Giving Visibility to the Impact of Slavery Crimes on Persons with Disabilities

Submission to the Prosecutor of the International Criminal Court in Response to the Call for Inputs on the Formulation of a New Policy on Slavery Crimes

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Introduction

We welcome the call by the Prosecutor of the International Criminal Court, Mr. Karim A.A. Khan KC, for public submissions to inform his Office's new Policy on Slavery Crimes. We are in full support of the formulation of such a Policy and believe it would enhance the investigation and prosecution of these heinous crimes. Although attention to slavery crimes perpetrated against persons with disabilities has not been commensurate with the outsize risks they face, the available evidence shows that persons with disabilities are routinely subjected to and are at elevated risk for slavery crimes.

This memorandum addresses a major lacuna in the modern international criminal law framework, namely, the failure to specify, in conformity with international human rights law and international humanitarian law as well as the jurisprudential legacy of Nuremberg, that persons with disabilities are at particular risk of experiencing atrocity crimes, including but not limited to slavery crimes. The development of a new Policy on Slavery Crimes represents a first step in redressing the invisibility of persons with disabilities in the modern international criminal law framework and, indeed, in the policy instruments of the International Criminal Court which to date are without a much-needed Policy on Disability.[1]

The evidence shows that persons with disabilities are routinely persecuted and are at elevated risk in relation to slavery crimes. While acknowledging that there has been a woeful lack of attention to these issues in the documentation of slavery crimes and their impact on persons with disabilities, nonetheless, an evidence base is emerging in contemporary international human rights documentation, academic literature and the case law, while attention is likewise being drawn to historical examples of such atrocity crimes.

[1] The formulation of such a Disability Policy has been proposed by researchers at the Harvard Law School Project on Disability and by the UN Special Rapporteur on the Rights of Persons with Disabilities. William I. Pons, Janet E. Lord, & Michael Ashley Stein, *Disability, Human Rights Violations, and Crimes Against Humanity*, 116 AM. J. INT'L L. 58, 91 (2022) ("The lack of policy on persons with disabilities is surprising given the adoption of the CRPD in 2006 the provision in Article 11 that tie CRPD principles not only into human rights law, but also into IHL and other international law domains including international criminal law. Accordingly, the adoption of a specific policy on persons with disabilities is long overdue and should be a top priority for the Office of the Prosecutor (OTP)."); UN Special Rapporteur on the Rights of Persons with Disabilities, Rep. on Peacebuilding and the inclusion of persons with disabilities, ¶ 87, U.N. Doc. A/78/174 (July 13, 2023) (recommending "[t]he International Criminal Court should consider guidelines on the investigation and prosecution of violations of international criminal law against persons with disabilities").

Recognition of disability-based persecution[2] not only helps to unearth the discriminatory intent that can lead to slavery crimes being perpetrated against persons with disabilities; it also helps shed light on individuals who are uniquely at risk because of multiple and intersecting forms of discrimination. For example, race, gender, poverty, and disability have frequently come together and created the conditions that have led to slavery crimes, as well as other historical and longstanding structural discrimination and fundamental rights deprivations experienced by individuals with disabilities. To take but one example, African Americans with disabilities were routinely held in segregated psychiatric hospitals, such as the Crownsville Hospital for the Negro Insane in the State of Maryland,[3] where they were forced to engage in unpaid labor and were exploited in other ways, including medical experimentation.

To aid the Prosecutor in developing a Policy on Slavery Crimes, this memorandum examines the following topics: 1) Slavery Crimes and Disability: The Nexus Explained; 2) Forms of Slavery Crimes Against and by Persons with Disabilities; 3) the Prohibition of Slavery Crimes under the Convention on the Rights of Persons with Disabilities; 4) Recommendations for Ensuring the Visibility of Persons with Disabilities in an OTP Policy on Slavery Crimes.

Slavery Crimes and Disability: The Nexus Explained

Recognition of disability a basis for the perpetration of slavery crimes is essential to combat the disproportionate risks of such crimes faced by persons with disabilities. Targeting persons with disabilities for slavery crimes is a phenomenon rooted in structural, disability-based discrimination and amounts to disability-based violence and persecution. Moreover, the heightened risk is due both to the underlying impairments of persons with disabilities and also to their overrepresentation in situations of risk and among other marginalized, at-risk groups. Last, the harms of slavery crimes suffered by persons with disabilities may also be disability-specific since slavery crimes not only can result in significant trauma and impairment contributing to new physical and psychosocial disabilities, but for persons who already have disabilities, these crimes can aggravate pre-existing physical, sensory and psychosocial disabilities or leading to secondary disabilities.

The systemic inequality that persons with disabilities experience creates a multitude of risks that place them at heightened precarity, enhancing the likelihood that they may fall victim to slavery crimes.[4] Contextualizing risks in the context of disability – in combination with other attributes – is important. Persons with disabilities – a highly diverse group which includes individuals with physical, sensory, mental, cognitive, behavioral, or other visible and invisible disabilities – experience stigma and discrimination rooted in cultural and societal conceptions around disability. Other factors reinforce risk and the circumstances faced by persons with disabilities that render them particular targets for perpetrators of slavery crimes. These factors include: structural inequality and discrimination on the basis of disability, lack of social support networks, external and internalized stigma, limited legitimate employment opportunities, limited education and training opportunities, insufficient social protection and

[2] We note that the terminology around slavery crimes and their perpetration against persons with disabilities is not uniform. Thus, this memorandum uses various terms that should be understood as falling under the umbrella of slavery crimes, howsoever they are denominated in the case law, literature, and human rights documentation that we cite.

[3] Letter from Susan Georgin, Exec. Dir., ACLU of Maryland et al. to Martin O'Malley, Governor, Maryland (Feb. 28, 2014), https://www.aclu-md.org/sites/default/files/field_documents/crownsville_8_2_13_finalwsigs_1.pdf.

[4] We use the term "slavery crimes" to denote the two separate and distinct crimes of enslavement and slave trading. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517, 536–37; *see* Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 542-54 (2022). Further, we acknowledge the separate but overlapping regime of human trafficking and the various terms used to describe "modern" or "contemporary" forms of slavery.

supports, and disproportionate experience of poverty.[5] This literature points to the particular contexts of modern slavery and its specific impact on persons with disabilities—notably, sex trafficking, domestic servitude in private home settings and forced labor in informal economies, such as agricultural settings.[6]

Slavery crimes against persons with disabilities are often exacerbated in situations of heightened risk and precarity, such as displacement, migration, the increased globalization of economic activities, armed conflict and foreign occupation, and violent extremism and terrorism. Those fleeing conflict, natural disasters, or repression of their rights, or those seeking to migrate for work, are particularly vulnerable to exploitation and migration is on the increase. The widescale deterioration of human rights conditions in the face of multiple crises only serves to increase risks for groups already vulnerable to slavery crimes.[7] Crisis leads to the breakdown of health and rehabilitation systems, damage to essential infrastructure, departure or caregivers, and risks of other trauma that can create or exacerbate psychosocial conditions.[8]

Disability-based persecution severely deprives a person or persons of the fundamental right to be free from discrimination on the basis of disability in connection with other fundamental rights deprivations. These are contrary to international law. For example, it may deprive a person of the right to be free from slavery or the slave trade or servitude. It can also drive violations of other human rights, including the right to life; to be free from torture or other inhumane or degrading treatment or punishment; freedom of assembly, opinion, expression, and movement; and the rights to equality, dignity, bodily integrity, family, privacy, security, education, employment, property, political or cultural participation, to access to justice or health care. Human rights violations can constitute a severe deprivation of fundamental rights on their own or when considered cumulatively. The deprivation of fundamental rights may be enforced by means of violence or occur via the imposition of regulations (e.g., forced institutionalization, forced treatment, segregation in schools, deprivation of legal capacity) that can impact persons in every aspect of life. Examples include the right to marry, found a family, enjoy sexual and reproductive autonomy, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist. Disability-based persecution may be used by perpetrators to enforce harmful social constructs and criteria through imposed discriminatory regulations that violate fundamental rights.

Emerging literature on the linkage between slavery and disability is helping to expose the overrepresentation of persons with disabilities in international human trafficked populations.[9] Reporting is

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[5] *See* Christopher Carey & Sarahfina Peterson, *Trafficking People with Disabilities: Legal Analysis*, 26 CARDOZO J. EQUAL RTS. & SOCIAL JUSTICE 47 (2020); A. Nichols & E. Heil, *Human Trafficking of People with a Disability: An Analysis of state and federal cases*, 7 DIGNITY 1 (2022). *See also* Nora Groce et al., *Disabled Beggars in Addis Ababa, Ethiopia* (Geneva: ILO, 2013) at 13.

[6] Carey & Peterson, *supra* note 5. *See also* Disability Rights International & Women Enabled International, Comments on the Committee on the Elimination of Discrimination Against Women's Draft General Recommendation on Trafficking in Women and Girls in the Context of Global Migration (May 14, 2020).

[7] *Global Slavery Index*, WALKFREE.ORG, https://www.walkfree.org/global-slavery-index/map (last visited Apr. 30, 2024).

[8] UN High Comm'r for Hum. Rts., Report on the rights of persons with disabilities under article 11 of the CRPD relating to situations of risk and humanitarian emergencies, U.N. Doc. A/HRC/31/30 (Nov. 3, 2013); UN High Comm'r for Hum. Rts., Report of the Special Rapporteur on the Rights of Persons with Disabilities on the Protection of the Rights of Persons with Disabilities in the Context of Military Operations, U.N. Doc. A/77/203 (July 20, 2022).

[9] *See, e.g.*, Polaris Project, *Individuals with Disabilities May Face Increased Risk of Human Trafficking* (Aug. 15, 2018); Emma Discher, *5 Charged for Holding Autistic Amite Woman in Cage, Accused of Beating Her and Other Heinous Acts*, THE ADVOCATE (July 26, 2018); J.J. Larsen & D.P. Durgana, *Measuring Vulnerability and Estimating Prevalence of Modern Slavery*. 30 CHANCE 21–29 (2017); L.A.A. Dalu, *The Crime of Human Trafficking against Persons with Disabilities. A comparative study*, 10 J. SOC. SCI. 303–316 (2021); Caroline Jagoe,

likewise noting disability as a risk factor for slavery crimes. For instance, the United States Department of State reporting on human trafficking recognizes that "people with disabilities [are]… especially vulnerable to human trafficking."[10] Documentation by human rights organizations is likewise exposing disability-based risks.[11] The phenomenon is global with reports on slavery crimes committed against persons with disabilities in diverse geographies, including Austria,[12] China,[13] Congo,[14] Ethiopia,[15] Egypt,[16] Guatemala,[17] Mexico,[18] Romania,[19] South Korea,[20] and the United States.[21] Still other work exposes how particular sub-groups of individuals within the disability community may face heightened risk on account of factors such as age, communication barriers, intensified support needs, and isolation, among others.[22]

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Forms of Slavery Crimes Against and by Persons with Disabilities

Slavery crimes have been and continue to be perpetrated against persons with disabilities, often specifically because of their disability identity. Such crimes take many forms, including forced labor and

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Pei Ying Natalie & Gillian Wylie. *Disability and the Risk of Vulnerability to Human Trafficking: An Analysis of Case Law,* JOURNAL OF HUMAN TRAFFICKING, 1–15 (2022).

[10] U.S. Dep't of State, *Trafficking in Persons Report* (2016). *See also* U.S. Dep't of State, Challenges in Protecting Vulnerable Populations [Fact Sheet] (2016).

[11] Anti-slavery Australia, *Modern Slavery* (n.d.).

[12] U.S. Dep't of State, *Trafficking in Persons Report* 77 (2015) (persons with physical and mental disabilities from Eastern Europe and Romani children trafficked and made the victims of forced begging in Austria).

[13] U.S. Dep't of State, *Trafficking in Persons Report* (2012) (reporting on people with mental and developmental disabilities enslaved in Chinese kilns).

[14] U.S. Dep't of State, *Trafficking in Persons Report* (2015), p. 34.

[15] Groce & Murray, *supra* note 5, at 13.

[16] Iman Bibars, *Street children in Egypt: from the home to the street to inappropriate corrective institutions*, 10 ENVIRONMENT AND URBANISATION 201 (1998) (study on street children in Egypt, identified two of the nine children in case studies as children intentionally maimed by relatives in order to enhance their ability to beg (a girl, partially blinded by her father at age 5; a boy ―forced to lose both his legs‖ by an uncle at age 6).

[17] Patients at the Federico Mora Hospital v. Guatemala, Precautionary Measures, Inter-Am. Comm'n Hum. Rts., No. No. 370-12 (Nov. 12, 2012) (precautionary measures applied buy Inter-American Commission in relation to women psychiatric patients trafficked to local male prison).

[18] DISABILITY RIGHTS INTERNATIONAL, NO JUSTICE: TORTURE, TRAFFICKING AND SEGREGATION IN MEXICO 17 (2015); CRPD Committee, Concluding Observations and Recommendations, Mexico, U.N. Doc. CRPD/C/MEX/CO/1 (2022) (highlighting "[r]eports of forced labour and trafficking for the purpose of labour exploitation of persons with disabilities" and recommending data collection on forced labour, exploitation and harassment, and trafficking for the purpose of labour exploitation, of persons with disabilities, disaggregated by sex, gender, indigence, urban and rural living environment and type of impairment, together with enhanced efforts to prevent and punish forced labour, exploitation and harassment, and trafficking for the purpose of labour exploitation of persons with disabilities).

[19] Adelina Tamaş et al., *Trafficking in Persons for Begging: Romania Study* (2013).

[20] Foster Klug, *The islands of abuse: Inside South Korea's slave farms for the disabled*, THE INDEPENDENT (Jan. 2, 2015).

[21] *United States v. Kozminski*, 487 U.S. 931 (1988) (Prosecutors brought a federal criminal case involving men with cognitive disabilities held on a dairy farm in Michigan under the involuntary servitude statute but the Supreme Court ruled that because the perpetrators did not use violence or threats of violence, the convictions under that statute could not be sustained). *See also* Nichols & Heil, *supra* note 5 at 7.

[22] Snowdrop Project, *Learning Disabilities and Modern Slavery: Post-Event Report Summary* (Jan. 2022).

[23] *Id*.

other types of economic exploitation, child and adult sexual exploitation, and medical exploitation, all of which can constitute internationally recognized crimes of enslavement and slave trading. In many instances, victims are subjected to more than one form of exploitation (e.g., forced labor and sexual servitude). Thus, it is important to recognize the overlap and co-occurring violations. Examples drawing from the evidence are provided in the sub-sections that follow.

Forced Labor

Persons with disabilities have long been targeted for forced labor and economic exploitation by both individuals and sophisticated networks, both in the context of segregated, institutional settings and in the community. A 2016 book canvasses traces the history and legacy of institutional peonage in the United States where for over a century, public and private institutions across the country exploited persons with disabilities through unpaid, forced labor.[24] Such abuses have an entrenched history rooted in the segregation of people with disabilities in large-scale institutions which could not have been built or functioned without the widespread social and professional acceptance of forced inmate labor. In the 19th century, experts justified life-long incarceration of the disabled for the purposes of forced labor as "the best remedy to the restlessness, viciousness, and discontent of feeble-minded persons."[25] In 1974, World Health Organization advisor and institutional superintendent Malcolm J. Farrell reflected that when he arrived at the Walter E. Fernald State School in Massachusetts in the late 1930s, inmates "were treated like teams of oxen."[26] Subsequent attempts at reform, ranging from boarding inmates out into the community to constructing sheltered workshops have succeeded only in shifting the perception of forced labor, while leaving in place the underlying forms of abuse that bear striking resemblance to the fundamental attributes of enslavement.[27]

More sophisticated syndicates have also targeted persons with disabilities for economic exploitation, as in the case of *EEOC v. Hill Country Farms*, where a turkey processing plant in Iowa contracted with a state institution for people with intellectual disabilities in Texas to send them several dozen intellectually disabled men to spend decades working long hours for meager pay (approximately 41 cents per hour) while living in squalor in a dilapidated schoolhouse and enduring verbal and physical abuse at the hands of their supervisors.[28]

However, not all courts have been willing to accord protection to victims. Prior to the passage of the Trafficking Victims Protection Act (TVPA),[29] the United States Supreme Court found that psychological coercion was not an element of involuntary servitude and that mental incompetents" were not entitled to special protections.[30] There, dairy farmer, Kozminski, used threats and psychological coercion to force two men with intellectual disability to work 17-hour days on his property for without pay, yet the Court found unanimously that the Thirteenth Amendment protected only against legal or physical coercion. This, in turn, led to the adoption of the TVPA.[31]

[24] RUTHIE-MARIE BECKWITH, DISABILITY SERVITUDE: FROM PEONAGE TO POVERTY (2016).
[25] E.P. Bicknell, *Custodial Care of the Adult Feeble-Minded*, *J. PSYCHO-ASTHENICS.* 51 (1896).
[26] Jean Dietz, *Giving the Retarded a Chance*, THE BOSTON GLOBE, April 28, 1974.
[27] Chris Serres & Glenn Howatt, "How Minnesota Fails the Disabled," STAR TRIBUNE (Minneapolis), November 8, 2018.
[28] *E.E.O.C. v. Hill County Farms*, 899 F. Supp. 2d 827 (S.D. Ia. 2012).
[29] Trafficking Victims Protection Act of 2000, 18 USC §1589.
[30] *United States v. Kozminski*, 487 U.S. 931 (1988).
[31] Trafficking Victims Protection Act of 2000, 18 USC §1589.

Finally, legal frameworks that permit segregated employment of persons with disabilities can be exploited to create similar conditions of modern slavery.[32] Investigations into sub-minimum wages by employers who hire persons with disabilities are bringing to light the interrelationship between labor exploitation, forced labor and disability.[33]

Forced Begging

Forced begging is another form of slavery crime for which persons with disabilities, especially those with visible physical disabilities, are deemed to be at high risk. A study on begging in Romania showed a higher ratio of person with physical or mental disabilities engaged in forced begging relative to other forms of trafficking.[34] That study reported exploitation of persons with disabilities through manipulation and false promises of expensive medical interventions abroad or the purchase of prosthesis or assistive products and/or various expensive medical interventions that cannot be performed in Romania.[35] Another study conducted by the International Labor Organization likewise demonstrated the link between disability, poverty and forced begging.[36]

Children with disabilities have been targeted and forced to beg because of their disabilities—especially if highly visible—to draw sympathy and charity from the public.[37] The 2019 US State Department trafficking Report found that criminal gangs operating in Iraq targeted internally displaced and refugee children with disabilities for forced begging and ack oweldged similar types of exploitation in both Bulgaria[38] and Burundi.[39]

In societies where children with disabilities are not expected to attend school, communities may be less likely to question why a disabled child is begging. All too often, young people with disabilities are regarded as undesirable and may even be subjected to trafficking by their own families. Children with less visible disabilities, such as cognitive or behavioral disabilities, are similarly at risk, as they also may be stigmatized by their families and communities and may not be in school due to bias or lack of understanding of how to provide reasonable accommodations.

Sex Trafficking

Persons with disabilities are targeted for sex trafficking and sexual slavery on an individual basis and in cases involving multiple victims with disabilities. Research points to girls with disabilities being sex trafficked.[40] Other research focuses on the precarity of individuals with specific types of disabilities, such

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[32] Linda Steele, *Ending Disability Segregated Employment: "Modern Slavery" Law and Disabled People's Human Right to Work*, INT'L J. LAW IN CONTEXT (2024, forthcoming) (on file with authors).
[33] US Commission on Civil Rights, Subminimum Wages: Impacts on the Civil Rights of People with Disabilities (2020) (finding among other things that persistent failures in regulation and oversight of the exemption under the Fair Labor Standards Act—the section 14(c) waiver program—which permits employers to pay less than the minimum wage to individuals with disabilities warrant its repeal as it is failing to satisfy its legislative goals.)
[34] Tamaş et al. *supra* note 19.
[35] *Id*. at p. 32.
[36] Groce & Murrary, *supra* note 5, 7-8.
[37] UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 250 (June 2019) https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf.
[38] *Id.* at 113.
[39] *Id.* at 123.
[40] Franchino-Olsen, H., Silverstein, H. A., Kahn, N. F., & Martin, S. L. (2020). Minor Sex Trafficking of Girls with Disabilities, 13 INTERNATIONAL JOURNAL OF HUMAN RIGHTS IN HEALTHCARE 97–108 (2020).

as the study addressing sex trafficking of girls with intellectual disabilities.[41] Research has also noted the risk of young people with learning disabilities being exploited and sex trafficked.[42] These risks are amplified for children with disabilities placed in orphanages and institutions, as reporting and advocacy by Disability Rights International has documented in Ukraine[43] and Guatemala.[44]

Sex trafficking impacts girls and women as well as men with disabilities.[45] In 2018, Robert King pled guilty to conspiracy to commit trafficking in persons for having exploited 15 males with psychosocial disabilities as part of a prostitution ring in Danbury, Connecticut.[46]

The Human Trafficking Pro Bono Legal Center indicated that numerous sex trafficking cases they tracked involved individuals with intellectual or mental disabilities and led to human trafficking convictions in Michigan, Ohio, Pennsylvania and Virginia.[47] They also reported on a case in Missouri where a trafficker forced a woman with a mental health disability to engage in commercial sex to pay off a drug debt.[48]

Forced Captivity for Benefits Exploitation

Persons with disabilities may also find themselves held in captivity for benefits exploitation in countries with financial compensation schemes for persons with certain disabilities.[49] In the United States, for example, accumulated assets make individuals with disabilities who may be unable to advocate for themselves targets include Social Security benefits, food stamps, retirement, and COVID-19 stimulus checks. Social marginalization may make this more likely to occur where who are isolated and due to

[41] Joan A. Reid, *Sex Trafficking of Girls with Intellectual Disabilities: An exploratory mixed methods study*, 30 *SEXUAL ABUSE* SAGE JOURNALS 107–131 (2018).
[42] Anita Franklin & Emilie Smeaton, *Recognising and Responding to Young People with Learning Disabilities who Experience, or are at Risk of, Child Sexual Exploitation in the UK*, 73 CHILDREN AND YOUTH SERVICES REVIEW, 474–481 (2017). See also Nick Stanley, et al, *The Health Needs and Healthcare Experiences of Young People Trafficked into the UK*, 59 CHILD ABUSE & NEGLECT 100, 103-104 (2016).
[43] Disability Rights International, *No Way Out: The Exploitation and Abuse of Children in Ukraine's Orphanages* (2015) (observing that absent government oversight, children detained in institutions are at-risk of sexual abuse, trafficking for sex, pornography, or sale of bodily organs).
[44] DRI brought a case before the Inter-American Commission exposing trafficking from a women's psychiatric hospital to the prison across the street for sexual exploitation. The case resulted in a precautionary measures decision by the Inter-American Commission. *See Patients at the Federico Mora Hospital, Guatemala*, MC 370-12, Nov. 12, 2012; Case 13.524 – 334, *Patients of the Federico Mora Hospital vs. Guatemala*. DRI has also brought attention to the plight of the survivors of the Hogar Seguro orphanages in Guatemala where 41 girls were burned to death after protesting their own trafficking at the institutions. A hearing on the case appears on the official website of the Inter-American Commission on Human Rights. *See also* Eric Rosenthal, *The Guatemala Fire Tragedy Shows Why its Time to Get Rid of Orphanages*, THE WASHINGTON POST, March 22, 2017; DRI, *Still in Harm's Way: International voluntourism, segregation and abuse of children in Guatemala* (2018).
[45] Mark Sherry, *SEX TRAFFICKING, ACTIVISM AND DISABILITY* 9-10 (2019) [on file with authors].
[46] *State v. King*, 300 A.3d 626, 628–29 (Conn. App. Ct. 2023).
[47] Human Trafficking Pro Bono Legal Center, *Trafficking of Persons with Disabilities in the United States Fact Sheet* (2016).:
[48] *United States v. Wallace*, 605 F.3d 477 (8th Cir. 2010) (Wallace, one of two sisters who convinced an unrelated 18-year old woman with intellectual disabilities to move into their St. Louis home, promising to take care of her, but instead stealing her disability benefits and holding her in forced prostitution, pled guilty and was sentenced to 20 years in federal prison.)
[49] Anna Thomas & Heather Strickland, *Benefits Trafficking: Human trafficking of older adults and adults with disabilities*. 4 FRONT REHABIL SCI. 305926 (2024); *U.S. ATT'Y'S OFFICE E. DIST. OF PA., GUILTY PLEA IN CASE OF DISABLED ADULTS HELD CAPTIVE IN SUBHUMAN CONDITIONS (2015);* Emma Discher, *5 Charged for Holding Autistic Amite Woman in Cage, Accused of Beating Her and Other Heinous Acts*, THE ADVOCATE (July 26, 2018); Michael Vinsanau, *Woman with Autism Kept in Cage Recalls Horrific Abuse after Family Members Sentenced*, WDSU NEWS, Nov. 1, 2019.

systemic failures in support networks. In such cases, perpetrators may pose as a victim's caregiver or may in fact be the caregiver.

Such exploitation is often paired with sexual or labor servitude and/or living in squalid conditions. For example, in 2009, two defendants were convicted in US federal court for abusing victims at a residential care facility in Kansas.[50] There, the Kaufmans, a doctor of social work, and a licensed nurse, operated an unlicensed residential care facility for persons with mental illness for more than 20 years in which they forced victims to perform nude manual labor and record videos of sex acts, while also stealing Social Security benefits and fraudulently billing Medicare for bogus services.

Persons with Disabilities as Perpetrators of Slavery Crimes

It should not be assumed that persons with disabilities are always hapless victims of slavery crimes. They may be voluntary or involuntary accomplices and primary actors in such crimes. Research exposed three cases wherein persons with disabilities were themselves traffickers.[51] One case involved domestic servitude, with victims forced to care for the traffickers' disabled children, another involved trafficked women were sold to male customers for sex and marriage, most of whom were elderly or disabled and in all three cases the perpetrators were diagnosed with mental health disorders. The three cases involved sexual exploitation while one also involved domestic servitude. In all three cases, the trafficker's disability was considered during prosecution of the crime and all three disclosed that persons with disabilities were among the consumers of the services made available through trafficking.

In another instance traffickers, some of whom were also deaf, brought 55 Mexican nationals who were deaf to the United States to beg and sell trinkets on the New York City subway. In the criminal case that followed, 2 of the 20 defendants— who were also the leaders of the trafficking ring— were also deaf.[52]

The Convention on the Rights of Persons with Disabilities Expressly Prohibits Slavery Crimes

Significant developments have occurred in the progressive development of international disability law since the adoption of the Rome Statute more than two decades ago. The adoption in 2006 of the Convention on the Rights of Persons with Disabilities (CRPD)[53] makes explicit that persons with disabilities are among the pantheon of groups receiving targeted human rights protection.[54] This recognition in a core international human rights convention following decades of neglect has brought about significant change across international, regional, domestic, and institutional frameworks.[55] Of specific note, the United Nations (UN) adopted a system-wide Disability Strategy in 2019.[56] The increase

[50] *United States v. Kaufman*, 546 F.3d 1242, 1246 (10th Cir. 2008) (for over 15 years, the Kaufmans had directed the severely mentally ill residents of an unlicensed group home to perform sexually explicit acts and farm labor in the nude while maintaining that these acts constituted legitimate psychotherapy for the residents' mental illnesses).
[51] Jagoe, Natalie & Wylie, *supra* note 9.
[52] *United States v. Paoletti-Lemus*, No. 1:97-cr-00768-NG-1 (E.D.N.Y. Apr. 7, 1998).
[53] Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].
[54] *See* Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007), *reprinted in* NUSSBAUM AND LAW 3 (Robin West ed., 2015), *reprinted in* VULNERABLE AND MARGINALIZED GROUPS AND HUMAN RIGHTS 665 (David Weissbrodt & Mary Rumsey eds., 2011).
[55] *See* Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 U. WASH. L. REV. 449 (2008) (describing practical efforts at and implications of CRPD domestication).
[56] United Nations, UN Disability Inclusion Strategy (2019). Other notable developments include: IASC, Guidelines, Inclusion of Persons with Disabilities in Humanitarian Action, 2019. These follow on earlier guidelines on mental health issues. *See* IASC Guidelines for Mental Health and Psychosocial Support in Emergency Settings, 2007. The

in attention being paid to disability-related human rights most directly applicable to the international criminal domain was the adoption of a 2019 Security Council Resolution emphasizing the "need for States to end impunity for criminal acts against civilians, including those with disabilities" and to warrant their "access to justice and effective remedies and, as appropriate, reparation."[57]

The CRPD promotes and protects the rights of persons with disabilities ***and includes protection from slavery crimes***.[58] In addition to the CRPD, several specific international frameworks govern slavery crimes and those instruments should be read together with the provisions of the CRPD.[59]

Article 11 (Situations of risk) of the CRPD makes this relational notion explicit and points to the need to abide by international law writ large during times of heightened risk.[60] Article 11 requires the engagement of the larger protection framework stemming from international humanitarian law, refugee law, criminal law, labour law, the conventions against statelessness, slavery and the slave trade and international human rights law instruments (among other domains). Accordingly, Article 11 reinforces and complements the regional and international law regimes for victims of slavery crimes and trafficking, in particular in cases in which explicit disability equality provisions are absent from international agreements. It is important to recognize that persons with disabilities retain the concurrent protection of those legal instruments.

Several cross-cutting principles and provisions of the CRPD should serve as guidance in the drafting of an OTP Policy as they will help to ensure that the Policy is disability-competent and grounded in international disability rights principles. Article 5 of the CRPD, on equality and non-discrimination provide an explicit prohibition against disability discrimination.[61] Article 4(3) together with Article 3 underscore the obligations of participation through the adoption of effective processes and the allocation of the resources necessary to ensure that diverse groups of persons with disabilities have opportunities to participate in every stage of policy development, implementation and monitoring at each level of government, at the local, national, regional and international levels.[62] Article 13 of the CRPD addresses access to justice and accountability, requiring the provision of appropriate, accessible and accurate information and mechanisms in order to ensure that all women and girls whose rights have been directly and indirectly affected by crimes are provided with adequate and timely remedies.[63]

CRPD Article 27 on work and employment also addresses slavery crimes explicitly. It provides: "States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour."[64] CRPD Article 16 on freedom from violence, exploitation and abuse helps expose the circumstances that may give rise to heightened risk for persons with disabilities.[65] Moreover, Article 16 obliges States both to prevent and protect persons with

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revised *Integrated Disarmament, Demobilization and Reintegration Standards* of the Inter-Agency Working Group on Disarmament Demobilization Reintegration include a module on disability inclusive disarmament, demobilization and reintegration.

[57] *See* UN Security Council Resolution 2475, S/res/2475 (June 20, 2019).

[58] Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

[59] This includes but is not limited to the following: The Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practice Similar to Slavery, Apr. 30, 1957, 266 U.N.T.S. 3.

[60] CRPD, at art. 11.

[61] CRPD, at art. 5.

[62] CRPD, at art. 4(3).

[63] CRPD, at art. 13.

[64] CRPD, at art. 27.

[65] CRPD, at art. 16.

disabilities from all forms of exploitation, violence and abuse,[66] and also "to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted."[67] CRPD Article 17 on personal integrity makes explicit the often-forgotten notion that persons with disabilities deserve the protection of their physical and mental integrity on an equal basis with others – and that includes in situations of risk.[68] This requires attention to their accumulated disadvantages rooted in structural inequality and the heightened risk they experience in particular contexts.

The positive obligation of States parties to prohibit slavery crimes is reinforced by international criminal law, including the Rome Statute of the International Criminal Court (Rome Statute),[69] in which enslavement, sexual slavery and enforced prostitution are recognized as crimes that may fall within the jurisdiction of the Court. Unfortunately, the Rome Statute neglected to follow the jurisprudential legacy of Nuremberg in which the persecution of persons with disabilities by the Nazi regime was found to constitute crimes against humanity. A further omission that ought to be remedied is the failure to differentiate between the crimes of enslavement and slave trading in the Rome Statute. Obligations flowing to non-State actors to respect the prohibition of trafficking also arise from the peremptory norm (jus cogens) prohibiting slavery, the slave trade and torture.

States parties bear a legal obligation to respect and ensure the rights set out in the CRPD to anyone within their power or effective control, even if not situated within their respective territories. The direct obligation of States parties to prevent, investigate, prosecute and punish slavery crimes committed against persons with disabilities and to provide redress to victims extends to the acts or omissions of all perpetrators, including private persons, family members and intimate partners, State-mandated actors and officials, organizations and businesses, as well as non-State actors, including armed terrorist groups.[70]

Ensuring the Visibility of Persons with Disabilities in an OTP Policy on Slavery Crimes

In light of the foregoing, we recommend specific enumeration of persons with disabilities in an OTP Policy on Slavery Crimes, a protected group under international law, which will assist in remedying the significant drafting oversight in the Rome Statute (and indeed in the International Law Commission's Draft Articles Prevention and Punishment of Crimes against Humanity).[71] Ensuring the visibility of persons with disabilities will help underscore state obligations to protect persons with disabilities, reinstate the Nuremberg jurisprudential legacy in relation to the Nazi slavery crimes and other atrocities perpetrated against person with disabilities, and align with current developments in international law.[72] Specific recommendations regarding making persons with disabilities and their heightened risk in relation to slavery crimes include the following:

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[66] *Id*.
[67] *Id.* at art. 16.
[68] *Id.* at art. 17.
[69] Rome Statute of The International Criminal Court, art. 7, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.
[70] CRPD, Article 5.
[71] *Draft Articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries*, *in* Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 (2019).
[72] *See generally* *Accounting for Disability in International Humanitarian Law,* 922 INTERNATIONAL REVIEW OF THE RED CROSS 60-98 (2022); William I. Pons, Janet E. Lord, & Michael Ashley Stein, *Disability, Human Rights Violations, and Crimes Against Humanity*, 116 AM. J. INT'L L. 58, 91 (2022); Janet E. Lord, Willima Pons and Michael Ashley Stein, *Addressing the Accountability Void: War Crimes against Persons with Disabilities*, 922 INTERNATIONAL REVIEW OF THE RED CROSS 465-483 (2022); Janet E. Lord, Rosemary Kayess, William Pons and Michael Ashley Stein, *The UN Process for a Crimes against Humanity Treaty. Will it Account for Persons with Disabilities?* JUST SECURITY, May 26, 2023.

- Provide explicit recognition in the OTP Policy on Slavery Crimes that disability-based persecution may target individuals with disabilities and their families and other associates on account of their disability. Acts of disability-based persecution committed against both children and adults with disabilities can include, for example, forced marriage, sexual enslavement, domestic servitude, involuntary captivity for financial exploitation, forced labor, among others.
- Acknowledge that while there is a dearth of information and awareness of disability-based persecution crimes within international crimes documentation and accountability efforts, there is ample evidence that persons with disabilities are uniquely at risk.
- Clarify that disability-based persecution may target persons with disabilities specifically on account of their impairment and that acts of disability-based persecution committed against persons with disabilities may include, for example, forced labor, forced begging, sex trafficking, involuntary servitude, benefits exploitation, among others.
- Recognize that systemic and structural forms of segregation and isolation of persons with disabilities in institutional settings, such as orphanages, psychiatric hospitals, and social care homes, puts them at unique risk for slavery crimes.
- Support and reflect a disability-inclusive approach to reparations (along with an intersectional approach to reparations), taking into account the disability-related impact on, as well as the harm caused to, and suffering of, the victims affected by disability-based persecution for which the individual has been convicted.
- Call attention to the need to ensure that victims of slavery crimes who are individuals with disabilities have effective access to justice, including the provision of disability-related reasonable accommodations they require and other supports to facilitate access where needed for witnesses, especially for persons with disabilities residing in institutional settings that impose liberty restrictions. It is important to acknowledge that victims with disabilities may be unable to access the justice system at any level because it is inaccessible to them or they may be kept in enslavement because of lack of legal capacity.
- Remedy the omission in the Rome Statute marking the distinction between the crime of enslavement on the one hand, and slave trading on the other. Thus, the OTP Policy on Slavery Crimes provides the opportunity to make explicit what was overlooked in the Rome Statute in this regard.