

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

CAN INTERNATIONAL CRIMINAL LAW HELP EXPRESS THE UNREALIZED VALUE OF
DISABLED LIVES?

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As international criminal lawyers and diplomats discuss the Draft Treaty on Crimes Against Humanity on the one hand,¹ and the potential of adding a fifth crime, ecocide,² to the Rome Statute on the other, Janet Lord, William Pons, and Michael Stein issue a well-timed and compelling call to demonstrate our understanding that people with disabilities (PWD) are a part of humanity. The authors map the many crimes and various situations in which PWD have been and continue to be specifically targeted, and persuasively argue that it is past time for the system of international criminal law to embrace prosecutions of crimes against PWD. In so doing, the authors make a series of important recommendations for international criminal law: for example, that international criminal processes must be made fully accessible to PWD. This essay offers three reflections on the authors' call to use international criminal prosecutions, specifically at the International Criminal Court (ICC), to elevate the rights of PWD, centering around the following questions: (1) do the people of the world believe that disabled lives matter; (2) if they do not, might international criminal law help shape domestic laws and overcome ableism;³ and, relatedly, (3) can the ICC create the necessary change? Or put another way, how capacious can and should the category of “crimes against humanity” be since institutional credibility and longevity are concerns?

I suspect that the Office of the Prosecutor of the ICC will be receptive to the argument that it is past time for the ICC to adopt internal policies regarding PWD, as it has already done for women and children. Nevertheless, the promise of the ICC may well prove disappointing for advocates seeking broad enforceability and compliance with laws recognizing the rights of PWD. PWD face diffuse and entrenched discrimination in criminal law already, however. The expressive value of even one ICC prosecution could indeed be deeply significant for the progress of international disability law, which has historically received scant attention, even from its parent, international human rights law.

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¹ [Draft articles on Prevention and Punishment of Crimes Against Humanity](#), 2 Y.B. INT'L L. COMM'N (2019), UN Doc. A/74/10 [hereinafter CAH Draft Articles].

² [Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text](#), STOP ECOCIDE FOUND. (June 2021).

³ See Jamelia N. Morgan, [Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation](#), 96 DENV. L. REV. 973, 980 (2019) (defining ableism as “a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society”).

Lagging Domestic Perceptions on the Rights of People with Disabilities

Among its functions, criminal law expresses a community's shared condemnation of certain acts committed with a particular state of mind. The turn to criminal justice in response to atrocities allows "people to feel that their voices are heard."⁴ Yet, despite some domestic-level gains as the authors mention,⁵ PWD still remain mostly neglected by criminal law. In turning to international criminal law, a central question arises: whether, notwithstanding the recent ratification of the Convention on the Rights of People with Disabilities (CRPD), *the people of the world* are committed to ensuring all PWD equal rights, especially access to justice, and necessary accommodations.

Does the sort of widespread condemnation of harms that underpins criminal law exist globally regarding crimes against PWD?⁶ Judging from domestic criminal justice systems worldwide, the answer may well be no. Most justice systems still present tremendous challenges to PWD, whether as suspects, defendants, witnesses, or victims.⁷ For international law scholars who are relatively new to the substantial literature on the social obstacles PWD face in accessing criminal justice, I offer the following anecdote.

Last summer, as the pandemic held sway, I had a series of discussions with a prosecutor from another country on how to promote greater accountability for gender-based crimes in her country. Our conversations flowed easily in English, our common language, until one particular call. In this difficult conversation, initially I thought I had misunderstood, but finally came to realize that this passionate advocate for gender justice was describing her frustration about times she was "forced to work with 'imbeciles.'"⁸ She meant, she explained, for example, deaf victims of crimes. She told me that, in exasperation, she and her criminal justice colleagues leave crimes reported by such "imbeciles" unexplored due to communication barriers. In her words, these criminal law officials let the crimes reported by PWD "die a natural death" in the system.

If otherwise socially progressive prosecutors in domestic systems like this one leave disabled victims' crimes unpunished, perhaps the best prospects are for the global community to ensure international recognition of disability-specific crimes against humanity. Seeking accountability and global recognition of the gravity of the crimes against PWD at the international level may be the only option in the short-term. Surely many of the crimes the authors list, such as targeted killing, mass murder, and forced experimentation, are universally and undeniably recognized as egregious harms, even if they have not yet been prosecuted as such in international law for specifically targeting PWD. Some other harms, however, such as institutionalization and mass sterilization of people with disabilities, continue in many countries as official policy. Though not less morally worthy of punishment, this could make these crimes more difficult for the ICC to punish.

Regarding such crimes, the authors' analogy to the incorporation of gender-based crimes, such as sexual violence, into international criminal law might be distinguished on the ground that many people are not aware of the

⁴ *Transitional Justice Should Focus on Future: Q&A with Priscilla Hayner*, INDEP. COMM'N MULTILATERALISM.

⁵ William I. Pons, Janet E. Lord & Michael Ashley Stein, *Disability, Human Rights Violations, and Crimes Against Humanity*, 116 AJIL 58 (2022).

⁶ For example, in the United States, which boasts the groundbreaking Americans with Disabilities Act (ADA), scholars have lamented what little effect the ADA has in fact had in changing attitudes and perceptions of PWD. Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 614 (2015).

⁷ See Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. (forthcoming 2022); Tony Abear & James Naughton, *Police Encountering People with Disabilities: A Deadly Encounter*, 32 DSBA BRIEF 8 (Jan. 2020); Carly A. Myers, *Police Violence Against People with Mental Disabilities: The Immutability Duty Under the ADA to Reasonably Accommodate During Arrest*, 70 VAND. L. REV. 1393 (2017); see also Ann C. McGinley, *Enough! Eliminating Police Abuse of Individuals of Color with Disabilities*, 21 NEV. L.J. 1081 (2021).

⁸ As I had recently been examining criminal laws relating to disability, I was aware of the outdated terminology in many domestic laws relating to disability, (e.g. "lunatic" or "imbecile" laws).

pervasiveness of ableism. Again, lagging perceptions of the equal worth of PWD pose a serious barrier, as law in general has historically denied even the basic capacity of PWD. By contrast, rape had been recognized as a war crime in international law long before it was specifically integrated into the International Criminal Tribunals for Rwanda and the former Yugoslavia's statutes and decisions. The various forms of mistreatment and harm suffered by PWD that the authors describe have been rampant and sanctioned by law.⁹

This concern need not fatally undermine the success of the authors' argument, however. The widespread ratification of the CRPD does undeniably demonstrate new foundations for a shared global awareness and understanding of the rights of people with disabilities. Nevertheless, the authors concede that domestic-level prosecutions would face significant obstacles, not only because so few member states of the UN have adopted domestic laws regarding crimes against humanity,¹⁰ but also because a "significant gap remains between the rights enumerated in the [CRPD] treaty and the protections accorded to persons with disabilities by national governments, both in law and in practice."¹¹ Globally, at the domestic level, there is negligible civil accountability for many of the systemic abuses PWD face. Criminal accountability for state-sponsored practices, such as institutionalization or police brutality, against PWD is also absent, as such practices are still widely and wrongly perceived to be necessary or unavoidable responses to immutable differences.¹²

A variant of the CRPD case is the recognition of the offense of recruiting child soldiers, on which there was a global consensus without a pre-existing international treaty. When Special Court for Sierra Leone defendants were charged with and convicted of recruiting underage soldiers, it arguably was not a clear violation of international criminal law. However, there was ultimately sufficient global support for this unprecedented criminal charge, to sustain it as an important component of international criminal law and it has since been explicitly included in the Rome Statute.¹³ It is arguably past time for a similar international consensus to prosecute crimes committed against PWD.

Can International Criminal Law Shape Domestic Law and Attitudes?

Many disability experts are understandably turning to international criminal law's potential to create shared norms of what constitutes forbidden behavior. As the authors indicate, while there have been some creative domestic prosecutions for crimes against humanity,¹⁴ thus far, none have been applied to crimes against PWD. Were the ICC to adopt internal policies regarding crimes against PWD and to prosecute crimes targeting PWD, would doing so influence domestic attitudes and, correspondingly, the content and implementation of domestic criminal law?

Scholars differ in their views of how successful international criminal prosecutions are at deterrence or in actually persuading states to adopt international standards. While international criminal law aims may vary by situation, a core goal includes the recognition of the dignity of individuals, in part through seeking accountability for violations against them, and also in preventing egregious harms from recurring. A related question is whether including disability abuses in international criminal law could affect how international bodies treat other human rights

⁹ See, e.g., Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AJIL 778 (2005).

¹⁰ Pons, Lord & Stein, *supra* note 5, at 67–68.

¹¹ *Id.* at 69. For example, persons with disabilities are disproportionately victims of crime at the domestic level. In the United States, from 2017 to 2019, persons with disabilities were victims of 26% of all non-fatal violent crime, while accounting for about 12% of the population. Erika Harrell, *Crime Against Persons with Disabilities, 2009–2019 – Statistical Tables*, BUREAU JUST. STAT. (Nov. 2021).

¹² Morgan, *supra* note 7.

¹³ *Rome Statute of the International Criminal Court*, Art. 8, *opened for signature* July 17, 1998, 2187 UNTS 3.

¹⁴ See, e.g., Melissa Eddy, *German Woman Convicted of a Crime Against Humanity in Death of Yazidi Child*, N.Y. TIMES (Oct. 25, 2021).

issues concerning disability. For example, as I discuss in a forthcoming piece,¹⁵ in the human rights treaty body system, the CRPD Committee, a relative newcomer, has faced multiple tensions, including some insurmountable disagreements, with the other human rights treaty bodies. If another international entity such as the ICC begins to take seriously the rights of PWD, guided by internal policies shaped by PWD, more progress for PWD at the international level might be made.

Although the influence of international criminal law on actors at the international and domestic levels remains uncertain, it is plausible that prosecutions by criminal tribunals, over time, do change the way that states and others treat the behavior subject to criminal prosecution. From the perspective of advocates for disability rights, therefore, prosecutions may seem well worth pursuing, with few costs and the potential for large gains. However, as I argue below, there are some capacity concerns about the ability of both international criminal law and the ICC to do this important work.

How Far Can the ICC Push Boundaries in Defining Crimes Against Humanity?

The authors argue that the ICC can prosecute disability-targeting crimes against humanity to elevate awareness and accountability for PWD, even though they acknowledge that the ICC is notoriously beleaguered and the nexus requirement between conflict and the crimes may pose an impediment to certain disability-related acts being charged as crimes against humanity.¹⁶ Both the institution of the ICC and the crime of crimes against humanity face the legitimacy and enforcement concerns that beset attempts to check abuses of power. I suggest here, however, that the costs for the ICC of formally recognizing the rights of PWD and prosecuting crimes targeting PWD would not be overly onerous.

The authors decry the failure of the final text of the draft articles of the Crimes against Humanity Convention to explicitly mention disability, even as the Convention includes a category for “other grounds,” which potentially includes disability.¹⁷ Some international criminal law scholars might defend this omission, arguing that it is not possible to coherently include explicit mention of all vulnerable groups eligible for special protection in crimes against humanity.¹⁸ Indeed, they might argue that too many groups similarly seek specific mention in the draft treaty. Or that the draft Crimes against Humanity Convention cannot possibly overcome the resistance of many states or embrace the sheer scope of possible topics, including for example, a non-binary, fluid understanding of gender as LGBTQIA+ advocates have urged instead of the definition adopted in the draft Crimes against Humanity Convention.¹⁹ Such defenses reflect the deprioritization of the rights of PWD, which is our status quo, and ultimately do not respond to the authors’ core point.

The authors, however, neglect the many, persistent delays and difficulties in securing the broad consensus of states necessary to make the Crimes against Humanity Convention a reality.²⁰ Crimes against humanity have been

¹⁵ See C. Cora True-Frost, *Listening to Dissonance at the Intersections of International Human Rights Law*, 43 MICH. J. INT’L L. (forthcoming 2022).

¹⁶ Pons, Lord & Stein, *supra* note 5, at 73; Natasha Godsiff, *The Failure of the International Criminal Court to Prosecute Sexual and Gender-Based Violence*, CAMBRIDGE UNIV. L. SOC’Y.

¹⁷ CAH Draft Articles, *supra* note 1, Art. 7 (covering crimes against people with disabilities since subsections (h) and (k) could cover disability as persecution on “other grounds that are impermissible under international law” or “other inhumane acts of a similar character . . .”).

¹⁸ See, e.g., Sean Murphy, *Striking the Right Balance for a Draft Convention on Crimes Against Humanity*, JUST SECURITY (Sept. 17, 2021).

¹⁹ Letter from the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions to the Int’l L. Comm’n (Nov. 18, 2018). Many advocates seek further expansion of gender justice with the CAH treaty. Akila Radhakrishnan & Danielle Hites, *Expanding Justice for Gender-Based Crimes with a Treaty on Crimes Against Humanity*, JUST SECURITY (Sept. 29, 2021). There have also been attempts to shoehorn broader concepts of international environmental harm into the treaty.

²⁰ Leila Sadat, *Towards a New Treaty on Crimes Against Humanity: Next Steps*, JUST SECURITY (Sept. 13, 2021).

invoked frequently by various wronged persons to elevate the harms done to them, including for example, through public health mismanagement or omissions during the pandemic.²¹ Indeed, in the face of the intransigence of states regarding the Crimes Against Humanity treaty and the embrace of crimes against humanity by so many interests, the fate of the expansion of crimes against humanity currently hangs in the balance.

Some international criminal law scholars might similarly urge the ICC prosecutor to be cautious in pursuing crimes committed against PWD so as to guard the court's fragile legitimacy and its capacity to secure states parties' compliance.²² After all, the ICC's effectiveness in enforcing its orders and judgments is only as good as states parties' willingness to comply. Yet, if the CRPD does indeed signal states' unprecedented international-level consensus that the rights of PWD matter, perhaps crimes against PWD will be seen as less politically controversial than many other crimes the prosecutor might have the discretion to pursue.

At any rate, given the frequency with which PWD are directly targeted in conflict in the crimes within the ICC's jurisdiction and the growing awareness of this problem at the international level, as the authors explain, the prosecutor of the ICC should embrace the human rights of PWD within the ICC's mission.

Conclusion

Awareness of the discrimination and challenges PWD face is acutely low in most domestic court systems. As the authors demonstrate, raising awareness of the injustices PWD face at the ICC in The Hague, as challenging as the task certainly is, might well be more feasible and rewarding than it currently is at the domestic level. It is possible that by identifying and prosecuting crimes against humanity in relation to PWD, the ICC would play a vital role in shaping global domestic perceptions on the rights of, and accountability owed to, PWD. While concerns persist regarding the capacity of the ICC to push boundaries in defining crimes against humanity inclusive to PWD, it is worthwhile for the prosecutor to pursue such a mission.

Finally, I add my full-throated support for the authors' argument regarding making international criminal law processes more inclusive and accessible. In a forthcoming piece, I have written about the need to make the proceedings of the United Nations human rights treaty bodies inclusive.²³ Indeed, rendering UN human rights entities disability-accessible is just a small part of the necessary work to be done in "mainstreaming disability" at the United Nations.²⁴ One hopes that the "In/Ex-clusiveness of International Law" theme of the 2022 annual conference of the European Society of International Law,²⁵ along with the American Society International Law's own self-reflection,²⁶ will also contribute to disability-inclusion related goals in international law generally, including, at the very least, for example, in the format and accessibility of our conferences.²⁷

²¹ See, e.g., Jack Nicas, [Brazilian Leader Accused of Crimes Against Humanity in Pandemic Response](#), N.Y. TIMES (Nov. 8, 2021).

²² See, e.g., Disability Rts. Int'l & Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, [Abandoned & Disappeared: Mexico's Segregation and Abuse of Children and Adults with Disabilities](#).

²³ See True-Frost, *supra* note 16.

²⁴ See, e.g., [United Nations Disability Inclusion Strategy](#).

²⁵ [2022 ESIL Annual Conference, Utrecht | 1–3 September 2022](#).

²⁶ See, e.g., [What Diversity, Equity, and Inclusion Require of International Law](#), ASIL.

²⁷ See, e.g., Debra Guckenheimer, [Ten Ways to Make Conferences Accessible to People with Disabilities](#), CHRONICALLY ACAD. (Dec. 10, 2016).