

SYMPOSIUM ON WILLIAM I. PONS, JANET E. LORD, AND MICHAEL ASHLEY STEIN,
“DISABILITY, HUMAN RIGHTS VIOLATIONS, AND CRIMES AGAINST HUMANITY”

EU CRIMINAL LAW AND PERSONS WITH DISABILITIES: REFLECTIONS ON
“VULNERABILITY” AND THE INFLUENCE OF THE CRPD

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This essay examines how EU criminal law, which regulates certain aspects of criminal procedural law of the twenty-seven EU member states, addresses the situation of persons with disabilities who come into contact with the criminal justice system. EU law on victims and on suspects and accused persons (partially) addresses disability through the prism of “vulnerability.” This essay argues that associating persons with disabilities with “vulnerability” can be stigmatizing. Moreover, the Convention on the Rights of Persons with Disabilities (CRPD), which requires that persons with disabilities have effective access to justice and receive appropriate accommodations, does not link these rights to a prior recognition of “vulnerability.” Even though the EU is a party to the CRPD, the 2013 Recommendation from the European Commission on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings, frames disability in terms of “vulnerability.” In contrast, parts of the EU Victims’ Rights Directive address the situation of individuals with disabilities without using the language of vulnerability.

In their lead article, Pons, Lord, and Stein note that, in the context of (international) criminal law “appeals to accommodate ‘vulnerable persons’ collectively in the aggregate as an undifferentiated group are ineffective at best,” and call for the CRPD to inform international criminal law.¹ This means that “where required in an individual case, reasonable accommodation and other accessibility supports must be provided to facilitate equal access to and participation in legal processes.”² The CRPD is also directly relevant in the context of EU law. It is the only core human rights treaty to which the EU is a party, and the EU is bound by the obligations therein to the extent of its competences.³ Nevertheless, to date, the CRPD seems to have exerted relatively little influence over EU criminal law. The recently adopted EU Strategy on Victims’ Rights 2020–2025 and the European Disability Strategy 2021–2030 indicate that some further action may be taken to align EU actions in this field with the CRPD, although the understanding of persons with disabilities as “vulnerable” is likely to be retained.

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¹ William I. Pons, Janet E. Lord & Michael Ashley Stein, *Disability, Human Rights Violations, and Crimes Against Humanity*, 116 AJIL 58, 72 (2021).

² *Id.*

³ Lisa Waddington, *Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities*, 4 EUR. Y.B. DISABILITY L. 169 (2013).

*Victims of Crime with Disabilities*⁴

The key legal instrument protecting the rights of victims under EU law is the 2012 Directive Establishing Minimum Standards of Rights, Support and Protection of Victims of Crime (Victims' Rights Directive).⁵ Article 1 of the Directive aims to "ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings." It sets out a number of rights relating to the provision of information and support for all victims and indicates that "persons who are particularly vulnerable . . . should be provided with specialist support and legal protection."⁶ Chapter 4 requires an individual assessment of victims to identify specific protection needs "due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation."⁷

The status of vulnerable victims, including disabled individuals, is thus linked to the risk of victimization, intimidation, or retaliation. The required individualized assessment should take into account the personal characteristics of the victim, the type and nature of the crime, and the circumstances of the crime.⁸ The Directive indicates the factors which should be taken into consideration in the individual assessment and provides that "victims with disabilities shall be duly considered."⁹

According to van der Aa, the types of victims referred to in this Article¹⁰ are "more or less earmarked as vulnerable," meaning that there is a presumption of "vulnerability." However, van der Aa also notes that these victims are not by definition "vulnerable," and this must be determined on the basis of an individual assessment.¹¹ Those victims who are identified as requiring special protection because of their "vulnerability" can be interviewed in premises designed or adapted for that purpose, be interviewed by professionals who have been specially trained, have all interviews with the same person, and be interviewed by a person of the same sex in the case of victims of sexual violence.¹² Additional protection can also be provided during criminal proceedings.¹³

The Directive also pays particular attention to people with disabilities, without explicitly identifying them as "vulnerable." Chapter 2 of the Directive, for example, concerns the provision of information and support to victims, and provides that communications with victims should be given in "simple and accessible language, orally and in writing." It specifically indicates "[s]uch communications shall take into account the personal characteristics

⁴ This section and the next draw on text in: Lisa Waddington, *Exploring Vulnerability in EU Law: An Analysis of "Vulnerability" in EU Criminal Law and Consumer Protection Law*, 45 EUR. L. REV. 779–801 (2020). Whereas that paper explored the understanding of the concept of vulnerability in EU law, the current essay focuses on how EU criminal law addresses the specific situation of persons with disabilities.

⁵ [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA](#), Nov. 14, 2012, OJ L 315/57.

⁶ *Id.*, Rec. 38. Recitals make up the preamble of EU directives. They provide guidance on how to interpret the directive but are not legally binding.

⁷ *Id.* Art. 22(1).

⁸ *Id.* Art. 22(2).

⁹ *Id.* Art. 22(3).

¹⁰ In addition to victims with disabilities, the Article refers to "victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime." *Id.*

¹¹ Suzan van der Aa, *Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims Under EU Law*, 7 NEW J. EUR. CRIM. L. 39, 49 (2016).

¹² [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA](#), *supra* note 5, Art. 23(2).

¹³ *Id.* Art. 23.

of the victims including any disability which may affect the ability to understand or to be understood.”¹⁴ Such communication, when it is adapted to the needs of the individual, can be viewed as a procedural accommodation as required by the CRPD.

Meanwhile, Recital 21, which also addresses information and advice provided by the competent authorities to victims, states that, when providing information, account should be taken, *inter alia*, of the victim’s intellectual and emotional capacity, literacy, and any mental or physical impairment. It also indicates that “[p]articular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments.”

Lastly Recital 15 addresses the particular situation of victims with disabilities more broadly, and indicates that:

Member States should ensure that victims with disabilities are able to benefit fully from the rights set out in this Directive, on an equal basis with others, including by facilitating the accessibility to premises where criminal proceedings are conducted and access to information.

In spite of the provisions addressing communication and accessibility in the Victims’ Rights Directive, van der Aa has criticized the instrument, arguing that it fails to provide “tailored minimum rights for [victims who experience difficulty with communication].” She describes Recital 15 as “a sort of blanket recommendation” and is critical of the Directive, both for its failure to give member states “further instructions” on how to meet the needs of victims with disabilities to “make sure they are capable of understanding the procedure and exercise of their rights,” as well as not addressing the needs of this group in the main body of the text, thereby “indicating a lower priority.”¹⁵ Moreover, while the reference to “on an equal basis with others” in Recital 15 resonates with the language of the CRPD,¹⁶ there is no explicit mention of the Convention in the Directive, even though the EU was a party to the CRPD when this Directive was adopted. Interestingly, other human rights conventions, to which the EU is not a party, such as the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child, are referenced in the preamble. Given this openness to international human rights law, it is not clear why the Directive did not pay more attention to the one human rights treaty to which the EU is a party, and Article 13 CRPD on access to justice in particular.

However, the recently adopted European Disability Strategy 2021–2030¹⁷ and the EU Strategy on Victims’ Rights 2020–2025¹⁸ both set out plans to address the rights of victims with disabilities, and explicitly recognize the relevance of the CRPD in this context. The European Disability Strategy indicates that the Commission will “launch a study on procedural safeguards for vulnerable adults in criminal proceedings, and assess the need for legislative proposals strengthening the support and protection of vulnerable adults who fall victims of crime.”¹⁹ This suggests that persons with disabilities will continue to be viewed through the prism of “vulnerability” in EU

¹⁴ *Id.* Art. 3(2).

¹⁵ van der Aa, *supra* note 11, at 50.

¹⁶ Article 1 of the CRPD provides: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” GA Res. 61/106, [Convention on the Rights of Persons with Disabilities](#), Art. 1 (Jan. 24, 2007).

¹⁷ European Commission, [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030](#).

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [EU Strategy on Victims’ Rights \(2020–2025\)](#), Brussels, June 24, 2020, COM(2020) 258 final.

¹⁹ [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030](#), *supra* note 17, at 17.

criminal law, even if greater attention is paid to the CRPD. The Strategy on Victims' Rights also refers to the CRPD and concisely states that actions under the Strategy "will be in line with the provisions" of the Convention.²⁰

Suspects and Accused Persons with Disabilities

In substantive terms, the most significant EU instrument concerning suspects and accused persons with disabilities is the 2013 Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.²¹ Unlike the other instruments discussed in this essay, the Recommendation is a non-binding instrument which calls on member states to act, but does not impose any legal obligation or related sanction for failure to comply. One of the reasons given by the Commission for adopting a non-binding recommendation rather than legislation was that it was not possible to reach agreement on a common definition of "vulnerable adult persons."²²

The Recommendation views "vulnerable persons" as those "who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities" and therefore explicitly links "vulnerability" with disability.²³ The Recommendation includes a "presumption of vulnerability" that applies "in particular for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in proceedings."²⁴ The instrument recommends that member states carry out an initial assessment to identify "vulnerable" individuals and their needs,²⁵ and identifies a series of rights that such individuals should have, dependent on their circumstances. These include non-discrimination, information in an accessible format, the right to access a lawyer which should not be waived, medical assistance, recording of any questioning, and certain guarantees in the case of deprivation of liberty and privacy. The instrument also recommends that relevant officials receive training in how to treat "vulnerable" persons.²⁶

This approach is arguably problematic in light of the CRPD, given the potential stigmatization associated with being labeled as "vulnerable,"²⁷ and the need to be recognized as such to benefit from relevant protections and accommodations. The CRPD imposes a duty on contracting parties to "ensure effective access to justice for persons with disabilities" and to provide "procedural and age-appropriate accommodations" in order to ensure access to justice.²⁸ The right to such accommodations of persons with disabilities is not dependent on a prior recognition of "vulnerability." Indeed, the language of "vulnerability" is wholly absent from the Convention.

²⁰ The Strategy refers explicitly to Article 6 on Women with disabilities, Article 9 on Accessibility, Article 12 on Equal recognition before the law, and Article 13 on Access to justice in this context. *Id.*

²¹ [European Commission Recommendation on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings](#), Nov. 27, 2013, OJ C378/8.

²² [Proposal for a Directive of the European Parliament and of the Council on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings](#), COM/2013/0822 final - 2013/0408 (COD), Explanatory Memorandum, para. 10.

²³ [European Commission Recommendation on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings](#), *supra* note 21, Rec. 1.

²⁴ *Id.* Art. 7.

²⁵ *Id.*, Rec. 6.

²⁶ *Id.*, Sec. 3, Arts. 5–17.

²⁷ M.A. Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in [VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS](#) 16 (Martha Albertson Fineman & Anna Grear eds., 2013).

²⁸ [Convention on the Rights of Persons with Disabilities](#), *supra* note 16, Art. 13.

Finally, Recital 16 to the Recommendation states references to “appropriate measures to ensure effective access to justice for persons with disabilities” should be understood in light of Article 13 CRPD, and of the objectives of the Convention as a whole. The Recommendation therefore explicitly invites an interpretation which is in line with the CRPD. Such an interpretation could draw inspiration from the International Principles and Guidelines on Access to Justice for Persons with Disabilities.²⁹ In its new Disability Strategy, the Commission has indicated that it intends to build on this set of Principles when providing guidance to member states.³⁰

In addition to this Recommendation, a number of EU Directives address the rights of suspects and accused persons. Directive 2010/64 on the right to interpretation and translation in criminal proceedings³¹ establishes rights for “persons who do not speak or understand the language of the criminal proceedings concerned,”³² without labeling them as de facto “vulnerable.” Persons with disabilities are not mentioned in this context, but sign language interpretation for deaf individuals seems to fall under the scope of this Directive.³³ Directive 2012/13 on the Right to Information in Criminal Proceedings³⁴ requires that suspects and accused persons be informed of their procedural rights in simple and accessible language, “taking into account any particular needs of vulnerable suspects or vulnerable accused persons.”³⁵ Directive 2013/48 on the Right of Access to a Lawyer and on the Right to Communicate with Third Persons³⁶ establishes a generic duty owed to “vulnerable” suspects and accused persons by requiring member states to take their particular needs into account when applying the Directive.³⁷ Directive 2016/343 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings³⁸ directs member states to ensure that the particular needs of “vulnerable” persons are taken into account, especially with regard to the right to be present at the trial and the right to a new trial.³⁹

All four of these Directives can be regarded as instruments that address “vulnerable persons” collectively, and do not address the specific situation of suspects and accused persons with disabilities.⁴⁰ Moreover, none of these Directives reference the CRPD, although the three more recent instruments were adopted after the EU became a party to the Convention, and other human rights instruments to which the EU is a party were referred to in the

²⁹ [International Principles and Guidelines on Access to Justice for Persons with Disabilities](#) (Aug. 2020).

³⁰ [Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030](#), *supra* note 17, at 17.

³¹ [Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings](#), Oct. 26, 2010, OJ L 280/1.

³² *Id.* Arts. 2–3.

³³ Jemina Napier & Tobias Haug, [Justisigns: A European Overview of Sign Language Interpreting Provision in Legal Settings](#), L., SOC. JUST. & GLOB. DEV. (2016).

³⁴ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings](#), June 1, 2012, OJ L 142/1.

³⁵ *Id.* Art. 3(2).

³⁶ [Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed Upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty](#), Nov. 6, 2013, OJ L 294/1.

³⁷ *Id.* Art. 13.

³⁸ [Directive \(EU\) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings](#), Mar. 11, 2016, OJ L65/1.

³⁹ *Id.*, Rec. 42.

⁴⁰ [Pons, Lord & Stein](#), *supra* note 1, at 34.

Preamble to Directive 2016/343.⁴¹ Again, it is not clear why Article 13 of the CRPD was apparently not drawn on when drafting these instruments. However, the aforementioned recently adopted European Disability Strategy indicates that further action will be taken in this field.

Conclusion

EU criminal law uses, to some degree, the notion of “vulnerability” to identify individuals in need of additional support when interacting with the criminal justice system, including persons with disabilities. Both the Victims’ Rights Directive and the Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings explicitly refer to persons with disabilities, although they adopt somewhat different perspectives on vulnerability. The Commission Recommendation includes a strong presumption that suspects and accused persons who have a disability are “vulnerable” in terms of their ability to participate in criminal proceedings and refers to the CRPD. While the attention paid in this instrument to the needs of persons with disabilities is welcome, the language of “vulnerability” can be stigmatizing.

In conclusion, there is not only scope for international criminal law to take greater account of the CRPD; such scope also exists at EU level, and this requires reflection on the appropriateness of using the concept of “vulnerability.”

⁴¹ [Directive \(EU\) 2016/343](#), *supra* note 38, refers to the International Covenant on Civil and Political Rights in Recital 1 and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment in Recital 45.