* 2011 http://www.who.int/disabilities/world_report/2011/report/en/ (last accessed 2019-07-08).
 - 6 Women's Refugee Commission, *Disabilities among Refugees and Conflict-affected Populations* (New York: Women's Refugee Commission 2008) <http://womensrefugeecommission.org/programs/disabilities> (last accessed 2019-07-08).
 - 7 UNHCR “People with Disabilities”, <http://www.unhcr.org/pages/4a0c310c6.html> (last accessed 2019-07-08).
 - 8 Soldatica, Somersb, Buckleyc & Fleayd “‘Nowhere to be found’: disabled refugees and asylum seekers within the Australian resettlement landscape” 2015 *Disability and the Global South* 501-522.
 - 9 Adopted 13 December 2006 by General Assembly Res A/RES/61/106 came into force 2008.
 - 10 El-Lahib & Wehbi, *Immigration and Disability: Ableism in the Policies of the Canadian State* (2012) 55 *International Social Work*, 95-108; Mirza, *Unmet Needs and Diminished Opportunities: Disability, Displacement and Humanitarian Healthcare* (2011) 212; Soldatic & Fiske “Bodies Locked Up: Intersections of Disability and Race in Australia's Immigration System” 2009 *Disability & Society* 289-301; Kanter *The development of disability rights under international law: From charity to human rights* (2017).

tactics including refugee and asylum selection status determination processes that work to actively “screen out” persons with disabilities (PWDs) for refugee status or resettlement. Meanwhile, there is substantial empirical evidence to suggest that it is these very conditions that force people across borders thereby creating high rates of disability and impairment.¹¹ The challenges that PWDs encounter, in this regard, are still often overlooked and in most institutionalised settings their rights to access justice and treatment before the law are usually violated. Though the CRPD in articles 12 and 13 recognises and safeguards equal recognition before the law and access to justice of PWDs respectively, the specific barriers that PWDs face in accessing protection and assistance when seeking asylum are yet to be recognised. For instance, apart from provisions for access to social security in article 24(1)(b),¹² the 1951 UN Refugee Convention relating to the Status of Refugees (1951 Refugee Convention),¹³ provides little guidance on protecting the human rights of refugees with disabilities.

It is against this background that this paper adopts a critical and comparative approach to examine how refugees with disabilities are recognised and protected during the refugee status determination and resettlement processes, with particular emphasis on the right to legal capacity,¹⁴ and the right to access to justice.¹⁵ The paper scrutinises the normative contents of articles 12 and 13 of the CPRD and how these provisions have influenced domestic refugee laws and policies in Ghana and Uganda. Particularly, the paper analyses the cross fertilisation between domestic disability laws and refugee laws in the selected countries. Following this introduction, section two discusses legal capacity of and access to justice for refugees with disabilities under international law. Section three examines access to justice and legal capacity of refugees with disabilities in Ghana and Uganda to appraise their compliance with the CRPD and other substantive international

11 Meekosha & Soldatic “Human Rights and the Global South: The Case of disability” 2011 *Third World Quarterly* 1383.

12 Art 24(1) of the 1951 Convention obliges “Contracting States to accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters: (b) states that Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.”

13 UN Convention Relating to the Status of Refugees 189 UNTS 150, entered into force 22 April 1954.

14 UN Convention on the Rights of Persons with Disabilities (CRPD) 2515 UNTS 3, entered into force 3 May 2008, Art 12.

15 CRPD, Art 13.

human rights instruments. Section four summarises and concludes the discussion.

2 Steps towards protection: legal capacity of and access to justice for refugees with disabilities under international law

The protection and material needs of refugees with disabilities has received little to no attention over the past decades. It has been observed that refugees with disabilities suffer triple disadvantage.¹⁶

Firstly, they are outside of their country of origin; secondly, they are usually stripped of the protections of a State of citizenship or habitual residence and live in fear of persecution if returned to the country from which they have fled; and thirdly, being hampered by physical, mental, intellectual or sensory impairments hinders their full and effective participation in society.¹⁷

Refugees with disabilities can be categorised among vulnerable persons in the world because their experience of forced migration is compounded by the manifold and varied challenges, which flow from impairment.¹⁸ Even in countries where they do have legal recognition and protection, refugees with disabilities are normally harassed by police through physical abuse and intimidation. Addaney observes that in most African countries beleaguered by economic crises and social problems, refugees, especially those with disabilities, are used as suitable scapegoats.¹⁹ Nevertheless, refugees with disabilities are entitled to protection under international human rights and refugee law.²⁰ These laws provide the framework within which the protection of and assistance to refugees with disabilities should be undertaken.

For several decades persons with disabilities were overlooked by the international human rights community.²¹ For instance, the Universal Declaration of Human Rights (UDHR) adopted by the United Nations

16 Crock, Ernst & McCallum "Where Disability and Displacement Intersect – Asylum Seekers and Refugees with Disabilities" 2013 *International Journal of Refugee Law* 735.

17 CRPD, Art 1; Crock, Ernst & McCallum 736.

18 Crock, Ernst & McCallum 737.

19 Addaney "Toward Promoting Protection: Refugee Protection and Local Integration in Sub-Saharan Africa" 2017 *Studia Migracyjne – Przegląd Polonijny* 71.

20 Goodwin-Gill "The politics of refugee protection" 2008 (27) *Refugee Survey Quarterly* 8.

21 As alluded to in Kayess & French "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" 2008 8 *Human Rights Law Review* 1-34; Ngwena "Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective" unpublished PhD thesis University of Free State 2010.

General Assembly (UNGA) in 1948 is recognised as the first international human rights law instrument.²² It provides that “all human beings are born free and equal in dignity and rights”,²³ and establishes “a common standard of achievement for all peoples and all nations”.²⁴ While the UDHR is a declaration and not a formal agreement, it is argued that it has assumed the position of *jus cogens* and therefore it is now binding due to its recognition as part of customary international law.²⁵ The UDHR, the International Covenant on Civil and Political Rights (ICCPR),²⁶ and the International Covenant on Economic Social and Cultural Rights (ICESCR),²⁷ together constitute the International Bill of Rights.²⁸ However, none of these instruments include disability within the list of protected groups.²⁹ It was not until 2006 that the UN adopted the CRPD as its first international human rights instrument addressing specifically the rights of PWDs.³⁰

Moreover, United Nations (UN) has adopted specialised human rights conventions on behalf of other groups, including a specific convention on the rights of refugees.³¹ Refugees with disabilities are thus at the meeting point of two main international human rights instruments, the 1951 Refugee Convention which has been in existence since the past six decades, and the CRPD. However, the CRPD signifies a momentous

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- 22 Certain customs and principles have become so widely accepted that they have become binding as customary international law. To establish an international custom, the party must show a widespread practice by states of confirming to the alleged rule, together with evidence that states have followed this practice because they believe that they are under an obligation to do so. As such, customary human rights law may be found binding on all states without regard for whether a particular state has consented. It has been argued that the UDHR has assumed the position of a binding customary law. See, Hannum “The status of the Universal Declaration of Human Rights in national and international law” 1995 *Georgia Journal of International and Comparative Law* 287; Hunnan (ed) *Guide to International Human Rights Practice* (1999) 10; Addaney “A step forward in the protection of urban refugees: The legal protection of the rights of urban refugees in Uganda” 2017 *African Human Rights Law Journal* 218.
- 23 Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N.Doc 810 at Preamble (1948).
- 24 Goodwin-Gill 8.
- 25 See, Hunnan *Guide to International Human Rights Practice* (1999) 10.
- 26 Adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on the 3 of January 1976 in accordance with art 27.
- 27 ICCPR, Art 49.
- 28 Kanter “The Globalization of Disability Rights Law” 2003 (30) *Syracuse Journal of International Law and Commerce* 241.
- 29 See, Art 25 of the UDHR and art 12 of the IESCR refer to disability in connection to social security and health issues, not as a human right.
- 30 UN CRPD.
- 31 See, 1951 Refugees Convention; Convention on the Elimination of All Forms of Discrimination against Women, entered into force 3 September 1981; Convention on the Rights of the Child, entered into force 2 September 1990, <https://treaties.un.org/doc/source/titles/english.pdf> (last accessed 2019-04-08).

paradigm change in the understanding of PWDs as rights holders.³² Responding to the intellectual and influences of the international disability rights movement, the CRPD discards the “medical/ welfare” model of disability which observes PWDs as “objects of charity, medical treatment and social protection”.³³ Rather, the CRPD conceptualises PWDs as rights holders who can “claim those rights as active members of society”.³⁴ Therefore, the CRPD indicates a revolutionary move towards acceptance of the “social” model of disability which recognises that a person’s disability is formed more by society than by bodily impairment.³⁵ The CRPD provides that “persons with disabilities consist of 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”.³⁶ In this manner, the CRPD perceives disability from a social model of disability.

The enunciation in the ICCPR and ICESCR is the recognition of the “inherent dignity and the equal and inalienable rights of all members of the human family”.³⁷ These guarantees, in essence, extend to refugees with disabilities since it has been observed that human rights responsibilities are owed regardless of whether an individual is a citizen of a state or not.³⁸ The General Comment No 31 on the nature of the general obligation imposed on states parties to the Covenant by the Human Rights Committee clarifies that “the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons”.³⁹ General Comment No15 on the position of aliens under the Covenant confirms that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity and irrespective of his or her nationality or statelessness”.⁴⁰ These imply that the protection offered by the ICCPR and ICESCR covers refugees. This view is supported by well-established principles of treaty interpretation;⁴¹ as the CRPD is premised on the

32 Umeh “Reading ‘disability’ into the non-discrimination clause of the Nigerian Constitution” 2016 *African Disability Rights Yearbook* 53; Ngwena “Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education” 2013 *African Disability Rights Yearbook* 139.

33 Crock, Ernst & Mccallum 735.

34 Kayess & French 1.

35 Crock, Ernst & Mccallum 735.

36 CRPD, Art 1.

37 The preambles of the ICCPR and the ICESCR.

38 Crock, Ernst & Mccallum 740.

39 Human Rights Committee, “General Comment No 31”, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10.

40 Kayess & French 1.

41 Crock, Ernst & Mccallum 745.

principle of universality.⁴² The CRPD “promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities”.⁴³ The Preamble also recalls the “inherent dignity, worth and the equal and inalienable rights of all members of the human family”, and further recognises that “everyone is entitled to all the rights and freedoms set forth in the UDHR without distinction of any kind”.⁴⁴

Article 11 affirms the provisions of the CRPD with the 1951 Refugee Convention by obliging States Parties to:

“take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to protect persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”⁴⁵

Without controversy, situations of risk include the three scenarios already argued that usually force people from their homes, producing refugee flows. Nevertheless, efforts to relate the protections of the CRPD to refugees will undoubtedly continue to face political resistance.⁴⁶ This is principally because of the current prevailing climate where asylum seekers are regarded as a burden on already overstretched economies and the adoption of tight border control mechanisms to stem the inflow of forced migrants.⁴⁷

Furthermore, despite the relevance of the 1951 Refugee Convention, it applies only to PWDs who meet the definition of refugee provided in article 1A(2) of the Convention as modified by the 1967 Optional Protocol and the 1969 OAU (now AU) Refugee Convention.⁴⁸ For persons seeking asylum or resettlement, their ability to meet the definition remains critical. It is argued that at the most basic level, the cognitive impairments of a person can affect his or her ability to demonstrate fear or to articulate a claim of any kind.⁴⁹ Consequently, article 1A(2) of the 1951 Refugee Convention necessitates that a refugee’s fear of persecution should be “well-founded”. The term “well-founded fear” implies both subjective and objective elements such that asylum seekers must not only fear persecution but that the fear must be rational.⁵⁰ In practical terms, these elements pose challenges for refugees with

42 This principally relates to the idea of appropriating the fundamental requirements of dignity and equality to everyone irrespective of class, status or body characteristics.

43 CRPD Art 1.

44 CRPD *preamble* (a) and (b).

45 CRPD Art 11.

46 Crock, Ernst & Mccallum 755.

47 Crock, Ernst & Mccallum 755.

48 1969 OAU Convention.

49 1969 OAU Convention.

50 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992, rev edn) para 38–41.

disabilities including those whose refugee claims are not substantively related to their disability. Particularly, the need to demonstrate personal fear can be a challenge for refugees with mental or intellectual disabilities, who do not have the psychological or cognitive ability to appreciate the situations that are logically dangerous.⁵¹ While some refugees with disabilities may be incapable of realising fear, others may hold fears that are forced by their mental or intellectual disability.

Addressing situations that involve refugees with disabilities requires the application of the principle of reasonable accommodation,⁵² by the appropriate bodies to make suitable allowances for persons with disabilities. Where a person with an intellectual or mental disability is expressing a pathological fear, a sensitive approach needs to be taken in the application of the Convention's definition.⁵³ The starting point for analysing article 12 and article 13 should be that State parties to the CRPD are obliged under international human rights law to provide reasonable accommodation to persons with disabilities. Non provision of reasonable accommodation during the refugee status determination process and/or resettlement process of refugees with disabilities could constitute discrimination in view of the provisions of article 2 and 5.

Similarly, the rights of refugees and persons with disabilities are recognised and guaranteed by regional human rights instruments. As such, regional treaties have also been used as mechanisms to enforce human rights protection for refugees with disabilities. The African Charter on Human and Peoples' Rights (African Charter) is the fundamental mechanism of the African human rights system. It recognises and protects individual rights as well as peoples' rights including some socio-economic rights as well as civil and political rights.⁵⁴ The African Charter plainly emphasises that:

“the virtues of the historical tradition and the values of African civilization should inspire and characterise the reflection on the concept of human and peoples' rights by recognising that fundamental human rights stem from the attributes of human beings, which justifies their international protection and as well as that the reality and respect of peoples' rights should necessarily guarantee human rights.”⁵⁵

Furthermore, the African Charter considers that the enjoyment of rights and freedom have implications on the performance of duties by everyone towards their family and society, the state and other legally

51 Crock & Berg *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (2011) 383.

52 CRPD Art's 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).

53 Crock, Ernst & McCallum 758.

54 Van Reenen & Combrinck “The UN Convention on the rights of persons with disabilities in Africa: Progress after 5 years” 2011 *International Journal on Human Rights* 132.

55 African Charter *Preambular* para 4, 5.

recognised communities.⁵⁶ In these respects, the African Charter is in compliance with and complements the CRPD.⁵⁷

Substantively, the African Charter provides for the right of everyone “to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.⁵⁸ Clearly, it can be argued that refugees and PWDs fall under the “other status” category and thus enjoy the guarantee offered by this provision. Article 3 further provides that “every individual shall be equal before the law and shall be entitled to equal protection of the law”.⁵⁹ In interpreting and applying this provision in the *Purohit and Another v The Gambia*, the African Commission on Human and Peoples’ Rights (the African Commission) held that “articles 2 and 3 basically form the anti-discrimination and equal protection provisions of the African charter”.⁶⁰ The African Commission further held that:

“Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.”⁶¹

The implication of this interpretation is that refugees with disabilities are to enjoy all the rights recognised and protected under the African Charter. In addition, article 4 recognises that everyone is “entitled to respect for his life and the integrity of his person”. Though not directly related to equal recognition and access to justice, this provision protects the core personhood and autonomy of an individual. The African Charter also guarantees that “every individual shall have the right to the respect of his dignity inherent in a human being and to the recognition of his legal status”.⁶² The African Commission has held that “human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination”.⁶³ It has contended that human dignity is “an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right”.⁶⁴ Article 13(3) of the African Charter further guarantees that “every individual shall have the right of access to public

56 African Charter *Preamble* para 6.

57 Van Reenen & Combrinck 133.

58 African Charter Art 2.

59 African Charter Art 3.

60 *Purohit and Another v The Gambia* 2003 AHRLR 96 (ACHPR 2003) 49.

61 *Purohit and Another v The Gambia*

62 African Charter, Art 5.

63 *Purohit and Another v The Gambia* para 57.

64 Van Reenen & Combrinck 133.

property and services in strict equality of all persons before the law”.⁶⁵ Therefore, the African Charter guarantees the equality of all persons.⁶⁶

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) set out to adequately protect the rights of women in Africa.⁶⁷ Article 24(a) obliges States Parties to ensure the protection of some categories of women including those from marginalised population groups and to provide an environment suitable to their condition and their special physical, economic and social needs.⁶⁸ This provision is of critical importance to refugee women with disabilities because States Parties are to reasonably accommodate them at all levels of societal interactions. Significantly, States Parties are “to provide suitable legal and other remedies to any woman whose rights or freedoms, as herein recognised, have been violated”.⁶⁹ Similarly, the AU (formerly OAU) in 1969 adopted a regional Convention governing the specific aspects of refugee problems in Africa (1969 OAU Convention). The 1969 OAU Convention’s definition of a refugee is considered more inclusive and progressive than other regional conventions.⁷⁰ The 1969 OAU Convention obliges member states “to use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality”.⁷¹ While this provision is relevant in protecting the rights of refugees with disabilities in Africa, some states can exploit the excesses by adopting repressive laws to the contrary.⁷²

Taking the discussion further, conceptually, scholars and practitioners have attempted to unpack the content of “equal recognition before the law” and “access to justice” as enshrined in articles 12 and 13 of the CRPD. Regarding equal recognition before the law, article 12(1) and (2) of the CRPD provides that:

65 African Charter, Art 13(3).

66 African Charter, Art 19 provides that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights”. Nothing shall justify the domination of a people by another.

67 MS Nsibirwa “A brief analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women” 2001 (1) *African Human Rights Law Journal* 41.

68 Maputo Protocol Art 24(a).

69 Maputo Protocol Art 25(a).

70 The definition of refugee in art 1 of the 1969 OAU Convention incorporates the definition of the 1951 Convention by removing the temporal or geographic restrictions with further extension in the definition. Para 2 of art 1 provides that “[t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

71 1969 OAU Convention Art 21(1).

72 Addaney 2017 *African Human Rights Law Journal* 218.

“(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”⁷³

Although it has been argued that article 12 is the most contentious, it is also the most important and “revolutionary” provision in the Convention.⁷⁴ The revolution of article 12 rests in its acknowledgment that all persons with disabilities possess legal capacity and have the right to exercise it on an equal basis. Primarily, this provision is a complete shift from substituted decision-making to supported decision-making.⁷⁵ It symbolises “the legal aspects of living independently, exercising autonomy and having the freedom to make one’s own choices”.⁷⁶ Arguably, legal capacity implies legal autonomy, which is the right to make one’s own choices. Schulze argues that legal capacity as used in the CRPD envelops all aspects of the capacity to act, which is the right to exercise his or her capacity in all aspects of life such as civil, criminal, as well as public.⁷⁷ Crucially article 12(3) of the CRPD obliges state parties to provide access to the support that persons with disabilities may require in exercising their legal capacity. Legal capacity is not defined in the Convention. However, legal capacity has been conceptualised as how we give effect to our preferences and choices in the real world.⁷⁸ In effect, legal capacity consists both of the recognition of a person as a right holder and the ability to exercise those rights. It can therefore be argued that enjoyment of legal capacity under article 12 is a “prerequisite for the equal enjoyment of all the other rights enshrined in the CRPD especially article 13 (the right to access to justice)”.⁷⁹

On access to justice, article 13(1) of the CRPD provides that:

73 CRPD Art 12(1) and (2).

74 Minkowitz “The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric interventions” 2007 *Syracuse Journal of International Law and Commerce* 405.

75 Zinkler “Supported decision-making in the prevention of compulsory interventions in mental health care” 2019 *Front Psychiatry* 137; Szmukler “Capacity”, “best interests”, “Will and Preferences” and the UN Convention on the Rights of Persons with Disabilities” 2019 *World Psychiatry* 34.

76 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (2009) 60.

77 Schulze 63.

78 Pearl “Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?” 2013 *Leeds Journal of Law and Criminology* 11.

79 Gombos, Benkó B & Kovács “Written submission on the right to equal recognition before the law: Based on the case of Hungary” Submitted to the Committee on the Rights of Persons with Disabilities by the Mental Disability Advocacy Centre and the Hungarian Association for Persons with Intellectual Disability” (2009) 14, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DayGeneralDiscussion21102009.aspx> (last accessed 2019-04-08).

“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.”⁸⁰

The inclusion of access to justice in article 13 of the CRPD is a substantiation that persons with disabilities face challenges in accessing legal representation, resources as well as protection. The meaning of the term “justice” can vary between regions, countries and cultures. However, the idea of justice is common to all and generally includes concept of fairness, accountability and equity of outcome. Therefore, “access to justice” encompasses people’s effective admission to the recognised and unofficial systems, procedures, information as well as locations used in the administration of justice. Bowd posits that “access to justice” encompasses the fairness with which litigants are treated, the justness of results delivered, the speed with which cases are processed, and the responsiveness of the system to those who use it”.⁸¹ He further asserts that access to justice broadly means the equity with which those from differing backgrounds are able to gain from the justice delivery system.⁸² Beyond seeking legal protection or remedies, there are numerous ways in which individuals can participate in the justice system including being judges, witnesses, jurors, and lawyers. In addition one may serve as a defendant in a civil or administrative case.⁸³ Larson observes that challenges such as stereotyping in the refugee status determination and resettlement processes in particular exacerbate these disadvantages for persons with disabilities.⁸⁴

Despite the recognition and protection offered in these international treaties, several barriers can be faced in terms of a country’s institutional structure for administering justice such as poor law enforcement and ineffective court systems. Bhabha opines that these are often complex, involving combined forms of inaccessibility and other types of discrimination.⁸⁵ The implications of such barriers are significant in the case of refugees with disabilities as lack of access to justice can compound the disadvantages they face, leaving them unable to protect their rights and at risk of ongoing abuse including physical and sexual violence.

80 CRPD Art 13(1).

81 Bowd *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* (2009) 1.

82 Bowd *supra*.

83 Lord, Guernsey, Balfe, Karr, De Franco & Flowers, *Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities* (2009) 8.

84 Larson “Access to justice for persons with disabilities: An emerging strategy” 2014 *Laws* 220.

85 Bhabha “Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Potential” 2009 *South African Journal of Human Rights* 218.

3 Measuring up to the CRPD: access to justice and legal capacity of refugees with disabilities

Ghana and Uganda have committed to protect the rights of PWDs and refugees by ratifying the relevant international and regional human rights instruments. These include the 1951 Refugee Convention;⁸⁶ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁸⁷ the ICCPR;⁸⁸ the ICESCR,⁸⁹ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).⁹⁰ Furthermore, these countries have both signed and ratified the Convention on the Rights of the Child (CRC),⁹¹ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW),⁹² and the CRPD.⁹³ At a regional level, these countries have signed and ratified the African

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- 86 Ghana acceded to the 1951 Convention on 18 March 1963 (Optional Protocol on 30 August 1968); Uganda acceded to the 1951 Convention and its Optional Protocol on 27 September 1976, <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last accessed 2019-06-08).
- 87 Ghana signed and the CERD on 8 September 1966; Uganda signed and ratified on 21 November 1980; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last accessed 2019-06-08).
- 88 Ghana signed and ratified on 7 September 2000; Uganda signed and ratified on 21 June 1995, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last accessed 2019-06-08).
- 89 Ghana signed and ratified on 7 September 2000; Uganda acceded on 21 January 1987, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en (last accessed 2019-06-08).
- 90 Ghana signed the CEDAW on 17 July 1980 and ratified on 2 January 1986; Uganda signed on 30 July 1980 and ratified on 22 July 1985, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last accessed 2019-06-08).
- 91 Ghana signed the CRC on 29 January 1990 and ratified on 5 February 1990; Uganda signed and ratified on 17 August 1990, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (last accessed 2019-06-08).
- 92 Ghana signed and ratified on 7 September 2000; Uganda acceded to it on 14 November 1995, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en (last accessed 2019-06-08).
- 93 Ghana signed the CRPD on 30 March 2007 and ratified on 31 July 2012; Uganda signed on 30 March 2007 and ratified on 25 September 2008, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (last accessed 2019-06-08).

Charter,⁹⁴ its Maputo Protocol,⁹⁵ the African Charter on the Rights and Welfare of Children (the African Children's Charter)⁹⁶ and the 1969 OAU Refugee.⁹⁷ Their respective Constitutions, along with several laws, subsidiary legislation and policies, relate to the rights of PWDs and refugees. However, similar to other countries in Africa, these countries are faced with challenges in the domestication and application of the CRPD as emphasised by Mgijima-Konopi that "most African countries face significant challenges in formulating, domesticating and implementing disability rights to make the rights guaranteed in the CRPD a reality for persons with disabilities on the continent".⁹⁸ Consequently, the relevant national legislation and policies of Ghana and Uganda are discussed below in relation to article 12 and article 13 of the CRPD.

3 1 Equal before the law? achieving social justice for refugees with disabilities in Ghana

In Ghana, there were over 18 457 persons of concern to UNHCR by the end of June 2016, comprising of 16 409 refugees and 2 048 asylum-seekers from about 25 different countries.⁹⁹ The UNHCR in Ghana prioritises mainstreaming access to basic social services for refugees into the national system and securing durable solutions for refugees.¹⁰⁰ Most of the refugees have been in Ghana for over five years, with the latest influx being that of Ivorian Refugees in 2011; other refugee groups arrived mostly in the 90s or early 2000s.¹⁰¹ Therefore, finding durable

94 Ghana deposited on 3 March 1989, ratified on 24 January 1989 and signed on 3 July 2004; Uganda deposited on 27 May 1986, signed on 18 August 1986 and ratified on 10 May 1986, <http://www.achpr.org/instruments/achpr/ratification/> (last accessed 2019-06-08).

95 Ghana signed on 31 October 2003, ratified on 13 June 2007 and deposited on 20 July 2007; Uganda signed on 18 December 2003 and ratified and deposited on 22 July 2010, <http://www.achpr.org/instruments/women-protocol/ratification/> (last accessed 2019-06-08).

96 Ghana signed on 18 August 1997, ratified on 10 June 2005 and deposited on 15 July 2005; Uganda signed on 26 February 1992, ratified on August 1994 and deposited on 21 October 1994, <http://www.achpr.org/instruments/child/ratification/> (last accessed 2019-06-08).

97 Ghana signed on 10 September 1969, ratified on 19 June 1975 and deposited on 18 August 1983; Uganda signed on 10 October 1969, ratified on 24 July 1987 and deposited on 7 August 1987, <http://www.achpr.org/instruments/refugee-convention/ratification/> (last accessed 2019-06-08).

98 Mgijima-Konopi "The Jurisprudence of the Committee on the Rights of Persons with Disabilities and its Implications for Africa" 2016 *African Disability Rights Yearbook* 269.

99 United Nations Office in Ghana "Refugees" <http://gh.one.un.org/content/unct/ghana/en/home/our-work/cross-cutting-themes/refugees.html> (last accessed 2019-06-08).

100 United Nations Office in Ghana "Refugees" <http://gh.one.un.org/content/unct/ghana/en/home/our-work/cross-cutting-themes/refugees.html> (last accessed 2019-06-08).

101 UNHCR "UNHCR in Ghana: Protection and Solutions Strategy" Briefing note, August 2016, <http://gh.one.un.org/content/dam/unct/ghana/docs/Agencies%27%20Publications/UNHCR/UNCT-GH-UNHCR-Ghana-Briefing-Notes.pdf> (last accessed 2019-06-08).

solutions is of utmost importance to allow refugees to acquire or re-acquire the full protection of the State. The 1992 Constitution of Ghana (the 1992 Constitution),¹⁰² along with other subsidiary legislation and policies, relates to the rights of refugees with disabilities in Ghana. Amongst them, the most relevant are the 1992 Constitution, the Refugee Law of 1992 and the Persons with Disability Act of 2006. After decades of political crises and frequent military takeovers, the Provisional National Defence Council of Ghana promulgated a new Constitution in 1992,¹⁰³ which was later amended in 1996.¹⁰⁴ The 1992 Constitution was enacted and adopted as a “framework of government which shall secure for current generation and posterity the blessings of liberty, equality of opportunity and prosperity” and “in a spirit of friendship and peace with all peoples of the world”.¹⁰⁵ It declares and affirms the commitment to “freedom, justice, probity and accountability”.¹⁰⁶ The Bill of Rights guarantees the basic human rights and freedoms that must be respected and upheld by all organs of state, all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided in the Constitution.¹⁰⁷

Article 17 of the Constitution further guarantees everyone’s “equality and freedom from discrimination”¹⁰⁸ and provides that “a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status”.¹⁰⁹ However, article 17 does not recognise disability as a protected ground of discrimination, rather article 29 seems to reflect disability related principles by providing for the protection of the rights and welfare of PWDs in Ghana. It guarantees that “disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature”.¹¹⁰ It also provides that “in any judicial proceedings in which a disabled person is a party, the legal procedure applied shall take his physical and mental condition into account”.¹¹¹ As already argued, the fundamental rights guaranteed in the Constitution are to be upheld by all state agencies and natural persons. Therefore, courts and all administrative tribunals dealing with refugee protection issues are obliged to comply with this constitutional imperative. This call is influenced by the development of disability laws and policies in Ghana, especially article 8 which mandates parliament to enact such laws as are necessary to ensure the enforcement of the guarantees enshrined in article 29.¹¹² In addition, the Directive Principles of State Policy “guide

102 Constitution of the Fourth Republic of Ghana (Promulgation) Law of 1992.

103 Constitution of Ghana.

104 Constitution of the Republic of Ghana (Amendment) Act of 1996.

105 Constitution of Ghana *preamble* para 1 and 2.

106 Constitution of Ghana *preamble* para 3.

107 Constitution of Ghana *preamble* Art 12(1).

108 Constitution of Ghana *preamble* Art 17.

109 Constitution of Ghana *preamble* Art 17(2).

110 Constitution of Ghana Art 29(4).

111 Constitution of Ghana Art 29(5).

112 Constitution of Ghana Art 29(8).

all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society”.¹¹³

In 1992 Ghana adopted the Refugee Law which recognises the 1951 UN Refugee Convention, the 1967 Protocol and the 1969 OAU Refugee Convention and recalls that “it is necessary to give effect to these Conventions and Protocol in order that the provisions of these instruments shall have the force of law in Ghana”.¹¹⁴ Different from other refugee laws on the continent, article 11 of the Refugee Law contains the rights and duties of a refugee, and provides that, “a person granted refugee status in Ghana shall be entitled to the rights and be subject to the duties specified in the 1951 Refugee Convention, its 1967 Protocol as well as the 1969 OAU Refugee Convention”.¹¹⁵ These Conventions are attached as a Schedule to the Law. This is innovative as refugees in Ghana are entitled to all the rights enshrined in these treaties. Part 2 of the Law, establishes a Refugee Board (the Board).¹¹⁶ The Board is mandated to perform *inter alia* the following duties:

“(a) receive and consider applications for refugee status; (b) recognise any person or group of persons as refugees for the purposes of this Law; (c) register and keep a register of persons recognised as refugees under this Law; (f) endeavour to ensure the provision of adequate facilities, advice and services for the reception and care of refugees in Ghana; (h) advise the Secretary on all matters relating to refugees.”¹¹⁷

This provision is significant because it meets international refugee protection standards. Jastram and Achiron observe two conditions that states must meet to effectively protect the rights of refugees.¹¹⁸ The first is adopting domestic refugee legislation and policies that are compliant with international standards to provide a basis for the protection of refugees. The second is integrating international human rights laws into domestic legislation, specifically in critical areas where the 1951 Refugee Convention and the 1969 OAU Refugee Convention are silent.¹¹⁹ Meeting these criteria would require states to institute an expert body to examine asylum applications to guarantee the availability of procedural safeguards at various levels and to speed up the process.¹²⁰

113 Constitution of Ghana Art 34(1).

114 Refugee Law of Ghana, *Preamble* para 3.

115 Refugee Law Art 11.

116 Refugee Law Art 4.

117 Refugee Law.

118 Jastram & Achiron “Refugee protection: A guide to international refugee law” (2001) http://www.ipu.org/pdf/publications/refugee_en.pdf (last accessed 2019-04-08).

119 Jastram & Achiron *supra*.

120 UNHCR *The 1951 Convention and its 1967 Protocol: The legal framework for protecting refugees* (2010) 2.

Regarding the protection of PWDs, the Persons with Disability Act of Ghana,¹²¹ was enacted in 2006. It has eight parts. Part 1 sets out the “general” rights of PWDs *to inter alia* include family life and social activities, freedom from exploitation and discrimination as well as accessibility of both public places and services.¹²² Part 2 sets out the rights relating to employment and rehabilitation.¹²³ Part 3 provides for the rights to education and training.¹²⁴ Part 4 sets out the rights relating to transportation.¹²⁵ Part 6 provides for the right to healthcare.¹²⁶ However, there is no provision for equal legal capacity in the Act. The Act is silent on the concept of equal legal capacity for PWDs and most importantly, it does not provide a definition of disability. Thus, this weakens the application and enforcement of the Act.

In instances where a PWD is a party to judicial proceedings, article 5 provides that “the adjudicating body shall take into account the condition of the PWD and provide appropriate facilities that enable the person with disability to participate effectively in the proceedings”. Though this provision seems to comply with articles 2, 12 and by extension article 13 of the CRPD, the concepts of “reasonable accommodation”, “legal capacity” and “access to justice” are not specifically defined. Therefore, there is a lack of clarity on the application of article 5 of the CRPD. However, the Parliament of Ghana having ratified the UNCRPD on 12 March 2012,¹²⁷ Ghana is consequently obligated to submit regular reports to the Committee on the Rights of Persons with Disabilities (CRPD) reporting on the legislative, judicial, policy and other measures being undertaken to domestically implement the rights affirmed in the Convention. These reports should particularly indicate the measures being taken in promoting, protecting and ensuring 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.¹²⁸ Ghana’s first report should have been submitted in 2014 (two years after ratification). However, due to implementation challenges, Ghana was only able to submit the report in June 2018. According to the report, citing the 2010 Population and Housing Census organised by the Ghana Statistical Service, three percent of Ghanaians (737 743) were classified as People with disabilities.¹²⁹

121 Persons with Disability Act of Ghana (Act 715) of 2006.

122 Disability Act Art 1-8

123 Disability Act Art 9-15.

124 Disability Act Art 16-22.

125 Disability Act Art 23-30.

126 Disability Act Art 31-35.

127 See, Status of ratification of CRPD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en (last accessed 2019-06-08).

128 Ministry of Gender, Children & Social Protection of Ghana (MGCSP), United Nations Convention on the Rights of Persons with Disabilities: Ghana’s Initial State party Report, CRPD/C/GHA/1, 5 June 2018, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGHA%2f1&Lang=en (last accessed 2019-06-08).

129 MGCSP *Ghana’s Initial State party report* 2018.

The challenges identified in the report include the exclusion of specific measures taken by the state targeting refugees with disabilities; making refugees with disabilities experience multiple forms of discrimination. There was also no statistics on refugees with disabilities in Ghana in the report. Arguably, the state has made a lot of efforts in promoting and protecting the rights of persons with disabilities. However, the initial country report concluded that although “the laws of Ghana gives recognition to every citizen irrespective of one’s socio-economic status, due to inadequacy of appropriate and accessible forms of communication and inaccessible physical structures, persons with disabilities do not enjoy equal recognition before the law.”¹³⁰ In order to domesticate the Convention, the report revealed that the Persons with Disability Act 715 of 2006 was being reviewed to comply with the provisions of the CRPD.¹³¹ The CRPD Committee is yet to issue a concluding observation on Ghana’s initial country report.

3 2 Hidden and forgotten: Securing justice for refugees with disabilities in Uganda

Uganda has an estimated 1.277 million refugees and asylum seekers.¹³² After decades of political and constitutional volatility, the Constituent Assembly of Uganda promulgated a new Constitution in 1995, which was later amended in 2005.¹³³ One of the principal objectives of the new Constitution is strengthening the framework for protecting and preserving fundamental human rights and freedoms.¹³⁴ Towards the realisation of this objective, Chapter IV contains a Bill of Rights, which guarantees the basic human rights and freedoms that must be respected and upheld by all organs of state, private entities and individuals alike.¹³⁵ It declares that the fundamental rights and freedoms of the individual are inherent and not granted by the State.¹³⁶ The equality clause includes an anti-discrimination provision which specifically lists disability as a prohibited ground of discrimination.¹³⁷ Article 45 of the Constitution provides that “the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically provided under the Bill of Rights shall not be regarded as excluding others not specifically mentioned”.¹³⁸ The implication of this provision is that the human rights protected in international and regional instruments ratified by Uganda cannot be debarred from the rights

130 MGCSP *Ghana’s Initial State party report* 40.

131 MGCSP *Ghana’s Initial State party report* 18.

132 World Bank and UNHCR “Refugee Agency: An Assessment of Uganda’s Progressive Approach to Refugee Management” <http://www.regionaldss.org/sites/default/files/Uganda-%20Approach%20to%20Refugee%20Management%20Final%20Report.pdf> (last accessed 2019-06-08).

133 Preamble Ugandan Constitution.

134 Preamble Ugandan Constitution.

135 Ugandan Constitution Art 21(2).

136 Ugandan Constitution Art 20.

137 Ugandan Constitution Art 21(2).

138 Ugandan Constitution Art 45.

guaranteed in the Bill of Rights.¹³⁹ However, the inspiring international legal and regional framework has not always translated into respect for the human rights of refugees in general and refugees with disabilities in particular. For instance, gross human rights violations such as arbitrary detention and the use of torture by the government have been continually observed over the last decade.¹⁴⁰ Although human rights have received at least some legislative attention since Uganda's independence, "the specific rights of refugees have been neglected notwithstanding the country's long history as a refugee-hosting nation".¹⁴¹

Even though the rights of refugees are not explicitly guaranteed like that of PWDs,¹⁴² the Bill of Rights specifies a wide ranging set of human rights. Article 21(1) provides that "all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".¹⁴³ In addition to the Bill of Rights, "the National Objectives and Directive Principles of State Policy", comprise of principles that are intended to direct all organs and agencies of the State including citizens and all other bodies and persons in applying or interpreting the Constitution or any other law and in implementing policy decisions. The Directive Principles specify that society and the state are to recognise the right of persons with disabilities to respect and human dignity.¹⁴⁴ The Directive Principles further direct that the state must advance the development of sign language for the Deaf.¹⁴⁵ However, the Directive Principles are only directive and not justiciable.

Uganda has also developed the Persons with Disabilities Act of 2006 (PDA). The Act was enacted in 2006 as the primary disability legislation in Uganda.¹⁴⁶ This Act provides for legal protection and equal opportunities for persons with disabilities and vulnerable groups in accordance with articles 32 and 35 of the Constitution.¹⁴⁷ Equal opportunity in its widest sense covers the provisions of articles 12 and 13 of the CPRD. The PDA predates the adoption of the CRPD. However, the philosophy and international change in attitudes towards persons with

139 See, Addaney 2017 *African Human Rights Law Journal* 218-243.

140 Human Rights Watch "Uganda: Kenyan activists at risk of torture" Press Release <http://www.hrw.org/en/news/2010/09/16/uganda-kenyan-activists-risk-torture> (last accessed 2019-06-08); Addaney "Enhancing the protection space for refugees in Kenya and Uganda" 2016 *Africa Policy Journal* 71.

141 Addaney 2017 *African Human Rights Law Journal* 220; Sharpe & Namusobya "Refugee status determination and the rights of recognized refugees under Uganda's Refugees Act 2006" 2012 *International Journal of Refugee Law* 563.

142 Ugandan Constitution Art 32-35.

143 Ugandan Constitution Art 21(2).

144 Ugandan Constitution Principle XVI.

145 Ugandan Constitution Principle XXIV.

146 Act 20 of 2006.

147 Articles 32 and 35 of Ugandan Constitution provide for Affirmative action for marginalised groups and Rights of persons with disabilities respectively.

disabilities that was later reflected in the CRPD, appears to have influenced the drafting of the text to a large extent. For example, the objectives of the PDA *inter alia* include:

“the promotion of dignity and equal opportunities to PWDs, encouraging the people and all sectors of government and society to recognise, respect and accept difference and disability as part of humanity and human diversity and promoting a positive attitude and image of persons with disabilities as capable and contributing members of society”.¹⁴⁸

In addition, the Act makes provision for a redress mechanism in Part VIII,¹⁴⁹ and makes provision for offences and penalties in Part IX.¹⁵⁰ The PDA makes it an offence for any person to contravene, or to aid another person to contravene, any of its provision and a conviction attracts a fine.¹⁵¹ Though the PDA imposes obligations on the State, it has been criticised for its “cautious approach” of using the language of human rights in a minimalist approach.¹⁵² In addition, some practical problems have surfaced since the enactment of the Act. The most disturbing one is a disagreement between the Ministry of Justice and the National Union of Disabled People of Uganda concerning the justiciability of the legislation.¹⁵³ The Ministry maintains that the language of the PDA is “aspirational” and therefore not enforceable whereas, it is considered that since the legislation derives its validity from the Constitution of Uganda, questions regarding its justifiability or otherwise have to be resolved in line with the Constitutional imperatives.

In addition, the 2006 Ugandan Refugee Act (Refugee Act)¹⁵⁴ provides that refugees shall be entitled to all rights contained in all international laws that Uganda has ratified. This implies that refugees have access to the courts of law and legal assistance under the applicable laws of Uganda.¹⁵⁵ This means that by virtue of the section 29 (1) (h) of the Refugee Act, refugees with disabilities also enjoy this right. The practice is that there is no special attention accorded to refugees with disabilities. Refugees with disabilities are still socially excluded, compared to their counterparts who are not disabled.¹⁵⁶ The laws are general and do not explicitly mention either refugees or PWDs.¹⁵⁷ Furthermore, there are practical challenges associated with identifying and recording the

148 PDA Art 3.

149 PDA Art 41.

150 PDA Art 43.

151 PDA Art 43(1) and (2).

152 Mbazira *Enforcing the Rights of Persons with Disabilities to Have Access to a Barrier-Free Physical Environment in Uganda: Is Litigation an Option? Kampala: Legal Action for Persons with Disabilities* (2009) 14.

153 Human Rights Watch *As if We Weren't Human: Discrimination and violence against women with disabilities in Northern Uganda* (2010) 65.

154 The Refugee Act of Uganda (Act 21) 2006, Art 29(1)(h).

155 Refugee Act Art 28 and 29(1)(h).

156 Crock M *et al.* “Protection of Refugees with Disabilities: Uganda Fieldwork Report” 2013 <http://blogs.usyd.edu.au/refugees-disabilities/> (last accessed 2019-06-08).

157 Ugandan Constitution Art 21(2).

specific disabilities especially those of refugees. Most of these people, specifically those with hearing, visual and mental disabilities go unidentified or even when identified, there are no special provisions in the existing refugee or persons with disabilities laws.¹⁵⁸ The implementation of the law is also a problem, especially the procedure for applying for refugee status. Article 19 of the Refugee Act provides that after an application has been lodged by an asylum seeker, the Eligibility Committee shall take a decision and inform the applicant within 14 days. However, in practice, it takes longer and sometimes over a year before a decision is taken.¹⁵⁹

In updating the CRPD Committee on measure being undertaken by the government of Uganda in implementing the Convention, the State party report,¹⁶⁰ underscored article 11 of the Ugandan Constitution in relation to situations of risk and humanitarian emergencies. The government of Uganda reiterated that, under the Constitution of Uganda, article 35 prohibits discrimination against persons with disabilities and clarified that this prohibition logically extends to situations of risk including armed conflict, humanitarian emergencies and the occurrence of natural disasters as required by article 11 of the Convention.¹⁶¹ On access to justice, as provided in article 13 of the CRPD, the government of Uganda contended that the various entities of the justice system including police and courts are covered by the provisions of Part V of the Persons with Disabilities Act.¹⁶² The report further clarified that section 25 of the Act prohibits such entities to exclude a person with disability from accessing the services, including by refusing to provide the service to the person or by making it impossible or unreasonably difficult for the person to use the service.¹⁶³ In addition, the report contended that the Act provides positive duties for service providers, both in terms of physical accessibility of the service as well as a duty to provide auxiliary aid or services to enable a person with a disability to use the service.¹⁶⁴

In its concluding observations relating to Uganda's initial state party report, the CRPD Committee commended the measures taken by the State to promote the rights of persons with disabilities.¹⁶⁵ Regarding equality and non-discrimination in article 5 of the CRPD, the CRPD Committee was concerned about persisting discrimination against persons with disabilities, including in particular persons with albinism, persons with intellectual and/or psychosocial disabilities, and on other grounds as well the insufficient legal remedies to protect them against

158 Crock *et al. supra*.

159 Crock *et al. supra*.

160 CRPD: Uganda's Initial State party Report, CRPD/C/UGA/1, 10 March 2015, 21-22.

161 CRPD: Uganda's Initial State party Report.

162 CRPD: Uganda's Initial State party Report para 111.

163 CRPD: Uganda's Initial State party Report para 111.

164 CRPD: Uganda's Initial State party Report para 111

165 CRPD, Concluding observations on the initial report of Uganda, CRPD/C/UGA/CO/1, 12 May 2016.

such discrimination.¹⁶⁶ It was further concerned about the non-recognition of reasonable accommodation in the legislation of the State party. The CRPD Committee consequently recommended to the State party to among others:

“(a) Provide for legal protection against disability-based discrimination and multiple and intersectional forms of discrimination faced by persons with disabilities; (b) Incorporate the concept of reasonable accommodation in its legislation as defined in article 2 of the Convention and recognize the denial of reasonable accommodation as a form of discrimination based on disability”.¹⁶⁷

Concerning situations of risk and humanitarian emergencies in article 11 of the CRPD, the Committee was concerned about “the absence of specific provisions for refugees with disabilities in Northern Uganda through the Peace, Recovery and Development Plan.”¹⁶⁸ The Committee thus recommended that the State party should “monitor, in close consultation with organizations of persons with disabilities, the implementation of the Peace, Recovery and Development Plan to ensure that the requirements of persons with disabilities, including refugees with disabilities, are addressed in the post-conflict districts of Northern Uganda.”¹⁶⁹ These recommendations by the Committee when fully addressed by the government of Uganda will go a long way in addressing most of the challenges faced by refugees with disabilities in that country especially in accessing justice during the status determination and resettlement processes.

4 Conclusion

This paper examined the normative content of article 12 (equal recognition before the law) and article 13 (access to justice) of the CPRD to ascertain how these provisions have influenced domestic disability and refugee law, policy and practice in Ghana and Uganda. Although it underscores the significance of enacting disability specific legislation as one of the most appropriate measures for implementing disability rights,¹⁷⁰ it however observed that just affording equal recognition to PWDs in national constitutions and/or legislation will not in itself guarantee their protection. The paper revealed that while the CRPD has inspired national disability frameworks, little explicit provision in domestic refugee protection systems has been made for the rights of refugees with disabilities, especially the right to equal recognition before the law as well as the right to access to justice. Consequently, refugees with disabilities continue to encounter many difficulties in seeking the

166 CRPD, Concluding observations on the initial report of Uganda para 8.

167 CRPD, Concluding observations on the initial report of Uganda para 9(a)(b) and (c).

168 CRPD, Concluding observations on the initial report of Uganda para 20(b).

169 CRPD, Concluding observations on the initial report of Uganda para 21(c).

170 CRPD Committee *Guidelines on treaty-specific document* (2009) Annex para A3 2(b).

protections accorded to them by the Refugee Convention. The paper therefore argues that for refugees with disabilities to effectively go through refugee status determination and resettlement processes, States must adopt a number of positive measures to overcome the obstacles that may prevent them from successfully going through these processes. Addressing this gap requires the incorporation of articles 12 and 13 of the CRPD into national refugee protection regimes. This will provide refugees with disabilities with legitimate human rights claims, useful for engaging state institutions constructively. This will ensure the construction of enabling disability laws and policy frameworks that have the potential to promote and protect the rights of refugees with disabilities.