

DESTROYING DISABILITY: EXPANDING APPLICATION OF THE GENOCIDE CONVENTION

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Summary: Disability is not a protected class under the Genocide Convention, even though disabled people across the world frequently face egregious human rights violations. Many of those practices should be considered genocide because they meet the criteria listed in the definition. In order to amount to genocide, an action must be committed with the intent to destroy a group, in whole or in part, by killing, causing serious harm, inflicting conditions of life calculated to bring about destruction of the group, prevent births, or forcibly transfer children out of the group. Disabled people have been subjected to all these actions. By refusing to grant this group status as a protected class, the international community has allowed acts of genocide to continue into the twenty first century. To prevent future genocides against this group, and advance disability rights on a global scale, disabled people need the protections provided in the Genocide Convention.

Keywords: Disability, genocide, expanding protection, human rights, disability rights, Genocide Convention.

1 Introduction

Helene Melanie Lebel was born in 1911 in Austria.¹ Helene enjoyed a normal childhood, finished her secondary education, and then attended law school.² At 19 however, Helene started showing signs of mental illness. In 1936 she was diagnosed with schizophrenia and placed in a psychiatric hospital.³ Nazi Germany annexed Austria in 1938, and by 1940 Helene was confined to the hospital, despite her condition improving.⁴ Her mother was told that she would soon be released, after transferring to another hospital in Bavaria.⁵ But Helene was never

1 United States Holocaust Memorial Museum. *ID Cards, Holocaust Encyclopedia*. [online]. Available at: <<https://encyclopedia.ushmm.org/content/en/id-card/helene-melanie-lebel>>. Accessed: 01.12.2020

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

sent to Bavaria. Instead she was transferred to a converted prison in Germany.⁶ There she was killed in a gas chamber.⁷

9,772 people were gassed that year, many of them were disabled.⁸ This was part of the Nazi's Aktion T-4 program, a genocidal program aimed at ridding society of the "useless eaters" and the "life unworthy of life"—the disabled people.

Disability is not a protected class under the Genocide Convention⁹, despite the fact that disabled people across the world consistently and frequently face egregious human rights violations. Many of these incidents or practices that violate basic human rights should be considered genocide because they meet all or many of the criteria listed under the definition of genocide. By refusing to recognize this minority as a cohesive group, and grant them status as a protected class, the international community has allowed acts of genocide to not only continue well into the twenty first century, but has also allowed those acts to be extolled as virtuous. The international community must expand the current application of the Genocide Convention to include those with disabilities as a protected group.

This paper addresses why disability should be covered under the Genocide Convention. Section II explains the Genocide Convention, and how genocide is defined. Section IIA analyzes the various elements laid out in the convention. First, it begins with a discussion of group identity, and why disability is a cohesive group. The analysis then moves to intent, and how to determine if targeting is done with the purpose of destroying a group. Next the idea of "in whole or in part" is addressed, and finally the differences between wartime genocides and peacetime genocides are laid out. Section IIB defines the different actions that constitute genocide.

Section III then applies the convention to multiple case studies: the Euthanasia practice during the Holocaust, and the Colombian False Positives Scandal as examples of deliberate killing; human experimentation under the Nazi regime and in Iowa as examples of serious bodily or mental harm; institutionalization in the USSR and imprisonment in South Sudan as examples of conditions of life calculated to bring about destruction of the group; and the Eugenics program in the US as an example of preventing births within the group.

Section IV closes with the importance of protecting this frequently targeted and uniquely vulnerable population.

Disabled people have repeatedly been the targets of genocide. In order to prevent future genocides against this group, and advance disability rights on

6 *Id.*

7 *Id.*

8 *Id.*

9 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

a global scale, disabled people need the protections provided in the Genocide Convention.

2 Genocide Convention

When the Nazis came to power, Germany began persecuting and killing millions of people that were deemed racially or biologically inferior. The Nazis aimed to cleanse the population so as to preserve the superior race. In the aftermath of the Holocaust, the world vowed to “never again” allow such an atrocity, and the international community began building organizations and drafting documents that would protect people from other humans. The Genocide convention was adopted December 9th, 1948.¹⁰ It was the first human rights instrument to be created by the international community, beating the Universal Declaration of Human Rights by a single day.¹¹ This timing perhaps shows the importance of the right to life and identity as one of the foundational human rights, especially as it followed on the heels of a massive genocide.

The International Court of Justice has stated that this convention applies to every state, because it embodies peremptory norms.¹² No state can opt out of the international law obligations codified in the convention, simply because they have not signed and ratified it.

The convention creates an obligation that states themselves must prevent and punish the crime of genocide¹³, regardless of whether the perpetrator is a constitutional ruler, public official, or private individual¹⁴. It also creates an obligation for states to enact necessary legislation to give power to the convention¹⁵, ensure there are effective penalties for people found guilty of genocide¹⁶, try people charged with genocide in a competent tribunal¹⁷, and grant extradition when charges of genocide are involved¹⁸. The convention further states that genocide may occur in times of peace or war¹⁹, though genocide in times of peace may be rare²⁰.

10 *Id.*

11 UN General Assembly. *Universal Declaration of Human Rights*. 10 December 1948.

12 United Nations Office on Genocide Prevention and the Responsibility to Protect. *Legal Framework*. [online]. Available at: <<https://www.un.org/en/genocideprevention/genocide-convention.shtml>>. Accessed: 01.12.2020 [hereinafter UN Genocide Prevention].

13 Genocide Convention, *supra* note 9, p. 280.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*, p. 282.

19 *Id.*, p. 280.

20 United Nations Office on Genocide Prevention and the Responsibility to Protect. *Definitions*. [online]. Available at: <<https://www.un.org/en/genocideprevention/genocide.shtml>>. Accessed: 01.12.2020 [hereinafter UN Genocide Background].

The Convention defines Genocide as:

“Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.”²¹

Additionally, conspiracy, incitement, attempt, and complicity in genocide can all be punished, not just the actual act of genocide.²²

2.1 Explanation of Elements

The Genocide Convention lays out four key elements:

1. The targeted individuals are part of a group,
2. there is intent to destroy that group,
3. either in whole or in part,
4. during peace time or in war time.

2.1.1 Group

The Genocide Convention currently protects only four groups: national, racial, ethnic, and religious.²³ The common characteristic between these four groups is that a person is often born with the identity, or that the groups have distinct traits that can be passed down to descendants.²⁴ There is an argument that these categories are the only ones included, because these group identities are not normally chosen by a person, but instead are inherited.²⁵ Similarly, disability is not chosen. Some disabilities are genetic and can be passed from parents to children. A few examples of genetic disabilities include cystic fibrosis²⁶ and muscular dystrophy²⁷, among others. Just like race and ethnicity, this is an

21 Genocide Convention, *supra* note 9, p. 280.

22 *Id.*

23 *Id.*

24 Prevent Genocide International. *The Legal Definition of Genocide*. [online]. Available at: <<http://www.preventgenocide.org/genocide/officialtext-printerfriendly.htm>>. Accessed: 01.12.2020

25 *Id.*

26 UCSF Health. *Carrier Testing for Cystic Fibrosis FAQ*. [online] Available at: <<https://www.ucsfhealth.org/education/faq-carrier-testing-for-cystic-fibrosis#:~:text=Cystic%20fibrosis%20is%20inherited%20in,the%20gene%20is%20a%20carrier>>. Accessed: 01.12.2020

27 National Human Genome Research Institute. *About Duchenne Muscular Dystrophy*. [online]. Available at: <<https://www.genome.gov/Genetic-Disorders/Duchenne-Muscular-Dystrophy#:~:text=Duchenne%20muscular%20dystrophy%20is%20inherited,will%20>

aspect of identity that was inherited, not chosen. And just like the color of one's skin, it cannot be changed.

However, a person *can* change their nationality or religion. A person may move and gain new citizenship or may convert to a new religion or decide to practice no religion. Disability is similar in that a person can join the group at any point in life. A person can become disabled mid-life if they develop a disabling condition, experience an accident, or have lasting effects from illness. Just like nationality and religion, this identity can change (though not usually voluntarily). Expanding the application of the convention to another group would not require new reasoning or justifications. However, it must first be established that disability is in fact a group.

Establishing Disability as a Cohesive Group

In order to claim that application of the convention should be expanded beyond these four groups, it is important to first evaluate whether or not the targeted disabled people are members of a group. This is because Genocide is the intentional killing of a group of people, with the intent of destroying that group.

International law identifies groups fairly often. For example, the United Nations Minority Declaration gives guidance on how to classify a minority group.²⁸ While there are no prescribed criteria for establishing that a group exists, the guidance for implementation explains that “any definition must include both objective factors... and subjective factors.”²⁹ Objective factors include considerations such as shared religion, language, or ethnicity, among other characteristics.³⁰ The category of subjective considerations is much broader, but includes the idea that individuals must identify as part of a minority.³¹ Based on these criteria the UN has been able to characterize indigenous peoples as minorities.³² Indigenous people “possess distinct social, economic and political systems, languages, cultures and beliefs, and are determined to maintain and develop this distinct identity.”³³ Indigenous people are a minority because the group possesses both objective and subjective qualities that tie the group together, making it distinct from other groups.

Similarly, disabled people are a cohesive group because they possess objective and subjective qualities that create a group identity. It is important that disability be recognized as a group in order to provide protection and access to justice

have%20Duchenne%20muscular%20dystrophy>. Accessed: 01.12.2020

28 United Nations Human Rights Office of the High Commissioner. *Minority Rights: International Standards and Guidance for Implementation*. U.N. Doc. (2010) [hereinafter *Minority Rights*].

29 *Id.*, p. 2.

30 *Id.*

31 *Id.*

32 *Id.*, p. 3.

33 *Id.*

that other similar groups enjoy. However, because not all disabled people share a common ancestry, culture, or language, the analysis is slightly more complicated. A person can become disabled at any point in life, thus membership in the group is unpredictable. Disabled people are also spread over the entire earth, represented in every race, ethnicity, nationality, religion, and gender. Because it is present in every culture, disability does not necessarily have its own culture, language, religion, or other objective factors.

Disability can perhaps be analogized to race in this aspect. Racial groups don't necessarily need to have shared language or culture to still be considered a group. Instead this group is more defined by objective physical characteristics--just like disability. Including disability as a protected group would not be stretching the definition of "group" much beyond how it is already defined.

Disability is also a very broad category. There are so many different kinds of disabilities. The category of disability encompasses everything from blindness to autism and amputations to cerebral palsy. Despite these large differences within the disability category, every disabled person across the world can still relate to some shared experiences. Disabled people must learn how to adapt, and how to deal with discrimination and prejudice. This creates a shared sense of struggle. In response to this shared struggle, and negative medical definitions of disability that focus on "fixing" a person, disability advocates created a new definition of disability in the 1980s³⁴. The "social model" of disability defines disability as a disadvantage or restriction caused by social exclusion, prejudice, or systemic barriers.³⁵ This definition treats disability as a shared experience between people who have been excluded from society in some way. This definition has helped push the disability rights movement forward³⁶, and has been accepted by educational and advocacy organizations, and also policy makers. For example, the United Kingdom requires employers to accommodate disabled employees following the social model definition of disability.³⁷

The new definition and the advent of modern technology has allowed disabled people to begin developing a sense of community. The internet has provided the opportunity to learn of and meet other disabled people. Social networking applications have provided a platform for communication, and allowed disabled people to influence and help each other, share experiences, and build a feeling of community³⁸. Again, language or culture is not what binds these people together.

34 OLIVER, Mike. The Social Model of Disability: Thirty Years On. *Disability & Society*, 2013, vol. 28, p. 1024.

35 GOERING, Sara. *Rethinking Disability: the Social Model of Disability and Chronic Disease*. [online]. Available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4596173/>>.

36 *Id.*

37 Government of the United Kingdom. *Definition of Disability Under the Equality Act 2010*. [online]. Available at: <<https://www.gov.uk/definition-of-disability-under-equality-act-2010>>. Accessed: 01.12.2020

38 The prevalence of Facebook has supported the creation of disability community groups.

er, instead it is a sense of shared struggle; a sense that there are other people who can understand what it feels like to be disabled, because they are also going through many of the same things. The recognition of shared experiences and the developing ability to identify as part of this group constitute a subjective element necessary to establish that a group exists.

Additionally, many countries have laws that treat disabled people as a cohesive group. In the United States, the Americans with Disabilities Act prohibits discrimination on the basis of disability³⁹, establishing a protected group. Australia implemented the Disability Discrimination Act⁴⁰, Brazil has a Persons With Disabilities Statute⁴¹, Peru has the General Law for the Inclusion of Persons with Disabilities⁴², and many other nations have similar laws. By enacting a law to protect this vulnerable population, each state is treating disability as a group. The United Nations has also created the Convention on the Rights of Persons with Disabilities, showing that the international community has recognized disability as a group, and is moving towards protecting this group's rights.⁴³

Finally, disabled people are treated as a group by those perpetrating violent or discriminatory practices. The strongest argument that the international community needs to recognize disability as an identity group and provide protection under the Genocide Convention is the fact that those violating basic human rights already recognize it as a group. And those that recognize it as a group perpetrate violence against disabled people with the intent of destroying the group.

2.1.2 Intent to Destroy

The convention requires that the perpetrator have the intent to destroy a group.⁴⁴ This intent to destroy means that the victims are being targeted because of their identity. The targeting may be the result of their actual identity, or their perceived identity. For example, during the Second Congo War in the Democratic Republic of the Congo, mentally disabled individuals were targeted and killed because they were rumored to be disguised rebels.⁴⁵ These individuals were

For example, there is a "Law School Disability Advocacy Coalition" group on Facebook that provides resources, a forum for discussion, and a sense of camaraderie to law students that have disabilities (that can be found at this link: <https://www.facebook.com/groups/lisdac>). Because of this group and groups like it, disabled people across the country are able to talk, give each other advice, and complain about experiences they have had. This ability to converse creates a sense of community that would not have existed among these disabled people without the internet.

39 42 U.S.C. § 12101 (2006).

40 *Disability Discrimination Act 1992* (Cth) (Austl.).

41 Lei No. 13,146, de 6 de julho de 2015, Diário Oficial Da União [D.O.U] de 7.7.2015 (Braz.).

42 Ley No. 29973, Diciembre 24, 2012, El Peruano (Peru).

43 United Nations Convention on the Rights of Persons with Disabilities, March 30, 2007, 2515 U.N.T.S 3.

44 Genocide Convention, supra note 9, p. 280.

45 Amnesty Int'l. *Democratic Republic of Congo War Against Unarmed Civilians*. AI Index:

targeted because of their disability, and because of their suspected identity as a rebel. Other times, non-disabled people are targeted because they are suspected of having an invisible disability (e.g. a mental disability). For example, during the United States eugenics movement, doctors and scientists targeted people for alcoholism, criminality, or “immoral behavior”, under the reasoning that they must have some form of intellectual disability in order to act that way.⁴⁶

This intent requirement has two sides. First, the intended target of destruction is the group. This means that the perpetrator is intending to eliminate the category of “disabled people.” Second, in the effort of exterminating the group, individuals are targeted because of their membership in the group. In these instances, a person is targeted because of their disability. This second side of intent comes into play frequently when disabled people face abuse and extreme discrimination. There is not always an intent to destroy or hurt the entire disabled group when a small group of disabled people are targeted, but intent to hurt a person because they are part of a group can be used to show intent to hurt the overall group. The International Criminal Tribunal for Rwanda has held “that the act must be committed against an individual because the individual was a member of a specific group, and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual.”⁴⁷ Targeting disabled people because they are part of the group is sufficient to prove intent.

The distinction between these two understandings of intent may be difficult to grasp, and in most instances of genocide, both are easily fulfilled. But in some historical cases, there seems to be an intent to kill people because they are disabled, but no overall intent to destroy the group, fulfilling the second side of intent, but not necessarily the first. For example, during the Colombian conflict, when pressured to boost the body count in the war against the armed guerilla groups, soldiers frequently targeted disabled boys.⁴⁸ Because of their disabilities, the boys were easy targets.⁴⁹ Once killed, they were falsely reported as FARC members.⁵⁰ This was known as the False Positives Scandal.⁵¹

This is not a prototypical example of genocide against disabled people. The Colombian army did not express a mandate to destroy the disabled group. How-

AFR 62/36/98, 1998.

46 CARLSON, Licia. *Intellectual Disability*. Eugenics Archive. [online]. Available at: <<http://eugenicsarchive.ca/discover/encyclopedia/535eeca7095aa0000000239>>. Accessed: 01.12.2020

47 Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (Trial Chamber), para. 410, May 16, 2003.

48 Human Rights Watch. *On Their Watch: Evidence of Senior Army Officer's Responsibility for False Positive Killings in Colombia*. [online]. Available at: <<https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings#>>. Accessed: 01.12.2020 [hereinafter On Their Watch].

49 *Id.*

50 *Id.*

51 *Id.*

ever, in their effort to inflate body counts, certain people were targeted because of their membership in the disabled group. When faced with the option of who to target, soldiers chose to take disabled boys because they were easier targets. This shows an intent to destroy the overall group. These boys were targeted specifically because their group identity made them particularly vulnerable. And by targeting individuals because of their membership in this group, the group itself has been victimized, not just the individual, by becoming a target of the False Positives Scandal. Under the guidance from the ICTR, this example fulfills the intent requirement.

2.1.3 In Whole or in Part

The Convention details no size requirement. Deliberate killing of a small group of people may constitute genocide just as much as mass killings, as long as it is committed with the intent to destroy a particular group “in whole or in part.”⁵²

In Brazil in 1993, 16 people were killed in a conflict between the Yanomami and gold miners mining the tribal land illegally.⁵³ The more the two groups interacted, the higher tensions rose, until eventually the gold miners attacked the Yanomami.⁵⁴ Although only 16 people were killed, the Brazilian Supreme Federal Court held that the crime was genocide.⁵⁵ As long as the perpetrators had the intent to destroy at least part of the group, the act may be considered genocide.

This is particularly important to note in the context of disability. Because disability is not a centrally located group, many genocides against disabled people are relatively small when compared to the numbers of the Holocaust or the Rwandan genocide. But these actions against disabled people still meet all the other criteria of genocide and should not be excluded merely because they are smaller.

2.1.4 In War or Peace

Article 1 of the convention recognizes that genocide can be committed in time of peace or time of war.⁵⁶ Historically, many genocides have been perpetrated during war. The most widely recognized genocides—the Holocaust, Rwandan, Bosnian, Armenian—all occurred during wars. Genocides during peacetime are less common, though still possible.⁵⁷ These peacetime genocides usually

52 Genocide Convention, *supra* note 9, p. 280.

53 Survival International. *The Yanomami*. [online]. Available at: <<https://www.survivalinternational.org/tribes/yanomami>>. Accessed: 01.12.2020

54 *Id.*

55 Survival International, *Supreme Court Upholds Genocide Ruling*. [online]. Available at: <<https://www.survivalinternational.org/news/1786>>. Accessed: 01.12.2020

56 Genocide Convention, *supra* note 9, p. 280.

57 UN Genocide Background, *supra* note 20.

look different from wartime genocides. They involve less violence and outright killing, and more quietly destructive state-implemented practices.

There is a fundamental difference in the genocides against disabled people that occur during times of war versus the ones that occur in times of peace. During war, almost all of the cases show that, while there was deliberate targeting with an intent to destroy the group, the reasoning was that the disabled people were either easy targets, or presented a threat, as they might be militants disguising themselves as disabled. Few case studies show outright animosity for the disabled group itself. Disabled people were the unfortunate victims and easy targets during war.

While there are several instances of genocides against disabled people during times of war, there are many more instances of genocide during peacetime. During peacetime disabled people are the heartbreaking target of widely supported beliefs that a disabled life is an unworthy one. During wartime genocides, extermination may also be justified by the belief that disabled people are unworthy of life, but these genocides seem to garner less support than peacetime ones. For example, though the Euthanasia program in Germany was justified by the belief that disabled people were “life unworthy of life”, it was widely protested. On the other hand, the eugenics movement during peacetime in the US was widely supported.

Genocidal acts during peacetime may be supported by claims that disabled people are a drain on resources, or that they are unable to contribute to society, and thus it is better to exterminate the disabled population in its entirety. These peacetime genocides of disabled people often have support among multiple factions of society. For example, by propagating the idea that disabled people were unable to positively contribute to society and the gene pool, the United States garnered support from civilians, politicians, educators, and various organizations in passing forcible sterilization laws during the Eugenics movement.⁵⁸ In many peacetime genocides of disabled people, the extermination is frequently celebrated as virtuous, or necessary, while wartime genocides may be recognized as the result of unique vulnerabilities.

Regardless of whether the genocide occurs during peace or war, there are multiple ways of exterminating the group.

2.2 Explanation of Categories

2.2.1 Killing

This first category of actions that constitute genocide is fairly straightforward. Killing members of a group, with the requisite intent, constitutes genocide.

⁵⁸ Eugenics Archive. *Players*. [online] Available at: <<https://eugenicsarchive.ca/discover/players>>. Accessed: 01.12.2020

This can include direct killing and other actions that cause death.⁵⁹ For example, during the Rwandan genocide, many Tutsi women were raped, and infected with HIV. Survivor's accounts suggest that this was a purposeful strategy, to infect Tutsi women with HIV, and cause a slow death, though no prosecution has yet advanced this theory.⁶⁰ Additionally, the Commission of Inquiry on Syria has found that inducing victims to commit suicide may also constitute killing.⁶¹

Essentially, either directly killing, or acting in a way that death is reasonably foreseeable may count as killing under the Convention.

2.2.2 *Serious bodily or mental harm*

The second category of actions that constitute genocide is causing serious bodily or mental harm. Serious bodily harm includes actions such as “torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.”⁶² Serious mental harm includes “more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat.”⁶³ The International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have also held that rape and sexual violence cause serious bodily and mental harm.⁶⁴ This category encompasses infliction of trauma on members of the group, and is not necessarily fatal.

2.2.3 *Conditions of life calculated to bring about physical destruction*

The third category is deliberately inflicting conditions of life calculated to bring about physical destruction of the group. This may look like deliberate deprivation of resources necessary for the group's survival, such as clean water, food, clothing, shelter, or healthcare services.⁶⁵ This deprivation can be done through confiscation or blockade of supplies, or detention, relocation, or expulsion of the population.⁶⁶

This category has not been relied upon in many cases, but it was included as a response to the concentration camps in Nazi Germany.⁶⁷ It can be applied to many other actions, such as death marches, poisoning water supplies, and perhaps even inhumane institutionalization.

59 Prevent Genocide International, *supra* note 24.

60 Global Justice Center. *Beyond Killing: Gender, Genocide, & Obligations Under International Law*. 2018. [hereinafter *Beyond Killing*].

61 *Id.*

62 *Kajelijeli* Trial Judgement, para. 815, referring to *Kayishema and Ruzindana* Trial Judgement, para. 10; *Semanza* Trial Judgement, para. 321.

63 *Id.*

64 *Beyond Killing*, *supra* note 60, p. 17.

65 Prevent Genocide International, *supra* note 24.

66 *Id.*

67 *Beyond Killing*, *supra* note 60, p. 23.

2.2.4 Prevention of births

The fourth category is imposing measures intended to prevent births within the group. Measures taken to prevent births serve to ensure the group does not continue into the future. These measures may include sterilization, forced abortions, prohibition of marriage, and separation of men and women intended to prevent procreation.⁶⁸

In Akayesu, the ICTR also included rape, sexual mutilation, forced birth control, forced impregnation, and mental trauma resulting in reluctance to procreate as additional measures intended to prevent births.⁶⁹

2.2.5 Forcibly transferring children

The final category of genocide is forcibly transferring children of the group to another group. Removal of children from the target group can be achieved through killing or forcible transfer.⁷⁰ This transfer can occur through direct force, threat of violence, duress, detention, psychological oppression, or other means of coercion.⁷¹ Transfer may look like forcible conscription of child soldiers, sexual slavery, forced labor, or indoctrination into perpetrator's religion or culture.⁷²

3 Application of the Convention

Disabled people face practices that fit the legal definition of genocide. In order to promote the rights of disabled people, the international community must expand the current application of the Genocide Convention to include disability as a protected group.

Within this section, cases are organized according to which category of actions amounting to genocide they fit into. Some cases may fit into multiple categories, but they were included under the heading that had the strongest argument.

3.1 Killing

3.1.1 Euthanasia

Prior to World War Two, many western nations practiced Eugenics.⁷³ This was the process of ensuring that only the best of the human race procreated.⁷⁴

68 Prevent Genocide International, *supra* note 24.

69 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 507, (Sept. 2, 1998).

70 Beyond Killing, *supra* note 60, p. 29.

71 Prevent Genocide International, *supra* note 24.

72 Beyond Killing, *supra* note 60, pp. 30–31.

73 United States Holocaust Memorial Museum. *Eugenics, Holocaust Encyclopedia*. [online]. Available at: <<https://encyclopedia.ushmm.org/content/en/article/eugenics>>. Accessed: 01.12.2020 [hereinafter USHMM Eugenics].

74 Personal Genetics Education Project. *What is Eugenics*. [online]. Available at: <<https://pged.org/history-eugenics-and-genetics/#:~:text=Eugenics%20is%20the%20philoso>>

This practice grew out of the ideas of Social Darwinism—the idea that only the fittest should survive.⁷⁵ Some nations practiced “positive eugenics”, in that they encouraged exceptional individuals to have children.⁷⁶ Other nations instead practiced “negative eugenics,” emphasizing the burden on society of multiple generations of undesirable people such as the mentally ill or disabled, and forcibly sterilized these people.⁷⁷ (A more in depth discussion of Eugenics is provided below in the section on preventing births). Most nations stopped at sterilization of the mentally disabled, Germany however, was heading down a darker path.

As eugenics spread and grew in popularity, the ideals were perverted and used to justify the killing of those deemed unfit. Thus, Eugenics evolved into Euthanasia. Instead of merely disallowing disabled people from contributing to the gene pool, it was decided that they should not be a part of society at all. Allowing disabled people to live was seen as a waste of resources, and an unfair burden on healthy, hardworking citizens.⁷⁸

In 1939 Philipp Bouhler and Karl Brandt organized a program to eliminate those deemed “life unworthy of life.”⁷⁹ They started with the children. In maternity wards doctors were required to report births of disabled infants and encourage the parents to give the child to a state run institution.⁸⁰ If there were disabled children in the home parents were also encouraged to admit them to the institutions, where it was promised they would be cared for.⁸¹ In reality these institutions were killing wards. Children were starved or administered lethal doses of medication.⁸²

In the fall of the same year Adolf Hitler signed a secret authorization that gave physicians legal protection: they could not be prosecuted for murder as Hitler formally legalized the euthanasia practice.⁸³ After being endorsed by the leader of the country the euthanasia program expanded to target disabled adults and became an open secret. This program of euthanasia was called Aktion T4.⁸⁴ Physicians were authorized to select people they deemed “incurably ill” and kill them.

phy%20and,termed%20%E2%80%9Cnegative%E2%80%9D%20eugenics)>. Accessed: 01.12.2020

75 *Id.*

76 *Id.*

77 *Id.*

78 United States Holocaust Memorial Museum. *Euthanasia Program, Holocaust Encyclopedia*. [online]. Available at: <<https://encyclopedia.ushmm.org/content/en/article/euthanasia-program>>. Accessed: 01.12.2020 [hereinafter USHMM Euthanasia Program].

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

Disabled people were rounded up based on ‘expert’ physician opinions, and sent to killing wards, where they waited to be exterminated.⁸⁵ Their bodies were then cremated and sent home in urns, with letters detailing fictitious causes of death.⁸⁶ Originally they were killed by lethal injection.⁸⁷ Later, the Nazis embraced gas chambers.⁸⁸ These gas chambers were created to efficiently exterminate increasing numbers of disabled people, and were later used to perpetuate genocide against other populations.⁸⁹

Interestingly, this was one of the most widely protested programs that Hitler had implemented. Because of these protests, Hitler ordered the program be halted.⁹⁰ All *official* capacities stopped, but they continued unofficially.⁹¹ It was no longer a government mandate to kill the “useless eaters”, but the practice continued, condoned by the government and better concealed.⁹² Once government control was removed from the equation the practice became even more destructive and discriminatory. The decisions of who qualified as inferior, and what rate to perform the many euthanasia were decentralized and left to the discretion of local officials, authorities, or doctors.⁹³ Euthanasia continued unchecked.

This practice was not confined to Germany. In German occupied territories the idea of “life unworthy of life” festered and grew. However, in many occupied territories the practice of extermination was more violent. In Poland and the Soviet Union disabled people were killed in mass shootings by the SS and Police Units.⁹⁴

It is estimated that between 80,000 and 100,000 adult mental patients from institutions were killed (though that number is believed to be low, and does not take into account children, or physically disabled people).⁹⁵

The Aktion T4 program was very clearly genocide against disabled people. The program’s purpose was to exterminate the disabled population. Lethal injections, gas chambers, and firing squads were all perpetrated with the stated goal

85 *Id.*

86 *Id.*

87 Jewish Virtual Library. *Nazi Euthanasia Program: Persecution of the Mentally & Physically Disabled*. [online]. Available at: <<https://www.jewishvirtuallibrary.org/nazi-persecution-of-the-mentally-and-physically-disabled>>. Accessed: 01.12.2020 [hereinafter Jewish Virtual Library].

88 *Id.*

89 United States Holocaust Memorial Museum. *Gassing Operations, Holocaust Encyclopedia*. [online]. Available at: <<https://encyclopedia.ushmm.org/content/en/article/gassing-operations>>. Accessed: 01.12.2020

90 USHMM Euthanasia Program, *supra* note 78.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 Jewish Virtual Library, *supra* note 87.

of killing disabled people. The Nazis recognized disability as a distinct group, declared disabled people to be “life unworthy of life” and implemented practices intended to destroy the group.

3.1.2 Colombia and Other Examples

Genocide of disabled people also occurred in Colombia, as referred to above. During the Colombian Conflict, Colombian soldiers were compelled to increase the body count in the war against the armed guerilla groups.⁹⁶ Upon reporting combatant fatality numbers to military officials, increased counts would receive a reward, and decreased counts would receive punishment.⁹⁷ This “pay for performance” strategy was in place between 2003 and 2008.⁹⁸ This system created an incentive for soldiers to artificially inflate the body count, and the fear of punishment motivated soldiers to begin targeting civilians.⁹⁹

The first decade of this century saw the highest rates of civilian killings of the entire Colombian conflict.¹⁰⁰ “Soldiers and officers abducted victims or lured them to remote locations under false pretenses... killed them, placed weapons on their lifeless bodies, and then reported them as enemy combatants killed in action.”¹⁰¹ This became known as the “False Positives Scandal.”

When selecting targets, soldiers typically chose those that were especially vulnerable. This included “petty criminals, the homeless, the mentally ill and others at the margin of society.”¹⁰² The army began to increasingly target young disabled boys because of their unique vulnerability: it was easy to lure mentally disabled boys away from any witnesses.¹⁰³

The False Positives Scandal in Colombia constitutes genocide. The Colombian army unofficially condoned a practice of killing disabled people. Though the reason for killing those with disabilities was not as clearly targeted at destroying the group as it was in the Holocaust example above, the sole reason the disabled individuals were targeted here was because of their disability, and the unique

96 On Their Watch, *supra* note 48.

97 *Id.*

98 ACEMOGLU, Daron, FERGUSSON, Leopoldo, ROBINSON, James, ROMERO, Dario, VARGAS, Juan F. The Perils of High-Powered Incentives: Evidence From Colombia's False Positives 2. *Nat'l Bureau of Econ. Research*, Working Paper No. 22617, 2016.

99 On Their Watch, *supra* note 48.

100 ACEMOGLU, Daron et al. Perils of High-Powered Incentives: Evidence From Colombia's False Positives 2. *Nat'l Bureau of Econ. Research*, Working Paper No. 22617, 2016, p. 2.

101 On Their Watch, *supra* note 48.

102 ACEMOGLU, Daron et al. Perils of High-Powered Incentives: Evidence From Colombia's False Positives 2. *Nat'l Bureau of Econ. Research*, Working Paper No. 22617, 2016, p. 8.

103 PARKIN DANIELS, Joe. *The Guardian. Colombian Army Killed Thousands More Civilians Than Reported, Study Claims*. [online]. Available at: <<https://www.theguardian.com/world/2018/may/08/colombia-false-positives-scandal-casualties-higher-thought-study>>. Accessed: 01.12.2020

vulnerability it created. In other words, while the Colombian soldiers were not killing disabled people specifically to destroy the group, they were specifically targeting disabled people because they were members of the group, knowing that it would lead to the total or partial destruction of the group. The group itself has become the victim of this genocidal practice.

The Holocaust and Colombia are not the only examples of intentional killing of disabled people as genocide. During the Bosnian genocide, disabled refugees were left in a school after all the other, able-bodied refugees had fled.¹⁰⁴ UN Peacekeepers were nearby, but under orders to remain neutral.¹⁰⁵ Soldiers approached the school, acknowledged the UN peacekeepers, entered, and massacred all the disabled refugees.¹⁰⁶ Neither the Croatian nor the Serbian forces claimed responsibility for the attack.¹⁰⁷ However, Colonel Bruno Covic, commander of Croatian forces in Dvor, hypothesized that soldiers may have thought they were “doing something good for them” by “ending their suffering.”¹⁰⁸ This case is not as well documented as the Euthanasia program of the Holocaust, or the False Positives scandal in Colombia. More information is needed before we can determine if this does in fact rise to the level of genocide. But the belief that soldiers were putting these disabled people out of their misery may show an intent to destroy or victimize this portion of the disabled group. It certainly shows an intent to kill these specific individuals because of their membership in the disability group.

Genocide may also have occurred in the Democratic Republic of the Congo in 1998. Mentally disabled people were killed because they were rumored to be rebels in disguise.¹⁰⁹ Again, there is not much documentation of this event, but from what little is known, an intent to kill people because of their mental disability is clear. Individuals were targeted because of their group membership. We do not know if there was intent to destroy the entire disabled group, but the group becomes a victim by intentional targeting of those identifying with the group. Other people were also targeted for rather arbitrary reasons, such as having red mud on shoes, when red mud could not be found in Kinshasa. However, the killing of disabled people was substantially different, because they were targeting a distinct identity, thus victimizing the overall group.

104 LARSEN, George, VEDSMAND, Kasper. *When the UN Watched a Massacre Unfold In Croatia*, *Al Jazeera*. [online]. Available at: <<https://www.aljazeera.com/features/2016/05/29/when-the-un-watched-a-massacre-unfold-in-croatia/>>. Accessed: 01.12.2020

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 Amnesty Int'l, *supra* note 45, p. 6.

3.2 Serious Bodily or Mental Harm

3.2.1 Holocaust experimentation

Nazi scientists conducted experiments on humans during the Holocaust.¹¹⁰ Populations targeted for experimentation included Romani, ethnic Poles, Soviet prisoners of war, disabled people, and Jews.¹¹¹

Psychiatric patients suffered doubly. Because of war rationing, and the belief that disabled people were “useless eaters”, psychiatric patients were given less food than non-institutionalized people.¹¹² Mentally ill people were starved. It is estimated that 250 deaths in one institution were the result of starvation.¹¹³ At the same time, psychiatric institutions and psychiatric patients became popular experimentation sites and test subjects.¹¹⁴

Some psychiatric patients developed “hunger edema” as a result of starvation.¹¹⁵ This is a condition that causes fluid to accumulate in cells, skin to grow papery, and hair to fall out.¹¹⁶ Patients with this condition were used to test four different hypotheses about how to “adequately nourish underfed people with protein hydrolysate.”¹¹⁷ In other psychiatric hospitals Tuberculosis vaccines were tested on children.¹¹⁸ This practice was sometimes fatal. Mentally ill people were also used in experiments testing new ways to kill large numbers of people, as mass shootings were too burdensome.¹¹⁹ In Navinki, 24 mentally ill people were killed by experimental explosives.¹²⁰ In Mogilev, they tested gas chambers.¹²¹

Vilnius State Psychiatric Hospital in Lithuania began experimenting with somatic therapies.¹²² Though some psychiatrists considered these practices to be

110 United States Holocaust Memorial Museum. *Nazi Medical Experiments, Holocaust Encyclopedia*. [online]. Available at: <<https://encyclopedia.ushmm.org/content/en/article/nazi-medical-experiments>>. Accessed: 01.12.2020 [hereinafter USHMM Experiments].

111 *Id.*

112 International Holocaust Remembrance Alliance [IHRA]. *Mass Murder of People with Disabilities and the Holocaust. IHRA series*, vol. 5, p. 100. [hereinafter IHRA].

113 *Id.*

114 WEINDLING, Paul, VON VILLIEZ, Anna, LOEWENAU, Aleksandra, FARRON, Nichola. *The Victims of Unethical Human Experiments and Coerced Research Under National Socialism, NCBI*. [online]. Available at: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4822534/>>. Accessed: 01.12.2020

115 IHRA, *supra* note 112, p. 99.

116 WITTENBERG, Dick. *The Correspondent. This is What Hunger Does*. [online]. Available at: <<https://thecorrespondent.com/5379/this-is-what-hunger-does/358445802-e6acda55#:~:text=Fluid%20accumulated%20in%20his%20cells,the%20young%20person%20turned%20elderly>>. Accessed: 01.12.2020

117 IHRA, *supra* note 112, p. 99.

118 *Id.*, p. 80.

119 *Id.*, p. 154.

120 *Id.*

121 *Id.*

122 *Id.*, p. 194.

new advances in psychiatry, they were still in the early experimental stage.¹²³ Among the new therapies tested on patients were fever therapy and various shock therapies.¹²⁴ Under fever therapy, a patient would be vaccinated with Malaria in order to induce a fever and seizures.¹²⁵ It was thought that the malaria seizures would fight infectious psychiatric diseases (e.g. progressive paralysis caused by syphilis, complications from meningitis, etc.).¹²⁶ Electroshock therapy also caused seizures in the brain in an attempt to provide relief from certain mental disorders.¹²⁷ Insulin shock therapy or Insulin coma therapy was used to induce comas.¹²⁸ These were also used in an attempt to provide relief from mental illness.

There is nothing inherently wrong about using cutting edge medical techniques (though we now know that many of these therapies do more harm than good¹²⁹). The problem with the experiments conducted in Vilnius was threefold. First, these therapies took a heavy toll on the body and they were administered to patients that were already weak from starvation.¹³⁰ Many weakened bodies could not handle the added stress, and they died or suffered permanent consequences. Second, these experimental treatments “were not in keeping with any contemporary medical knowledge.”¹³¹ There was no basis for performing these experimental treatments. There was no way to know how many times to administer the therapy or the effects it would have on a person. In some instances, a therapy that was intended to treat one kind of mental illness was administered to a patient not experiencing that mental illness.¹³² Third, these patients did not give consent to the experimental treatments.¹³³ The International Covenant on Civil and Political Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”¹³⁴ This suggests that unconsented to experimental treatments are close in practice to torture and may actually meet the definition of torture in some cases.

123 *Id.*, p. 195.

124 *Id.*, p. 194.

125 *Id.*, p. 195.

126 *Id.*

127 Mayo Clinic. *Electroconvulsive Therapy (ECT)*. [online]. Available at: <<https://www.mayoclinic.org/tests-procedures/electroconvulsive-therapy/about/pac-20393894>>. Accessed: 01.12.2020

128 Science Museum. *'Heroic Therapies' in Psychiatry*. [online]. Available at: <<https://www.sciencemuseum.org.uk/objects-and-stories/medicine/heroic-therapies-psychiatry#insulin-coma-therapy>>. Accessed: 01.12.2020

129 *Id.*

130 IHRA, *supra* note 112, p. 195.

131 *Id.*

132 *Id.*, p. 196.

133 USHMM Experiments, *supra* note 110.

134 Article 7. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

Serious bodily or mental harm has been held to include torture.¹³⁵ These practices of experimental mass murder, nutrition, vaccination, and therapy constitute genocide. These were genocidal practices targeted at the disabled group. Psychiatrists and scientists had a clear intent to experiment on the mentally disabled. These new therapies were intended to have an effect on brain function and were intended to be used on people experiencing mental illness. Administering them to patients with mental illness would provide more information about the usefulness of the therapy than administering the therapies to anyone not experiencing mental illness.

3.2.2 United States – Iowa

In addition to the examples that occurred in armed conflict discussed above, these genocidal acts can also occur in times of peace. For example, in late 2019 the US Justice Department began an investigation of the Glenwood Resource Center for “harmful and uncontrolled human subject experiments.”¹³⁶ This is a facility in Iowa where disabled people live and receive care. Residents died at a rate twice as high as normal during a one-year period at this facility, and caretakers failed to report patterns of suspicious injuries and allegations of possible abuse and mistreatment of residents.¹³⁷ Federal officials are investigating studies that may have taken place at Glenwood. These studies were about “optimal hydration” and “sexual arousal.”¹³⁸ It is believed that these studies were not consented to, as many residents have disabilities that would cause consent to be called into question.¹³⁹

The investigation is still ongoing, and no entity has been charged with anything as of yet. But a similar analysis applies in this case as in the above study of Nazi experimentation. Nonconsensual experimentation is akin to torture. Experimentation causes serious physical and mental harm.

Genocidal practices do not have to have the intent of destroying the group in its entirety. It is enough to intend to cause serious bodily or mental harm to the group “in whole *or in part*” (emphasis added).¹⁴⁰ From the evidence available now, it can be inferred that there was an intent to target a portion of the disabled group. The superintendent of the facility expressed an interest in researching

135 Akayesu, Case No. ICTR-96-4-T at ¶ 504.

136 RODRIGUEZ, Barbara. *DOJ Investigating Allegations of ‘Sexual Arousal Studies’ at Iowa Facility for People with Disabilities*, Des Moines Register. [online]. Available at: <<https://www.desmoinesregister.com/story/news/health/2019/12/11/federal-justice-investigation-sexual-arousal-studies-glenwood-patient-disabilities/4401890002/>>. Accessed: 01.12.2020

137 SMITH, Mitch. *N.Y. Times. Justice Department Investigates Experiments on People with Disabilities*. [online]. Available at: <<https://www.nytimes.com/2019/12/13/us/iowa-human-experiments.html>>. Accessed: 01.12.2020

138 RODRIGUEZ, *supra* note 136.

139 SMITH, *supra* note 137.

140 Genocide Convention, *supra* note 9, p. 280.

“deviant sexual behavior in persons with developmental disabilities.”¹⁴¹ The target of his destructive experiments was the developmentally disabled portion of the disabled group.

3.3 Conditions of Life Calculated to Bring About Physical Destruction

3.3.1 USSR

During the Soviet Era, the USSR created a hierarchy of disability, with classifications based on work capacity.¹⁴² People in different categories were afforded different rights and privileges, and experienced different forms of discrimination.¹⁴³

In the early 1920s, only injured war veterans could be considered “invalids”.¹⁴⁴ People with congenital disabilities, or disabilities acquired as the result of an accident or illness could not be considered invalid, and thus were not afforded the same rights.¹⁴⁵ There was further categorization within the war wounded invalid category based on work capacity. There were three ranks of individuals, the first was total invalids who needed constant care, the second was invalids that could do light, irregular work, and the third was those that had only a partial loss of work capacity but were unable to make an independent living.¹⁴⁶ Institutions and invalid homes were organized by this categorical determination, not disability type.¹⁴⁷ By the 1930s this categorization of disabled people based on work capacity was extended to all disabled people, not just veterans.¹⁴⁸

The soviet emphasis on work as a duty stigmatized those that had decreased work capacity.¹⁴⁹ State run institutions evolved in their purposes because of this emphasis. They became either hospital institutions, providing care for the most severely disabled, or work institutions, providing support for those that could contribute to society in some way.¹⁵⁰ Conditions in hospital institutions grew more and more inhumane as the Soviet state attempted to rid itself of unproductive workers.¹⁵¹ It is estimated that in 1979 these institutions housed 360,000 people.¹⁵²

141 RODRIGUEZ, *supra* note 136.

142 PHILLIPS, Sara D. “There Are No Invalids in the USSR!”: A Missing Soviet Chapter in the New Disability History. *Disability Studies Quarterly*, 2009, vol. 29, no. 3.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

Parents that gave birth to a disabled child were compelled to send them to an institution for disabled children.¹⁵³ Few of these institutions had decent conditions. Disabled infants and young children were put into “lying down” rooms; they received only the most basic nutrition and medication; and they had no stimulation.¹⁵⁴ Often the children were not talked to, and thus never developed the capacity to understand language¹⁵⁵. Children that were “agitated” would be “tethered, restrained, and given powerful sedatives.”¹⁵⁶

The children that survived to adulthood were transferred at 16 or 18 to institutions for the elderly and disabled, along with any people that became disabled later in life.¹⁵⁷ These facilities were overcrowded, loud, unsanitary, understaffed, and chaotic. People slept in hallways, screaming could be heard frequently, there was not enough food to go around, and residents were often not given proper medication.¹⁵⁸ Some residents were chained to floors, others isolated, and still others kept sedated.¹⁵⁹ These institutions were where disabled people were sent to rot away and die.¹⁶⁰

This practice of inhumane institutionalization was genocide. The USSR government imposed on the disabled population conditions of life calculated to bring about its physical destruction. Disabled people that could not work in a traditional manner were sent away, to institutions where the conditions were so terrible, it was expected that they would die. They were deprived of basic necessities such as food, medication, and sometimes human contact. Restraints, sedation, isolation, and improper nutrition, sanitation, and medication ultimately lead to death for many disabled people in these institutions. The Soviet government targeted the disabled group, intending to remove the burden of unproductive workers from society.

3.3.2 South Sudan

In South Sudan, as recently as 2011, people that demonstrate evidence of a mental disability are imprisoned.¹⁶¹ Community members do not know how,

153 *Id.*

154 *Id.*

155 *Id.*

156 Human Rights Watch. *Abandoned to the State: Cruelty and Neglect in Russian Orphanages, Summary and Recommendations*. [online]. Available at: <https://www.hrw.org/legacy/reports98/russia2/Russ98d-02.htm#P274_21036>. Accessed: 01.12.2020

157 PHILLIPS, *supra* note 142.

158 *Id.*

159 Human Rights Watch. *Abandoned to the State: Cruelty and Neglect in Russian Orphanages, Childhood Doomed: Psychoneurological Internaty*. [online]. Available at: <<https://www.hrw.org/legacy/reports98/russia2/Russ98d-07.htm>>. Accessed: 01.12.2020

160 Phillips, *supra* note 143.

161 Human Rights Watch. *“Prison Is Not For Me” Arbitrary Detention in South Sudan*. [online]. Available at: <<https://www.hrw.org/report/2012/06/21/prison-not-me/arbitrary-detention-south-sudan>>. Accessed: 01.12.2020

cannot, or do not want to take care of these disabled people, so they are handed over to police custody, and placed in prison.¹⁶² Most of the disabled people in prison have not committed a crime, but imprisonment is justified by the belief that they pose a danger to themselves or the general public, by nature of their disability.¹⁶³

Most of the disabled people in prison are unable to appeal the decision to imprison them.¹⁶⁴ They do not know why they are being detained, do not have release dates, or a maximum period of detention.¹⁶⁵ Most have not met with a lawyer, and have not had a judge rule on their case.¹⁶⁶ Some are imprisoned without proper procedures, meaning that there is no documentation of them being in prison, or why they were put in prison in the first place.¹⁶⁷ With no procedures, no records, and no protections of their rights, these disabled people are left to languish and sometimes die in jail.

Conditions for the mentally disabled inmates are appalling. They are kept in situations significantly worse than other non-disabled inmates.¹⁶⁸ The mentally disabled are chained to the floor day and night.¹⁶⁹ They do not receive medical care unless a family member brings medication themselves.¹⁷⁰ Sometimes they are sedated by force.¹⁷¹ They sleep on overcrowded and unsanitary floors.¹⁷² They have no latrines, and are forced to defecate inside their cells, which are never cleaned.¹⁷³ Mentally disabled female inmates are mostly kept in solitary confinement, chained to trees or walls alone outside the prison compound.¹⁷⁴ On the other hand, the men are not protected from each other, and can get into violent fights.¹⁷⁵

Though this imprisonment is the result of inadequate resources, the inhumane conditions these disabled people face in prison are conditions calculated to bring about the destruction of this group. By treating this disabled group significantly worse than other inmate groups, the government has created conditions that foreseeably could bring about the destruction of the group. These disabled inmates are deprived of resources necessary for their survival, live in unsanitary

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

and unsafe conditions, and have no hope of release. The mentally disabled people have been imprisoned as a method of disposing of an inconvenient group.

3.4 Preventing Births

3.4.1 Eugenics

Eugenics is the practice of arranging reproduction to ensure desirable characteristics endure.¹⁷⁶ This program was practiced as early as the nineteenth century and reached its peak just before the second world war.¹⁷⁷ It was popular across the western world.¹⁷⁸ It was intended to improve the human race and build a stronger gene pool. In order to accomplish this, physically and mentally exceptional individuals were encouraged to parent children.¹⁷⁹ This was known as “positive eugenics”.

However, there is a darker side to eugenics, known as “Negative eugenics.” People that were deemed mentally inferior or deficient, or had certain genetic anomalies, were discouraged from procreation, often forcibly.¹⁸⁰ Proliferation of this practice led to distortions in the basic underlying ideology and justifications. As discussed above, a direct line can be traced from the practice of Eugenics to the Euthanasia program employed by Nazi Germany in World War Two.¹⁸¹

Negative eugenics most often took the form of forcible sterilization. In countries practicing negative eugenics, propaganda compared the impact of multiple generations of healthy individuals to multiple generations of inferior individuals. It was argued that healthy individuals would continue to produce healthy offspring, who would benefit society, while inferior individuals would only breed inferior children who would be a burden on hardworking citizens. Negative eugenics promoted ending the burden of inferior breeders.

Germany was not the only country participating in this dark practice—the US took part as well. In 1927, the US Supreme Court decided *Buck v. Bell*¹⁸². This was a landmark case that held forced sterilization of the intellectually disabled was constitutional.¹⁸³

Carrie Buck was an 18-year-old patient in the Virginia State Colony for Epileptics and Feeble-minded.¹⁸⁴ Buck’s mother was also a patient, and was also

176 WILSON, Philip K. *Eugenics*, *Britannica*. [online]. Available at: <<https://www.britannica.com/science/eugenics-genetics>>. Accessed: 01.12.2020

177 *Id.*

178 *Id.*

179 Personal Genetics Education Project, *supra* note 74.

180 *Id.*

181 WILSON, *supra* note 176.

182 *Buck v. Bell*, 247 U.S. 200, (1927).

183 *Id.*, p. 207.

184 *Id.*, p. 205.

labeled “feeble-minded.”¹⁸⁵ There is a law in Virginia that allows for sterilization of feeble-minded people if the person would “become a menace but if incapable of procreating might be discharged with safety.”¹⁸⁶ The superintendent of the facility issued an order to sterilize Buck after she became pregnant and gave birth to an illegitimate feeble minded child.¹⁸⁷ Buck contended that this violated her due process and equal protection rights.¹⁸⁸ The court however held that her forced sterilization would benefit society.¹⁸⁹ According to Justice Holmes, “three generations of imbeciles are enough.”¹⁹⁰ From the 1920s to the 1970s over 60,000 people were forcibly sterilized.¹⁹¹ *Buck v. Bell* has never been overturned.

This practice of forcible sterilization is genocide. The US government itself had an intent to destroy the group of disabled people. By not allowing births within the group, this legal practice ultimately was an attempt to stop the creation of the next generation and end the group. Buck and many like her, were and still are forcibly sterilized in an attempt to end the generations of imbeciles, thus ending the disabled group.

4 Conclusion

Disabled people throughout history have faced egregious violations of their basic human rights, yet the legal system has largely ignored them. Recent progress such as the United Nations Convention on the Rights of People with Disabilities may reflect a changing attitude and a willingness to acknowledge the unique challenges faced by the disability community. But there are challenges this group faces that are not unique, that could be remedied by expanding the application of our existing legal framework. Other distinct identity groups have faced genocide and have received the protection of the law. Disabled people face similar acts that meet all of the elements of the Genocide Convention. Yet the Convention has not been applied to the disabled group.

Disabled people were deliberately killed in the Holocaust. Nazi leaders deemed them “life unworthy of life” and authorized extermination in an attempt to create the perfect society. In Colombia disabled people were deliberately targeted because of their unique vulnerability. In Croatia, disabled people were massacred inside a school, and in the Democratic Republic of the Congo they were targeted because they were believed to be rebels in disguise.

185 *Id.*

186 *Id.*, pp. 205–206.

187 *Id.*, p. 205.

188 *Id.*

189 *Id.*, p. 207.

190 *Id.*

191 American Baby & Child Law Centers. *Involuntary Sterilization of Disabled Americans: An Historical Overview*. [online]. Available at: <<https://www.abclawcenters.com/blog/2018/11/06/involuntary-sterilization-of-disabled-americans-an-historical-overview/>>. Accessed: 01.12.2020

Disabled people have suffered serious bodily and mental harm. Nazi doctors and psychiatrists experimented on them. Disabled people were also human subjects for experiments as recently as 2019 in the United States.

Disabled people are subjected to conditions of life calculated to bring about their deaths and destruction of the group. In the USSR, disabled people were ranked, and those deemed to have no work capacity were placed in institutions. It was expected that institutionalization would eventually lead to their deaths. Disabled people in South Sudan are imprisoned and live in inhumane conditions, with no hope of release.

Disabled people have also been the target of Eugenics, a practice of forcible sterilization to prevent the continuation of the group.

The case studies described above are not the only instances of genocide disabled people have faced. There are, unfortunately, many more. Some of them are not documented well, while others are not documented at all. Some are ancient practices, while some are still ongoing. In some of these instances, if certain elements are established, there is an argument that the practice was genocidal. Targeting of a group, and intent to destroy that group in whole or in part are essential elements to establishing genocide.

Disability is a distinct identity, and a cohesive group. Just like race and ethnicity, disability is not an identity that a person can choose. And just like nationality and religion, this is a group that a person can join at any time. A person can be born into a religion or born with a disability. They can also convert to a new religion or experience an accident that causes a disability. The disabled group is similar enough to the four named groups in the convention that expansion would not require a new justification or explanation for the protected classes. Additionally, disability is a cohesive group. Disabled people have objective and subjective characteristics that separate them from other groups and bind them together as one cohesive group. Disability, just like race, can be separated from other groups based on objective physical characteristics. Additionally, because of changing definitions and advances in technology, disabled people are able to develop subjective characteristics and identify as part of a community. Most nations also have domestic laws that acknowledge disability as a cohesive group. Finally, the fact that perpetrators treat disability as a cohesive group should be reason enough to give disabled people protection under the Genocide Convention.

In order to amount to genocide, an action must be committed with the intent to destroy a group, in whole or in part, by killing, causing serious harm, inflicting conditions of life calculated to bring about destruction of the group, prevent births, or forcibly transfer children out of the group. Intent is established when the target of destruction is the group, or when individuals are targeted because of their membership in the group, such that the group itself becomes a victim, not merely the individual. Additionally, disabled people experience genocide both in

times of war and times of peace. Genocides against disabled people in times of war may be the result of unique vulnerabilities, while genocides in times of peace seem to garner support from more factions of society.

How can the world move from extolling these actions as virtuous to condemning them? The first step is to recognize these actions for what they are: practices of extreme prejudice amounting to genocide. The international community must expand the current application of the Genocide Convention to include those with disabilities as a protected group. The world will not grow to be inclusive of this identity group until we are able to provide them protection from egregious human rights violations and justice after genocide. A group cannot hope to advance their civil rights on a global scale until the most basic of human rights are assured.

Does this analysis open up the convention to arguments that even more distinct identity groups should be included? Maybe, maybe not. But if we have the ability to protect particularly vulnerable people, shouldn't we do so?

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