

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

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In their pathbreaking article “Disability, Human Rights Violations, and Crimes Against Humanity,” William I. Pons, Janet E. Lord, and Michael Ashley Stein persuasively argue that international criminal law should take effective steps to address the rights of persons with disabilities. Specifically, egregious and systemic human rights violations against persons with disabilities should be prosecuted as crimes against humanity, and international criminal processes should be made accessible to persons with disabilities.¹ This symposium presents the views of several distinguished scholars on the issues raised by the article.

In the last two decades, international criminal law has fallen far behind international human rights law in the recognition of rights of persons with disabilities. In 2002, when the Rome Statute entered into force, its silence on their rights might have been described as reflecting a similar silence, or near-silence, among international human rights agreements and institutions. For most of its history, international human rights law, like international criminal law, largely ignored abuses against persons with disabilities. The Universal Declaration of Human Rights and the two International Covenants on human rights list nine types of discrimination—“race, colour, sex, language, religion, political or other opinion, national or social origin, property, [and] birth”—but do not mention disability, consigning it to the concluding catch-all term in the list, “or other status.”²

This lack of attention in human rights law persisted for decades, despite innumerable violations of the rights of persons with disabilities. Some of the worst examples of these abuses were well known to the international community at the time that it laid the foundations of international human rights law. As Pons, Lord, and Stein recall, one of the atrocities committed by the Nazi regime was its systematic murder of more than 250,000 people with disabilities and its forced sterilization of 375,000 more.³ But from Nuremberg to the present, such atrocities have received relatively little attention. For example, despite reports that the North Korean government has killed infants with disabilities, forced the disappearance of children with disabilities, and willfully neglected prisoners with disabilities resulting in their deaths, the UN Commission of Inquiry established to investigate possible crimes against humanity committed by North Korea “barely noted” these abuses.⁴ Forced sterilization has occurred in a

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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 (2022).

² [Universal Declaration of Human Rights](#), Art. 2 (1948); [International Covenant on Civil and Political Rights](#), Arts. 2(1), 26, Dec. 16, 1966, 999 UNTS 171; [International Covenant on Economic, Social and Cultural Rights](#), Art. 2(1), Dec. 16, 1966, 993 UNTS 3.

³ [Pons, Lord & Stein](#), *supra* note 1, at 62.

⁴ *Id.* at 63.

wide range of countries, including India, Japan, Sweden, and the United States.⁵ Persons with disabilities are disproportionately and involuntarily institutionalized and thereby exposed to “serious risk of sexual and physical violence, sterilization and human trafficking,” as well as “a higher risk of being subjected to torture and inhuman and degrading treatment, including forced medication and electroshock, restraints and solitary confinement.”⁶

The COVID-19 pandemic exposed the magnitude of the systematic violations committed against this group, as people in institutional settings experienced the highest rates of mortality⁷ due to neglect and segregation, and older persons and persons with disabilities represent the majority of institutionalized people globally.⁸ In addition, in many countries, they were at greater risk of discrimination in accessing healthcare and life-saving procedures during the pandemic outbreak, facing health care rationing decisions, including triage protocols (e.g. intensive care beds, ventilators), that left them with no medical service based on assumptions about quality or value of life based on disability.⁹

In the last two decades, international human rights law has begun to address the rights of persons with disabilities and the corresponding obligations of states. Most important, the Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006, entered into force in 2008, and quickly achieved near-universal ratification.¹⁰ International efforts to identify violations of the Convention and to promote compliance with it have steadily increased. One hundred states have ratified the Optional Protocol to the CRPD, which authorizes the Committee on the Rights of Persons with Disabilities to receive communications alleging violations of the treaty. In 2014, the Human Rights Council appointed its first special rapporteur on the rights of persons with disabilities, and it has renewed the mandate ever since.

In stark contrast, international criminal law continues to say, and international criminal institutions continue to do, virtually nothing about the rights of persons with disabilities. As noted, the Rome Statute makes no explicit reference to disability; more surprisingly, neither do the draft articles on crimes against humanity proposed by the International Law Commission in 2019 as a basis for a new convention.¹¹ The International Criminal Court (ICC) has never investigated, much less prosecuted, a case based on abuses against persons with disabilities.

This is not because atrocities committed against them cannot rise to the level of international crimes. As Pons, Lord, and Stein explain, the definition of crimes against humanity has expanded beyond its Nuremberg-era links to armed conflict and has been applied to a broader range of crimes, including sex- and gender-based crimes and

⁵ *Id.* at 65.

⁶ [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), para. 24, UN Doc. A/HRC/40/54 (Jan. 11, 2019).

⁷ The percentage of COVID-19 related deaths in care homes—where older persons with disabilities are overrepresented—ranged from 19% to 72% in countries in which official data is available. Adelina Comas-Herrera, et al., [Mortality Associated with COVID-19 Outbreaks in Care Homes: International Evidence](#) (2020).

⁸ OECD Health Statistics 2019, [Beds in Residential Long-Term Care Facilities, Long-Term Care Beds in Hospitals and Psychiatric Care Beds in Hospitals](#); Melanie Luppa, et al., [Prediction of Institutionalization in the Elderly. A Systematic Review](#), 39 AGE & AGEING 31 (2010).

⁹ Samuel R. Bagenstos, [May Hospitals Withhold Ventilators from COVID-19 Patients with Pre-existing Disabilities? Notes on the Law and Ethics of Disability-Based Medical Rationing](#), 130 YALE L.J. F. (forthcoming).

¹⁰ GA Res. 61/106, [Convention on the Rights of Persons with Disabilities](#) (Jan. 24, 2007) [hereinafter CRPD]. As of February 1, 2022, the CRPD has 184 parties, more than the Convention on the Elimination of Racial Discrimination (182), the International Covenant on Civil and Political Rights (173), and the International Covenant on Economic, Social and Cultural Rights (171), and almost as many as the Convention on the Elimination of Discrimination Against Women (189). The Convention on the Rights of the Child is the most-ratified human rights treaty, with 196 parties. See [United Nations Treaty Collection](#).

¹¹ International Law Commission, [Report on the Work of the Seventy-First Session](#), UN Doc. A/74/10, ch. IV, para. 42 (2019). See [Pons, Lord & Stein](#), *supra* note 1, at 84.

crimes committed against children.¹² Gross abuses against persons with disabilities, such as the examples of extermination, forced sterilization, and forced treatment, hospitalization, and institutionalization described in the article, would certainly appear to fall within the definition of “crime against humanity” in the Rome Statute, which includes, among other actions, extermination, severe deprivation of physical liberty, torture, enforced sterilization, and other forms of persecution, when committed as part of a widespread or systematic attack directed against a civilian population.¹³

The international justice system has a critical role to play in preventing these outcomes and providing effective reparations when they occur. This is an indispensable contribution to achieving justice for all. Advancing the CRPD by guaranteeing access to justice to all persons with disabilities at the international level is a democratic imperative and indispensable to combating egregious rights violations. The ICC should not only prosecute disability rights cases; it should also make sure that all of its processes are inclusive and accessible to all. The international system must ensure equal access to justice for all persons with disabilities by providing the necessary substantive, procedural, and age- and gender-appropriate accommodations and support, 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.

Everyone should, on an equal basis with others, enjoy the rights to equality before the law, to equal protection under the law, to a fair resolution of disputes, to meaningful participation, and to be heard. To that end, it is necessary to design, develop, modify, and implement justice systems that provide equal access to justice for all persons with disabilities, regardless of their roles in the process, in accordance with the CRPD. Article 13 of the Convention, which requires the parties to “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,” represents a paradigm shift in the legal recognition of the autonomy of persons with disabilities.¹⁴ In the justice system, persons with disabilities have often been considered to be unworthy of, unable to benefit from, or even likely to be harmed by due process protections provided to all other citizens.

This unequal access to justice is the consequence of bias, stigma, and the lack of understanding about persons with disabilities by officials in the justice system. Complainants and victims with disabilities risk their testimonies not being considered credible, thereby providing impunity to the perpetrators of crimes against persons with disabilities. Consistent with their obligations under the Convention, it is also critically important that states closely consult with and actively involve persons with disabilities and their representative organizations. Persons with disabilities are entitled to enjoy the standards contained in all previously adopted international and regional human rights instruments that are relevant to justice systems, access to justice and, more generally, the administration of justice on an equal basis with others without discrimination.

It is therefore time, and past time, for international criminal law and international criminal institutions to incorporate the rights of persons with disabilities. Informed by the CRPD, the ICC and other organizations should take formal steps to recognize the legal capacity of persons with disabilities and ensure that they have access to international criminal procedures. The ongoing effort to draft a new instrument on crimes against humanity should explicitly include disability within its scope, so that the silence of international criminal law on these issues would be dispelled for good. Perhaps most important, the ICC, as well as national courts and hybrid courts, should make clear that they can and will investigate and try the perpetrators of gross abuses committed against persons with disabilities as crimes against humanity, and prosecutors should actively seek to bring such actions. We believe that

¹² Pons, Lord & Stein, *supra* note 1, at 80–84.

¹³ Rome Statute of International Criminal Court, Art. 7, July 17, 1998, UN Doc. A/CONF.183/9, 2187 UNTS 38544 [hereinafter Rome Statute]. Article 7 also requires that the act must be committed “with knowledge of the attack.” *Id.*

¹⁴ CRPD, *supra* note 10, Art. 13.

Pons, Lord, and Stein's article provides a compelling basis for these steps and for further work by scholars, practitioners, and advocates.

To further explore the issues raised by the article, *AJIL Unbound* invited contributions from several accomplished scholars in this field: Arlene Kanter, Karen Soldatic, Shaun Grech, Cora True-Frost, and Lisa Waddington.

Arlene Kanter of Syracuse University College of Law assesses an important aspect of the implementation of the CRPD: the development by the United Nations Office of the High Commissioner for Human Rights (OHCHR) of indicators to measure the progress of states toward compliance with the treaty.¹⁵ The indicators will address structural issues, such as internal legislation, processes by states to implement their commitments, and the outcomes of laws and policies. The first set of indicators OHCHR has developed for an entire treaty, the CRPD human rights indicators can be used not only by the states themselves, but also by the CRPD Committee and others seeking to promote the full enjoyment of the rights of persons with disabilities—including by potentially helping to substantiate claims before the ICC and other tribunals. While the indicators have real promise, Kanter emphasizes that to be effective, people with all types of disabilities must be included in their operationalization.

Karen Soldatic of Western Sydney University and Shaun Grech of the Critical Institute describe obstacles to the investigation and prosecution of disability crimes as crimes against humanity.¹⁶ They emphasize that many people with disabilities are also living in deep structural poverty, which disempowers them and others from claiming their rights, especially against states and other powerful actors. Moreover, crimes against the poor, minority groups, and persons with disabilities are “often dismissed or hardly investigated.” Soldatic and Grech also point out that “persons with disabilities are disproportionately segregated, incarcerated and detained in discrete, often carceral and carceral-like centers,” in ways that intersect with and are worsened by other forms of marginalization, including discrimination against those with Indigenous backgrounds, women, and sexually and gender-diverse women. Finally, they underline the need to re-educate the legal system, and the legal profession in particular, to recognize persons with disabilities as agents, and not invariably vulnerable or weak.

Cora True-Frost of Syracuse University College of Law also describes obstacles to the effort to use international criminal law to further the rights of persons with disabilities.¹⁷ She notes that many judicial systems present challenges to them whether they are victims, suspects, defendants, or witnesses, and that these challenges extend to civil as well as criminal actions. Among other problems, prosecutors and others often lack a basic awareness of the injustices faced by persons with disabilities. She asks whether successful international criminal prosecutions might help to influence domestic attitudes toward their rights and accountability for abuses against them. She suggests that in light of the widespread support for the CRPD, ICC prosecutions of crimes against persons with disabilities might be less politically controversial than many other cases. She concludes by pointing out that international criminal institutions are not the only ones that need to become more accessible to persons with disabilities—UN entities, including human rights treaty bodies, have a similar need.¹⁸

Lisa Waddington of Maastricht University examines how EU law addresses persons with disabilities who come into contact with the criminal justice system, as victims, suspects, accused, or other participants.¹⁹ The 2012 EU

¹⁵ Arlene S. Kanter, *Potential Benefits and Limitations of the New Human Rights Indicators for the Convention on the Rights of People with Disabilities*, 116 *AJIL UNBOUND* 69 (2022).

¹⁶ Karen Soldatic & Shaun Grech, *Unchaining Disability Law: Global Considerations, Limitations, and Possibilities in the Global South and East*, 116 *AJIL UNBOUND* 74 (2022).

¹⁷ C. Cora True-Frost, *Can International Criminal Law Help Express the Unrealized Value of Disabled Lives?*, 116 *AJIL UNBOUND* 79 (2022).

¹⁸ *Id.* (citing C. Cora True-Frost, *Listening to Dissonance at the Intersections of International Human Rights Law*, 43 *MICH. J. INT'L L.* (forthcoming 2022)).

¹⁹ Lisa Waddington, *EU Criminal Law and Persons with Disabilities: Reflections on “Vulnerability” and the Influence of the CRPD*, 116 *AJIL UNBOUND* 84 (2022).

Victims' Rights Directive established minimum standards of treatment for victims, including with respect to protection and information. She notes that the Directive requires individual assessment of victims to identify their specific needs for protection, "due to their particular vulnerability to secondary and repeat victimization, to intimidation and to retaliation," and that one of the factors to be taken into consideration in this assessment is disability.²⁰ The Directive also provides that communications with victims shall take into account the personal characteristics of the victims, "including any disability which may affect the ability to understand or to be understood."²¹ A 2013 Commission Recommendation on vulnerable suspects and accused persons also views disability through this lens, defining "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."²² Waddington points out that this kind of language can be stigmatizing. She also notes that this Recommendation is the only one of these instruments to refer to the CRPD; specifically, the Recommendation states that "References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the objectives" of the CRPD, particularly Article 13, on access to justice.

Needless to say, the incorporation of the rights of persons with disabilities into international criminal law would not end all abuses, any more than the adoption of the CRPD did. But the CRPD has provided invaluable support to efforts at the international, national, and local levels to protect and promote the rights of persons with disabilities. The adoption and widespread ratification of the CRPD have provided a detailed legal framework and an agreed legal language for calling the violations what they are, and a basis to begin to hold states accountable. As the authors of the lead article of this symposium have powerfully demonstrated, the CRPD can also inform the long-overdue inclusion of a disability perspective into international criminal law. By bringing international criminal law to bear on abuses against persons with disabilities, in turn, the International Criminal Court and other tribunals could help to make further progress toward the realization of their rights. Among other benefits, ICC prosecutions might prompt greater attention to human rights violations beyond the scope of international criminal law.²³ International criminal law and international human rights law could thus finally begin to work together to promote the full enjoyment of the rights of persons with disabilities.

²⁰ [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](#), Art. 22, Nov. 14, 2012, OJ L 315/57.

²¹ *Id.* Art. 3(2).

²² [European Commission Recommendation on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings](#), Nov. 27, 2013, OJ C378/8.

²³ See Geoff Dancy & Florencia Montal, [Unintended Positive Complementarity: Why International Criminal Court Prosecutions May Increase Domestic Human Rights Prosecutions](#), 111 AJIL 689, 690 (2017).