

[Home](#) > Refugees with disabilities: are new qualification norms required to address today's protection needs?

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## Refugees with disabilities: are new qualification norms required to address today's protection needs?

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### The EU and international legal framework

EU Member States are being profoundly affected by the humanitarian crisis and further efforts are needed to tackle this unprecedented emergency. In this context, persons with disabilities, the elderly, children and women are the most vulnerable categories of individuals who are forced to leave their country in order to escape persecution or abuse. The EU is therefore called upon to take into account the specific situation of persons with disabilities and provide a legal framework that is in line with the international obligations of the [Convention on the Rights of Persons with Disabilities](#) [1] (CRPD).

All the EU Member States have indeed signed the CRPD, but Ireland has not yet ratified it. Moreover, in January 2011, the European Union also became a party to the CRPD in its capacity as a regional organization. The CRPD's ratification constitutes a 'mixed' agreement, on the grounds that EU and Member States are separate contracting parties and have concurrent powers to conclude such agreement. As a consequence, the European institutions are bound to the provisions falling within the EU competence and the Union secondary legislation must be enacted in compliance with the CRPD rules.

In addition, the EU competence in asylum law lies in Article 78 of the [TFEU](#) [2]. This policy must be in accordance with the [Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967](#) [3] relating to the status of refugees, and other relevant treaties.

This legal background is highly interesting and raises some important issues with regard to the protection of refugees with disabilities in the EU legal system. The CJEU has often concluded that the EU asylum provisions must be interpreted in compliance with the Refugee Convention. Furthermore, the ratification of the CRPD by the EU binds the European institutions to comply with the fundamental obligations enshrined in the CRPD. The extent to which the CRPD's provisions can add value to the existing states' obligations to protect refugees will now be examined.

### The legal interaction between the CRPD and the Refugee Convention

It is worth noting that the CRPD applies to situations of risk and humanitarian emergencies by virtue of its Article 11 and consequentially reinforces the international protection of asylum seekers with disabilities.

This provision represents fertile grounds to extend the CRPD's scope to the protection of

refugees with disabilities. Indeed, situations of risk include different circumstances such as armed conflicts, complex humanitarian emergencies and natural disasters. During these dramatic situations, individuals are often obliged to leave their countries in order to reach a place of safety. Against this background, asylum seekers with disabilities should also benefit from the rights enshrined in the CRPD, as it applies in situations of risk and humanitarian emergencies.

The increasing attention towards persons with disabilities is forcing the international community to update and revise the interpretation of the Refugee Convention's obligations. The interplay between the CRPD and the Refugee Convention is a fundamental opportunity to improve the conditions of refugees with disabilities under international law. The high standards and thresholds required to obtain refugee status should be mitigated by the guidelines of the CRPD. For instance, the principle of reasonable accommodation (Article 2 CRPD) may play a significant role in the context of risks and humanitarian emergencies.

The concept of reasonable accommodation encompasses those "necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 CRPD). It represents a "substantive equality facilitator" that aims to ensure the equal distribution of benefits among members of society and [equal access to human rights](#) [4]. This principle should lead the jurisprudential interpretation of the requirements included in the definition under Article 1A(2) of the Refugee Convention. Indeed, the threshold required to assess the well-founded fear of being persecuted is particularly challenging for persons with mental or intellectual disabilities. As a result, Courts should take into account the specific cognitive conditions of asylum seekers with disabilities in order to assess the fear of persecution. Fear is a subjective element that should imply an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his/her country of origin. Accordingly, the [latest version of the Handbook](#) [5] of the UNHCR highlights that "an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions". To this end, it is crucial to take into account the personal background of refugees, their own perception of the situation and their individual experiences. The obligation to provide reasonable accommodation could be applied in this framework to highlight the vulnerability of refugees with disabilities and facilitate the assessment of the case's credibility.

As such, in the refugee context, the CRPD has the potential to reinforce the rights of refugees with disabilities and fill the legal loopholes of the Refugee Convention by applying the principle of reasonable accommodation in the process of claiming asylum.

It is also important to underline that the CRPD's implementation is monitored by the [Committee on the Rights of Persons with Disabilities](#) [6]. All States parties have the obligation to submit regular reports to the Committee on how the rights are being implemented at national level. States must report initially within two years of accepting the Convention and thereafter every four years. The Committee examines each report and adopts general recommendations to the State Party concerned. The [Optional Protocol to the Convention](#) [7] acknowledges the Committee's competence to examine individual complaints with regard to alleged violations of the CRPD by States parties to the Protocol.

Importantly, the CRPD Committee has recently released a list of issues in relation to the initial report submitted by the European Union. The Committee expressly urged the EU to explain how the Directorate General for Humanitarian Aid and Civil Protection (ECHO) ensures that humanitarian aid and relief from the EU are inclusive of and accessible to all persons with disabilities. The Committee asked for reliable information about the situation of refugees with

disabilities in the European Union. The Committee's observations emphasise that the EU has the obligation to specifically address the situation of asylum seekers with disabilities in compliance with international commitments.

The legal qualification of refugees with disabilities under EU asylum law, namely the Qualification Directive will be now briefly analysed. An overview of the new Qualification Directive will be given in order to verify whether the EU is living up to its international obligations relating to the protection of refugees with disabilities.

### **Refugees with disabilities and 'membership to a particular social group': the New Qualification Directive 2011/95/EU**

The Qualification [Directive 2004/83/EU](#) [8], replaced by the new [Directive 2011/95/EU](#) [9], symbolises one of the most important pieces of legislation of the CEAS. Its Article 2(d) sets out the conditions for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international or subsidiary protection. The definition of refugee mirrors the legal contents of the Geneva Convention.

Disability is still not expressly mentioned amongst the grounds of persecution that qualify for international protection. In addition, the possibility to ensure adequate protection to persons with disabilities on the grounds of 'membership to a particular social group' raises several interpretative issues. Refugee jurisprudence is not homogenous with regard to the approach for interpreting this concept. In this respect, the Guidelines on Sexual Orientation and Gender Identity of [the UNHCR](#) [10] clarify that 'the two approaches - protected characteristic and social perception - to identifying particular social groups are alternative, not cumulative tests'. By contrast, the [CJEU](#) [11] has stressed that the Qualification Directive asks for the combination of both approaches in order to qualify an applicant as a member of a particular social group. The CJEU stated that: a group is regarded as a particular social group where, inter alia, two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

The legal framework of the new Qualification Directive demands the assessment of two compulsory conditions that may narrow the protection of asylum seekers with disabilities. Indeed, persons with mental and intellectual disabilities who share an innate characteristic, but are socially invisible, may be excluded from international protection. To the same extent, those individuals who are perceived as being different by society, but do not share an immutable or innate characteristic, will not be considered as eligible for asylum.

It may be said that the EU failed to put into practice the specific annotations of the [UNHCR](#) [12] on the previous Qualification Directive 2004/83/EC. Indeed, the UN agency appreciated the recognition of women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purposes of the 1951 Convention. At the same time, the UNHCR encouraged 'Member States, to provide in their legislation for further examples of groups which can qualify for refugee status, beyond the example of sexual orientation. Other examples would be gender, age, disability, and health status'. The UNHCR's annotations show that the inclusion of disability as grounds to be qualified for refugee status would have improved the content of refugee protection, as well as being in coherence with the obligations within the CRPD.

Against this backdrop, the missing category of disability has significant implications on international protection, especially since other protected characteristics such as age and gender are accommodated for in the definition of acts of persecution. The Directive explicitly regards acts

of a gender-specific or child-specific nature as peculiar forms of persecution leaving out those acts based on disability grounds (Article 9(2f) Directive 2011/95/EU). As a consequence, the lack of an express reference to persons with disabilities in the Qualification Directive for determining refugee status may reduce their chances to be considered eligible for international protection.

## Concluding remarks

The CRPD and the Refugee Convention represent two crucial legal instruments to enhance the protection of refugees with disabilities. The CRPD can be applied to persons with disabilities in situations of risk, including situations of armed conflict and humanitarian emergencies. Under these circumstances, States Parties have the obligation to adopt all necessary measures to ensure the protection and safety of persons with disabilities. Moreover, asylum seekers with disabilities are entitled to claim the international protection afforded by the Refugee Convention. The legal interplay between the two Conventions is a remarkable opportunity to reinforce the guarantees in favour of refugees with disabilities. The application of the duty to provide reasonable accommodation enshrined in the CRPD may indeed lower those high standards and thresholds to obtain refugee status according to the Geneva Convention.

The Qualification Directive missed the opportunity to include disability as a specific ground to afford refugee status. In this case, the EU did not comply with the annotations of the UNHCR on the previous Qualification Directive 2004/83/EC. Such an omission contrasts with provisions of the [Recast Asylum Procedure Directive 2013/32/EU](#) [13] and [Recast Reception Conditions Directive 2013/33 EU](#) [14] relating to applicants in need of special procedural guarantees and special reception needs. Indeed, the Recast Reception Directive explicitly recognises persons with disabilities as vulnerable and prescribes specific rules to assess their reception needs. Moreover, the QD is at odds with its own provisions since Articles 20 and 30 of the Directive on the content of status refers specifically to the situation of disabled persons. To not include disability into the qualification articles is to ignore the development and incorporation of tailored provisions for those with disabilities in other Articles of the QD as well as the APD and RCD.

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The full paper [?What about Refugees with Disabilities? The Interplay between EU Asylum Law and the UN Convention on the Rights of Persons with Disabilities](#) [16]? is available on the European Journal of Migration and Law, Volume 18, Issue 3, 2016, pages 327 ? 349.

(This journal entry is an expression of the author's own views, and not necessarily those of EDAL or ECRE)

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## Links:

[1]

- <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>
- [2] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>
- [3] <http://www.unhcr.org/uk/3b66c2aa10>
- [4] [http://www.socialrightsonario.ca/wp-content/uploads/2011/08/article\\_RebeccaBrown\\_Reasonableness-for-Convention-for-persons-with-disabilities.pdf](http://www.socialrightsonario.ca/wp-content/uploads/2011/08/article_RebeccaBrown_Reasonableness-for-Convention-for-persons-with-disabilities.pdf)
- [5] <http://www.refworld.org/docid/4f33c8d92.html>
- [6] <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- [7] <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx>
- [8] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>
- [9] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>
- [10] <http://www.unhcr.org/509136ca9.pdf>
- [11] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-19912-c-20012-and-c-20112-minister-voor-immigratie-en-asiel-v-x-y-and-z>
- [12] <http://www.refworld.org/docid/4200d8354.html>
- [13] <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>
- [14] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>
- [15] <http://www.edf-feph.org/migration-refugees-disabilities>
- [16] <http://booksandjournals.brillonline.com/content/journals/10.1163/15718166-12342105>