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Institutionalization and the Right of Persons with Disabilities to Live in the Community, within the Inter-American Human Rights System

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I. Introduction**

In recent years, the Inter-American Human Rights System has given particular attention to the protection of persons with disabilities. This is reflected in the way the Inter-American Court of Human Rights (Court) has analyzed disability issues in recent cases, and also in the approach the Inter-American Commission on Human Rights (IACHR) has taken through various of its mechanisms to carry out its mandate: public hearings, precautionary measures, thematic and country reports, and on-site visits, among others. This line of work, without a doubt, derives from the international treatment of disability issues since the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD),[\[i\]](#) which has revolutionized disability rights in light of what is known as the social model of disability.

In this context, the purpose of this article is to present the main precedents of both organs that compose the Inter-American System, the IACHR and the Court, in relation to the psychiatric (de)institutionalization of persons with disabilities. Although the pronouncements made by the

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** Note: The opinions expressed in this article are the exclusive responsibility of the author and do not necessarily represent the opinions of the General Secretariat of the Organization of American States, the Organization, or the IACHR.

Inter-American System have not been extensive on the subject, this system—and in particular, the IACHR—has begun to focus on developing standards regarding community integration of persons with disabilities.

The first part of this document analyzes the Inter-American system's treatment of the CRPD given that it is the only instrument that establishes the rights of persons with disabilities to live independently and to be included in the community. The second part deals with the main pronouncements on institutionalization, established by the Court in the case, *Ximenes Lopes v. Brazil*. Finally, in the third part, the deinstitutionalization of persons with disabilities will be analyzed in light of two precautionary measures granted by the IACHR for patients of psychiatric hospitals in Paraguay and Guatemala.

II. Use of the CRPD to Give Light and Content to the Rights of Persons with Disabilities

It is essential for the organs of Inter-American System to use the CRPD as a guide to interpret and conceptualize the right of a person with a disability to live in the community considering that this treaty is the only international instrument that contemplates this right.

Although the CRPD is not a treaty that could be applied by the organs of the Inter-American System, according to Article 29 of the American Convention, both the IACHR and the Court are authorized to use international instruments other than those emanating from the Inter-American System to give light and content to the provisions of the American Convention, and to ensure broader protection for persons under their jurisdiction.[\[ii\]](#)

In particular, the CRPD has been used by the Court to ensure the protection of rights from a disability perspective, specifically in the cases: *Furlan and relatives v. Argentina* (2012); *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica* (2012); and *Sandoval Chinchilla v. Guatemala* (2016).[\[iii\]](#) In the case of *González Lluy et al. v. Ecuador*, the Inter-American Court used the social model of disability contemplated in the CRPD to give broader protection to people with HIV who were facing obstacles to access to education.[\[iv\]](#)

The first case on disability that the Court analyzed was *Ximenes Lopes v. Brazil*, a decision issued in July 2006, prior to the adoption of the CRPD.[\[v\]](#) In this regard, the Court used standards contained in various international instruments to determine the special protection of States with respect to persons with disabilities for the enjoyment of their rights.[\[vi\]](#)

III. (De)institutionalization in the Inter-American Human Rights System

A. Inter-American Court of Human Rights

Although the Court has not yet issued any decision related to the right to community integration of persons with disabilities, in *Ximenes Lopes*, the Court analyzed the special situation of risk faced by persons with mental disabilities in psychiatric institutions, and consequently, the Court determined some of a States' special duties in this regard. With regard to persons with disabilities detained in mental health institutions, the Court highlighted the particular vulnerability they face due to their internment, which makes them more susceptible to torture or ill-treatment.[\[vii\]](#) This is mainly a consequence of the high degree of intimacy that characterizes the treatment of psychiatric illnesses, the strong control medical personnel have over their patients, and the imbalance of power

between patients and the medical staff.^[viii] Considering the situation of special risk, the Court determined that based on the general obligation to ensure the rights to life and humane treatment, States have special duties of protection and prevention in relation to these persons, and that translates into duties to care and to regulate the provision of mental health services.^[ix]

Ximenes Lopes principally concerns the abuse, negligent medical care, and death of Damião Ximenes Lopes, a person with a mental disability detained in the Casa de Reposo Guararapes—a private psychiatric hospital in Brazil. Despite being admitted “in excellent physical condition [and with] no signs of aggression or external injuries,”^[x] Ximenes Lopes’ mother found him in deplorable conditions after just three days in the institution. He was dirty, placed under physical restraint, had bruises and torn clothes and smelled like excrement. He was in pain, shouting, and having difficulty breathing.^[xi] Ximenes Lopes’ mother found a doctor to examine her son; without preforming an examination, the clinical director and doctor prescribed Ximenes Lopes medication.^[xii] Ximenes Lopes died approximately two hours later, without any medical care at the time of death.^[xiii]

In considering the facts, the Court observed and analyzed different violations in the context of psychiatric institutionalization, such as medical negligence; deplorable conditions of detention; the use of physical restraints; and ill-treatment. For the first time, the Court established that the State’s responsibility derived from the lack of regulation and supervision of private institutions that provided health services. The Court established violations of the rights enshrined in Articles 4 (right to life), and 5 (personal integrity) of the American Convention, in connection with Article 1.1 (obligation to respect rights).

Although the Court to date has not ruled on the deinstitutionalization of persons with disabilities, its considerations on violations of their rights in psychiatric institutions establishes the clear situation of risk these persons face in the general psychiatric contexts of deprivation of liberty. Based on this, it can be inferred that in order to prevent persons with disabilities from being detained in long-term institutions, which due to their nature *per se*, pose a great risk to the enjoyment of their rights, States must adopt effective measures that allow their independent living in the community as Article 19 of the CRPD establishes.

B. Inter-American Commission on Human Rights

The pronouncements of the Commission have given clarity to the scope of the right of persons with disabilities to live in the community. The main precedents are cases brought to the attention of the Commission through requests of precautionary measures, first, in favor of the patients of the Neuro-psychiatric Hospital, Paraguay; and second, in favor of the patients of the Hospital Federico Mora, Guatemala.^[xiv]

The precautionary measures are protective mechanisms, initiated upon request of a party by the IACHR initiative, in serious and urgent situations, in order to avoid irreparable harm to a person or persons. Under Article 25(2) of the IACHR Rules of Procedure, “such measures [...] shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the Inter-American system.”^[xv]

1. Precautionary Measures for the Patients at the Neuro-psychiatric Hospital, in Paraguay

In 2003, the Commission received a precautionary measures request to protect the life and personal integrity of the patients detained in the psychiatric facility in Paraguay. Their internment was egregious and life-threatening because of the physical and sexual abuse, deplorable conditions, and lack of separation between adults and children that prevailed in the institution. The request was also sought to protect Jorge Bernal and Julio César Rotela, youths with intellectual disabilities who had remained in solitary confinement for four years.[\[xvi\]](#)

Based on these allegations, the Commission granted precautionary measures on December 27, 2003, and requested Paraguay to adopt actions to protect the life and personal integrity of the patients, such as: a) making medical diagnoses, with special emphasis on women and children; and b) using solitary confinement according to relevant international standards.[\[xvii\]](#)

Due to the grant of the precautionary measures and the political will of the State, important advances were adopted. The director of the Hospital was replaced and an audit of the hospital was launched. The patient population was decreased by approximately 33%, the budget for community mental health increased, and community-based services were implemented. Additionally, the two youths, Bernal and Rotela, were released from the hospital to live in the community. Bernal lives with his family and Rotela was transferred to a substitute home in the community—implemented and financed by the government—where he resides with other persons with the same type of disability.[\[xviii\]](#)

This case, in addition to preventing irreparable harm to the Neuropsychiatric patients, represents in practice the main precedent of what it means to adopt measures to deinstitutionalize persons with disabilities, through the implementation of community-based services.

2. Precautionary Measures for the Patients at the Federico Mora Hospital, in Guatemala

In October 2012, through a precautionary measures request, the Commission learned of the risk to life and integrity faced by patients interned in the only long-term psychiatric institution in Guatemala, the “Federico Mora” National Mental Health Hospital. The Commission was informed of violations, such as physical and sexual abuse by medical and guard staff, as well as by patients themselves, abusive use of isolation rooms, degrading conditions, and negligent medical care. One of the main problems derived from the colocation of regular patients and forensic patients,[\[xix\]](#) which led to difficulties of treatment and abuse.[\[xx\]](#)

In November 2012, the IACHR granted precautionary measures (MC-370-12) in favor of these patients and required Guatemala to adopt measures to ensure their lives and personal integrity. In particular, the IACHR asked Guatemala to take the following actions: a) provide adequate medical treatment to the patients; b) ensure separation of children from adults; c) separate forensic patients from the rest of the hospital patients; d) ensure that custody of the forensic patients be provided by unarmed hospital staff; e) restrict the use of solitary confinement in accordance with international standards, and f) prevent physical, psychological and sexual violence.[\[xxi\]](#) IACHR’s grant of MC-370-12 attracted public awareness, drew extensive national and international media coverage, and led to pronouncements by other international human rights bodies.

Five years after the granting of the measure MC-370-12, during an on-site visit to Guatemala, the Commission visited the Federico Mora Hospital in August 2017. During its visit, the Commission

observed and acknowledged two main changes: improvement of the institution's infrastructure and separation of hospital patients from those charged with criminal offenses.^[xxii] The Commission was also informed of the increased budget allocation the Federico Mora Hospital (from approximately \$2-\$7 million dollars).^[xxiii] The Commission regretted—especially considering the lack of community-based services and the significant increase of the budget—that the State has not created alternatives in the community that enable the social reintegration of patients. This was particularly worrisome considering that most patients continue living at the institution because of the lack of services available in the community.^[xxiv]

For first time in its history, the Commission called a particular State to guarantee the right of persons with disabilities to live in the community by creating and establishing community-based services. The Commission urged Guatemala to adopt the following measures: a) define an expedite strategy for the deinstitutionalization, with a timeline, sufficient resources and specific evaluation measures; b) ensure the participation of persons with disabilities, directly and through the organizations representing them, in the design and implementation of said strategy; and c) allocate sufficient resources for the development of support services.^[xxv]

IV. Conclusion

In general, the cases presented before the Inter-American System are those that have not been resolved in the internal jurisdictions of the respective countries. Frequently, the cases received respond to systemic problems that prevent the effective enjoyment of human rights. The cases analyzed in this article—in relation to Brazil, Guatemala, and Paraguay—are emblematic in making visible the devastating and abusive situation that persons with disabilities in psychiatric institutions face and have historically faced.

In this context, the CRPD offers an invaluable tool to influence these rights. In this regard, it is particularly relevant to highlight its provisions before international human rights bodies that are not primarily focused on the development of disability rights, such as the Inter-American Court or the IACHR. This will allow these entities to incorporate within their mandate and decisions, specific protections that will lead to a greater impact regarding the rights of this group.

The precautionary measures of Paraguay and Guatemala are currently the main precedents regarding the right of persons with disabilities to live in the community. Despite this, the specific measures requested by the IACHR under this mechanism were not aimed at deinstitutionalization, and—according to the Commission's perspective—were intended to avoid irreparable harm in serious and urgent situations.

However, the advances that Paraguay reached in the framework of the precautionary measures constitute in practice, the clearest example in the Americas of what deinstitutionalization means. With regard to Federico Mora, the standards the Commission established regarding the right of persons with disabilities to live in the community did not come directly from the guidelines established in the precautionary measures, but from the IACHR's other mechanisms: the preliminary observations and the country report, both based on the on-site visit to Guatemala in August 2017. These mechanisms had as their main source of interpretation the CRPD.

Finally, it is important to note that the main developments on the right of persons with disabilities to live in the community within the Inter-American System have been adopted through IACHR mechanisms, different from the system of petitions and cases. This demonstrates the importance of having knowledge of the different options that the Inter-American System provides to fulfill its mandate, and therefore, of creating a comprehensive strategy to advocate for specific rights—in this case, the right of persons with disabilities of living independently and being included in the community.

[i] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/ RES/61/106 (CRPD).

[ii] According to Article 29.b of the American Convention, no provision of the Convention shall be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party”. American Convention on Human Rights (ACHR), adopted 22 November 1969, entered into force 18 July 1978.

[iii] **I/A Court H.R., Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246; Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257; and Case of Chinchilla Sandoval et al v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312.**

[iv] **I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298.**

[v] For more information about this case, see Galván S. [*Ximenes Lopes: Decisión emblemática en la protección de los Derechos de las Personas con Discapacidad*](#), ‘National Human Rights Commission, Mexico, October 2015, pp. 67.

[vi] These instrument, among others, were the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities; the United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, and the Mental Health Care Law: Ten Basic Principles of the World Health Organization. **I/A Court H.R., Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, paras. 104, 128 and 131.**

[vii] **Ximenes Lopes v. Brazil** at para. 106.

[viii] *Id.* at paras. 107 and 129.

[ix] *Id.* at paras.98, 99, 108, 137, 140 and 146.

[x] *Id.* at para. 112.5.

[xi] *Id.* at para. 112.9.

[xii] *Id.* at para. 112.10.

[xiii] *Id.* at para. 112.11.

[xiv] For more information, see Galván S. [*La Protección de los Derechos de las Personas con Discapacidad en instituciones psiquiátricas, a la luz de las medidas cautelares dictadas por la CIDH*](#) [The Protection of the Rights of Persons with Disabilities in psychiatric institutions, in light of the precautionary measures issued by the IACHR], National Human Rights Commission, Mexico, August 2016, pp. 52.

[xv] IACHR, [*Rules of Procedure*](#), approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013.

[xvi] IACHR, [*Precautionary Measures – Patients of the Neuro-psychiatric Hospital*](#), 2003.

[xvii] *Id.*

[xviii] United Nations Documentary, [*DRI’s Paraguay Advocacy: The story of Jorge and Julio*](#)’.

[xix] The so-call forensic patients are persons in pretrial detention or serving sentences whose internment is ordered by a judge because they are deemed to have some mental illness.

[xx] IACHR, [*Precautionary Measures, MC 370/12 – 334 Patients of the Federico Mora Hospital*](#), Guatemala, 2012. See also: Disability Rights International, [*Application for precautionary measures in favor of the 334 people with mental disabilities interned in the Federico Mora Hospital, in Guatemala*](#), October, 2012.

[xxi] IACHR, [*Precautionary Measures, MC 370/12 – 334 Patients of the Federico Mora Hospital*](#), Guatemala, 2012.

[xxii] IACHR, [*Report on the “Situation of Human Rights in Guatemala*](#), OEA/Ser.L/V/II.Doc. 208/17, 31 Decemeber 2017,

para. 460.

[\[xxiii\]](#) *Id.* at para. 461.

[\[xxiv\]](#) *Id.* at para. 469.

[\[xxv\]](#) *Id.* at para. 470.

Historic Recognition of the Right to Community Integration for Persons with Disabilities in the Inter-American Human Rights System

April 19, 2018

by Priscila Rodriguez*

On December 21, 2017, the Inter-American Commission on Human Rights (IACHR) released a report after an *in loco* visit to Guatemala, calling on the State of Guatemala to integrate into the community the people with disabilities detained at the Hospital Nacional de Salud Mental (Federico Mora) in Guatemala City, Guatemala.^[1] The Federico Mora patients are the beneficiaries of precautionary measures granted by the IACHR. It is the first time that the IACHR, in the context of precautionary measures, has acknowledged that in order to protect the right to life and to personal integrity of persons with disabilities who have been institutionalized, persons with disabilities must be reintegrated to the community. The right to community integration is enshrined in international law through Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD), which has been ratified by Guatemala.^[2]

Federico Mora has been branded as the “world’s most dangerous hospital” in a documentary released in 2014 by BBC.^[3] The documentary describes Disability Rights International’s (DRI) efforts to bring international attention to the horrific abuses happening inside this institution. DRI first visited Federico Mora in 2011 and found some of the worst conditions and abuses it had seen in psychiatric institutions around the world,^[4] including rampant sexual abuse, physical abuse, inhuman and degrading conditions, medical negligence, and use of prolonged restraints and isolation rooms.^[5]

In DRI’s first fact-finding visits, DRI found minors detained in the institution together with adults, which can be dangerous for the minors. One teenager was locked in an isolation room in order to “protect him” from being raped if he was let out.^[6] A psychiatric resident reported to DRI that he witnessed at least one rape every single day. Patients were left to languish on the floors and corridors of the institution, most of them severely overmedicated. Patients were also routinely put in isolation rooms in prolonged restraints as a form of punishment, a very painful practice that has been equated to a form of torture.^[7] All of these practices observed and reported about the conduct at Federico Mora constitute inhuman and degrading treatment that may arise to the level of torture.^[8]

Given the extreme conditions at the facility, DRI filed a petition for precautionary measures to the IACHR in October 2012, in favor of the 334 people with disabilities detained in Federico Mora.^[9] Precautionary measures are urgent actions that the IACHR requests a State to take in

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order to prevent “irreparable harm” to a person or a group of people,^[10] in “serious and urgent cases.”^[11] The requirement of seriousness and urgency to adopt precautionary measures presumes the existence of an imminent danger that could result in irreparable harm to the fundamental rights of persons.^[12] In DRI’s view, the conditions and abuses documented put the fundamental rights of each and every person detained in the facility at imminent risk, particularly their right to life and to personal integrity.

In its precautionary measures petition, DRI requested that the IACHR to, among other things, urge Guatemala to make immediate plans “for the transfer of patients to other safe locations in the community where they can receive the care, support, and safe living conditions they need.”^[13] On November 2012, the IACHR granted precautionary measures in favor of the patients detained at Federico Mora and called on the State to take urgent actions to prevent further abuses, improve medical care, separate children from the rest of the population, and restrict the use of isolation rooms to international standards.^[14] However, the IACHR did not initially order the release and community reintegration of the patients as part of the precautionary measures.^[15]

In August 2017, almost 5 years after granting the original precautionary measure, the IACHR found that the actions carried out by the State to implement the precautionary measures had not been “adequate to protect their lives and integrity.”^[16] From 2012 to 2017 the State of Guatemala has invested over USD \$7 million in the hospital to physically renovate it.^[17] Despite this, the IACHR regretted that “the measures adopted have not been focused on the creation of community-based services.”^[18] This was particularly worrisome “considering that most of them continue living at the institution because no support is available to them in the community.”^[19]

A study carried out in 2013 by a DRI mental health expert in collaboration with Federico Mora medical professionals and social workers that was submitted to the IACHR found that 75% of the patients in the Federico Mora institution could leave immediately and be easily reintegrated to the community if they had the necessary support.^[20] According to staff, the patients did not need to be at the hospital due to psychiatric reasons, but remained there because they have nowhere else to go.^[21] The patients at Federico Mora have nowhere else to go because the State has failed to create community services and supports for them, including access to housing in a community setting, mental health services in outpatient facilities, rehabilitation, and job training.^[22]

Failure to create community services is in violation of Article 19 of the CRPD, which guarantees the right of persons with disabilities to live in the community with equal opportunities to others, and enshrines the obligations of State Parties to create the necessary services to make this possible.^[23] This failure on the side of the State has also resulted in a violation of the right to personal liberty and personal integrity, recognized in Articles 14 and 17 of the CRPD respectively, for people with disabilities detained in Federico Mora. If there were adequate support in the community, they would not remain in the institution and would not continue to suffer violations to their rights. It is therefore crucial that the IACHR is calling on the State to create community services:

“Because of the lack of community-based options for the patients of the Federico Mora Hospital to receive the necessary services and treatment outside the institution, the IACHR recommends that the State guarantee community living for these persons, by creating and establishing community-based services. For this purpose, the Commission urges the State to adopt, among

other ones, the following measures: a) expeditiously define a strategy for the de-institutionalization of persons with disabilities, with a timeline, sufficient resources and specific evaluation measures; b) ensure the participation of persons with disabilities, directly and through the organizations representing them, in the design and implementation of said strategy, and c) allocate sufficient resources for the development of support services.”[\[24\]](#)

Recognizing that in the context of a precautionary measure, in order to fully guarantee the fundamental rights of persons with disabilities who are detained in institutions, the State must create community services and fully reintegrate them into society. This is a very important step towards advancing the rights of people with disabilities in the region. It is no longer enough to improve conditions inside an institution, but rather States must take action to deinstitutionalize and reintegrate the people to the community in order to truly protect their most basic rights to dignity and life. In this recognition, there is an underlying acknowledgement that institutions are inherently dangerous and, as long as a person with a disability is detained in an institution, his or her fundamental rights remain at risk. This acknowledgment is not new to the IACHR as the Commission has already recognized the inherent dangers of institutions for children stemming from the way they operate. According to a report by the United Nations Children’s Fund (UNICEF) and the IACHR titled “The right of girls and boys to a family. Alternative care. Ending institutionalization in the Americas”:

“Violence in institutions is the result of a number of factors associated with the normal operation of these institutions, such as the precariousness in sanitary and security conditions of the facilities, overcrowding, insufficient staff to provide adequate care to the children, social isolation and limited access to services, the implementation of disciplinary or control measures that involve violence, the use of force or treatments that, themselves, constitute a form of violence, such as unnecessary psychiatric medications, among others.”[\[25\]](#)

All of these factors are present in many institutions for adults with disabilities, including Federico Mora. Since Guatemala invested millions of dollars renovating the facility, DRI has continued to monitor the conditions in the institution and, for the treatment and experience of the patients remains virtually unchanged. People with disabilities are still languishing on the floors of the facility, the patients are still overmedicated, still suffer physical abuse from staff, and, most importantly, are still segregated from society. The IACHR 2017 report continued to advocate for the rights of persons with disabilities to live fully integrated in the community, recognized by Article 19 of the CRPD, and for the deinstitutionalization of children and adults in Guatemala and in the region.

While Article 19 of the CRPD does not make specific reference to deinstitutionalization, its provisions indicate that it is required. The requirement that State parties ensure that persons with disabilities have access to community services that support their social inclusion and “prevent isolation or segregation from the community”[\[26\]](#) is incompatible with persons continuing to be placed in institutions.[\[27\]](#) The Committee on the Rights of Persons with Disabilities (CRPD Committee) has repeatedly expressed “its concern about the institutionalization of persons with disabilities and the lack of support services in the community,”[\[28\]](#) and it has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities.[\[29\]](#) In addition, it has called for the allocation of more financial resources to ensure sufficient community-based services.[\[30\]](#)

DRI has also filed a case before the Inter-American Human Rights System (IAHRS) on behalf of the people with disabilities detained at Federico Mora.^[31] If it reaches the Inter-American Court on Human Rights (Inter-American Court), it would be the first case on the right to community integration in the region. The American Convention on Human Rights (ACHR) does not recognize the right to community integration *per se*; however, the Convention must be interpreted in light of international standards, including the CRPD.^[32] Article 24 of the ACHR enshrines the right to no discrimination. DRI's position is that segregation through institutionalization is one of the most severe forms of discrimination.

The Federico Mora case serves as an opportunity for the State of Guatemala to guarantee the rights of persons with disabilities detained in institutions by starting a long overdue deinstitutionalization and reintegration process in the country. This case is part of a broader effort of DRI in the region towards full recognition of the right of children and adults with disabilities to live in the community, through the use of the IAHRS.^[33] For the IAHRS, this case continues to represent an opportunity to recognize the right of all people with disabilities to live in the community, with equal opportunities to others, in accordance with Article 19 of the CRPD. The IACHR is already taking steps in this direction. Last year, in another historic move, the IACHR finally created a Disability Unit, recognizing the increasing importance of disability rights in the region and the need to oversee, protect and guarantee the rights of this, until now, neglected population.

[1] Inter-American Commission on Human Rights, "Situation of Human Rights in Guatemala" (December 31, 2017), available at <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

[2] United Nations Convention on the Rights of Persons with Disabilities (CRPD), Article 19, available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

[3] BBC, "Inside the 'world's most dangerous' hospital," (December 2014), available at <http://www.bbc.com/news/magazine-30293880>.

[4] Disability Rights International has worked in over 40 countries for the past 25 years, see www.driadvocacy.org.

[5] Disability Rights International, "Application for precautionary measures in favor of the 334 people with mental disabilities interned in the Federico Mora Hospital, in Guatemala, Guatemala" (October 2012), p. 2, available at <https://www.driadvocacy.org/wp-content/uploads/DRI-Guatemala-Precautionary-Measures-FINAL.pdf>.

[6] *Id.*

[7] ONU, "Report from the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/22/53 (Feb. 1, 2013), Juan E. Méndez, para. 63.

[8] Eric Rosenthal, Laurie Ahern, "When Treatment is Torture: Protecting People with Disabilities Detained in Institutions." Human Rights Brief 19, no. 2 (2012): 13-17.

[9] Disability Rights International *supra* note 6.

[10] Organization of American States, "Mandate and Functions of the Commission," available at <http://www.oas.org/en/iachr/mandate/functions.asp>.

[11] See Rules of Procedure of the Inter-American Commission on Human Rights, art. 25 (approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2, 2011).

[12] See IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, § 432 (Dec. 31, 2011), available at <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

[13] Disability Rights International, *supra* note 6, p. 40.

[14] Inter-American Commission on Human Rights, "PM-370-12 Patients at the Federico Mora Hospital, Guatemala," available at <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

[15] *Id.*

[16] Inter-American Commission on Human Rights, "Situation of Human Rights in Guatemala" (December 31, 2017), available at <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf> para. 467.

[17] *Id.* para. 460.

[18] *Id.* para. 467.

[19] Id. para. 468.

[20] Id.

[21] Disability Rights International, “Application for precautionary measures in favor of the 334 people with mental disabilities interned in the Federico Mora Hospital, in Guatemala, Guatemala” (October 2012), available at <https://www.driadvocacy.org/wp-content/uploads/DRI-Guatemala-Precautionary-Measures-FINAL.pdf>.

[22] Harvard University, “Health and Human Rights Resource Guide: Introduction to Disability and Human Rights” available at <https://www.hhrguide.org/2014/03/21/disability-and-human-rights/>.

[23] Convention on the Rights of Persons with Disabilities, Article 19.

[24] Inter-American Commission on Human Rights, “Situation of Human Rights in Guatemala” (December 31, 2017), available at <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf> para. 469.

[25] UNICEF, IACHR, OAS, *The Right of Girls and Boys to a Family. Alternative Care. Ending Institutionalization in the Americas*, OEA/Ser.L/V/II. Doc 54/1 (2013), para. 11.

[26] Convention on the Rights of Persons with Disabilities, Article 19.

[27] Parker C, *A Community for All: Implementing Article 19 – A Guide for Monitoring the Implementation of Article 19 of the Convention on the Rights of Disabilities* (Open Society Foundations, Dec 2011), available at <http://www.opensocietyfoundations.org/sites/default/files/community-for-all-guide-20111202.pdf>.

[28] CRPD/C/ESP/CO/1, paras. 35-36; CRPD/C/CHN/CO/1, para. 26; CRPD/C/ARG/CO/1, para. 24; CRPD/C/PRY/CO/1, para. 36; CRPD/C/AUT/CO/1, para. 30; CRPD/C/SWE/CO/1, para. 36; CRPD/C/CRI/CO/1, para. 30; CRPD/C/AZE/CO/1, para. 29; CRPD/C/ECU/CO/1, para. 29; CRPD/C/MEX/CO/1, para. 30.

[29] Ibid.

[30] CRPD/C/CHN/CO/1, para. 26; CRPD/C/AUT/CO/1, para. 31; CRPD/C/SWE/CO/1, para. 36.

[31] Disability Rights International, “DRI files international case to protect children and adults detained in Guatemala’s dangerous Federico Mora institution” (October 29, 2014) available at <https://www.driadvocacy.org/dri-files-international-case-to-protect-children-and-adults-detained-in-guatemalas-dangerous-federico-mora-institution>.

[32] American Convention on Human Rights, Article 29.

[33] DRI has another case in Guatemala, “Hogar Seguro Virgen de la Asuncion” on children detained in an abusive institution, and one in Mexico, “Casa Esperanza” on adults with disabilities abused in a private institution that received government funding.

The Right of People with Disabilities to Asylum and Protection from Deportation on the Grounds of Persecution or Torture Related to Their Disability

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by Eric Rosenthal & Arlene Kanter

Investigations by Disability Rights International: Demonstrate A Worldwide Pattern of Abuse and Torture Which may Provide Grounds for Asylum and Protection from Deportation for People with Disabilities in the U.S.

Eric Rosenthal*

Throughout the world, people with disabilities are subject to a broad range of discrimination and abuse.^[2] The confinement and mistreatment of people with disabilities to institutions was once seen as a matter of poor medical practice or outmoded social policies. ^[3] For twenty-five years, Disability Rights International (DRI) has worked to bring about recognition that such practices constitute serious violations of internationally-recognized human rights law. The 2006 adoption, 2008 entry into force, and subsequent widespread ratification of the UN Convention on the Rights of Persons with Disabilities (“CRPD”) has greatly contributed to the worldwide recognition of the rights of people with disabilities under international law.^[4] DRI’s involvement goes back much further – to a time when it was necessary to demonstrate that the rights of people with disabilities were already protected by established human rights treaties. One of the goals of DRI was to provide the documentation necessary to use existing human rights “triggering ... protections through domestic courts, such as the right to ... asylum.”^[5]

Over the last twenty-five years, DRI has documented human rights violations of people with disabilities confined to institutions and segregated from society.^[6] Drawing on findings from around the world, DRI submitted an *amicus curiae* brief in *Matter of Ricardo de Santiago-Carillo*,^[7] the first case to establish that being a person with a disability could qualify for membership in “a particular social group” for the purposes of protection under U.S. immigration laws.

DRI has been especially focused on demonstrating that abuses in institutions could rise to the level of torture as defined in Article 1 of the UN Convention Against Torture.^[8] Based on findings of people subject to “unmodified” electro-convulsive therapy (electric shock treatment without anesthesia) in Turkey,^[9] children tied to cribs in Serbia,^[10] people locked in dark, airless isolation cells in Argentina,^[11] individuals locked in cages in Hungary,^[12] and men, women, and children raped and exploited for sex in the institutions of Guatemala^[13] and Mexico.^[14]

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In the landmark case of *Ximenes-Lopes v. Brazil*, in which the Inter-American Court found a violation of the right to life as well as inhumane treatment for a man who died in a private psychiatric facility in Brazil, I served as an expert for the plaintiff, appointed by the Inter-American Commission on Human Rights (IACHR), that mistreatment in a psychiatric facility could constitute torture.[\[15\]](#)

Drawing on its findings throughout the Americas, DRI has submitted its own petitions to the IACHR, contributing to the recognition that people with disabilities are subject to “severe and irreversible” abuses – a high threshold required to obtain “precautionary measures.” As established by the Inter-American Commission on Human Rights (IACHR):

Precautionary measures serve two functions related to the protection of fundamental rights recognized in the provisions of the inter-American system. They serve a “precautionary” function in the sense that they preserve a legal situation brought to the Commission’s attention by way of cases or petitions; they also serve a “protective” function in the sense of preserving the exercise of human rights. In practice, the protective function is exercised in order to avoid irreparable harm to the life and personal integrity of the beneficiary as a subject of the international law of human rights.[\[16\]](#)

The grant of precautionary measures is difficult to obtain. It is reserved for the protection of people from only the most serious abuses, requiring proof of a serious and urgent situation and an irreparable harm. As a result, only a few such precautionary measures are granted each year.[\[17\]](#)

In Paraguay, DRI obtained an order for precautionary measures to protect people detained in the country’s main psychiatric facility.[\[18\]](#) In Guatemala, the IACHR ordered precautionary measures to protect residents of the *Federico Mora* psychiatric facility.[\[19\]](#) For the first time, the IACHR recognized a right to community integration of people with disabilities in Guatemala.[\[20\]](#) DRI and the Ombudsman of Guatemala also obtained precautionary measures to protect survivors of the *Hogar Seguro Virgen de la Asuncion*, where 41 girls were burned to death in 2016.[\[21\]](#) DRI found that the survivors of that fire had been moved to other, equally abusive institutions, and called for their full community and family re-integration. DRI and the Ombudsman of Guatemala have taken the position that children will only be safe when they are returned to families in the community, receiving the supports necessary to avoid further confinement.

DRI’s findings from Mexico obtained over two decades through hundreds of site visits, are particularly striking – as they demonstrate a pattern of abuse that is both severe and pervasive. Since DRI’s findings in Mexico were first covered by the New York Times Magazine in 2000[\[22\]](#) – and then covered extensively by press in Mexico and the United States[\[23\]](#) – the public and the authorities in Mexico have been on notice about the urgent need for improved protections.

DRI filed a case before the Inter-American Commission on Human Rights showing systematic segregation and abuse of people with disabilities — especially people with psychiatric and intellectual disabilities –in Mexico[\[24\]](#). DRI has shown the near total lack of community-based services and support systems, without which people with disabilities will be continued to be detained in dangerous and uninhabitable institutions. DRI’s reports have resulted in powerful condemnation by the UN Committee on the Rights of Persons with Disabilities (CRPD

Committee) about the failure of the Mexican government to enforce the right to live in the community.[\[25\]](#)

DRI's *Casa Esperanza* case, now pending before the Inter-American Commission on Human Rights, demonstrates the extent of abuse faced by people with disabilities. DRI first visited *Casa Esperanza*, a 37-bed facility in Mexico City, because it was one of dozens of facilities on a "black list" prepared by Mexico's authority for children and families (DIF) of known, abusive facilities.[\[26\]](#) The DIF's "black list" did not stop States throughout Mexico from sending children to this facility at government expense.[\[27\]](#)

When DRI first visited *Casa Esperanza*, the director admitted, on video, that all women admitted to the facility were sterilized because the facility could not protect them from being sexually abused by staff and outside workers at the facility. DRI observed children and adults at the facility locked in cages and left permanently with their arms tied behind their back.[\[28\]](#) After DRI presented documentary evidence of these abuses to the local authorities, the local authorities failed to respond for more than a year.[\[29\]](#) During that time, DRI reported on *Casa Esperanza* to the UN Committee on the Rights of Persons with Disabilities (the CRPD Committee), which included specific reference to the facility in its period report on compliance with the CRPD.[\[30\]](#) For more than six months after the United Nations issued this report, Mexico failed to stop abuses at *Casa Esperanza*.[\[31\]](#)

Finally, in May 2015, DRI gained the assistance of the Mexico City Human Rights Committee to stage a raid at *Casa Esperanza*. When DRI and the local human rights authorities entered the premises, they found that the institution had been emptied. According to neighbors, all the detainees had been put on a bus and sent to a "vacation" resort the morning before the raid. This sudden movement of detainees is particularly striking, because the director had reported to DRI that many of the residents of his facility had never previously left their beds.[\[32\]](#) Mexico City's social service agency, the Department for the Development of Children of Families (DIF), had been informed in advance of the raid. This development suggests someone had tipped off the facility about the plans and timing of the raid.

Within a few days, the Mexico City Human Rights Commission was able to find the detainees and remove them from the control of *Casa Esperanza*. They found that a number of the women in the facility had been systematically sexually abused by staff and workers at the facility, and that they were forced to work in the homes of the institution's staff.[\[33\]](#) Some of these women had grown up in orphanages in Mexico and had very minor disabilities – apart from the trauma of repeated sexual abuse and life-long detention.

DRI suggested to Mexico City authorities that the residents of *Casa Esperanza* should remain in the home (once the abusers had been removed) until community placements could be identified.[\[34\]](#) DRI filed a petition for precautionary measures with the Mexico City Human Rights Commission to ensure that detainees at *Casa Esperanza* would not be moved to other, similarly abusive institutions. Mexico authorities ignored this petition, and moved the *Casa Esperanza* residents to other abusive institutions throughout Mexico.[\[35\]](#) In a city of 8.5 million people, the local authorities reported that no community placements were available. Conditions at other institutions are so bad that, within one year, two of the 37 people formerly detained at *Casa*

Esperanza, had died. DRI learned that one woman was repeatedly raped inside the institution to which she had been transferred after her release from *Casa Esperanza*.

The *Casa Esperanza* case demonstrates the total lack of safe and appropriate community placements for children and adults with disabilities. Even with extensive international pressure and attention, Mexico City has been unable to provide community placements for people with disabilities, formerly detained in abuse institutions. More importantly, this case shows that Mexican authorities were informed and aware of abuse and torture at *Casa Esperanza*, and that they nonetheless knowingly and intentionally left the residents there, exposed to such abuse and mistreatment. As of today, there have been no remedies provided to any of the *Casa Esperanza* survivors.

For twenty-five years, DRI has dedicated extensive resources to documenting the abuse and torture of people with disabilities in institutions in Mexico and other countries. DRI's reports on Mexico as well as additional documentation about conditions in other countries are essential to support the claims of people with disabilities who seek asylum and protection from deportation in the U.S. Of course, not all people with disabilities are subject to persecution or torture upon return to their home countries. But children and adults who are at risk of confinement in abusive orphanages, psychiatric facilities, and other social care facilities require protection from deportation under U.S. law and international protections against torture. The following article by Professor Arlene Kanter will summarize the current state of the law with respect to claims by people with disabilities for protection from deportation under U.S. law.

The Right of People with Disabilities to Asylum And Protection from Deportation on the Grounds of Persecution or Torture Related to their Disability

Arlene S. Kanter*

I. Introduction

As the previous introduction by Eric Rosenthal, Executive Director of Disability Rights International, explains, men, women and children with disabilities are subjected to persecution and torture in various countries throughout the world today, solely on account of their disability. For people with disabilities who arrive in the United States seeking asylum or relief from deportation, presenting such evidence of persecution or torture in their homelands may provide them with the relief they seek. However, it was not until 1999 when the U.S. Board of Immigration Appeals

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(“BIA”) determined, for the first time, that an individual with a disability could qualify as a member of “a particular social group” for protection from deportation.^[37]

Under the Immigration and Nationality Act (“INA”) a person is entitled to asylum or withholding of removal if he or she “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”^[38] In *Matter of Ricardo de Santiago-Carrillo*, the BIA upheld the Immigration Judge’s decision that people with serious mental illness qualify as a particular social group “given their close affiliation and immutable characteristic of mental illness,” and because members of this group are “readily identified either through misbehavior or an inability to function in a society at large, and are subsequently involuntarily hospitalized, oftentimes for life.”^[39] Nonetheless, the BIA held that Mr. de Santiago-Carrillo was not entitled to withholding of removal because he had failed to establish that the conditions of institutionalization in Mexico to which he would be subjected upon his return rose to the level of persecution required under the law.^[40]

Although Mr. de Santiago-Carrillo ultimately lost his claim for withholding of removal, his case opened the door for countless other individuals seeking protection from deportation grounded in claims of persecution on the basis of their membership in “a particular social group” of people with disabilities. Although most of the cases that have been brought in the past decade by people with disabilities seeking asylum, withholding of removal and/or protection from deportation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), or for humanitarian relief have been denied, an increasing number of courts, the BIA, and immigration judges have held that the “particular social group category” applies to people with disabilities, and, that with sufficient evidence, their claims for withholding of removal, protection under CAT, or humanitarian relief may proceed.^[41] A detailed analysis of the cases in which individuals with disabilities, and their families, have raised claims of persecution or torture on the basis of disability is the subject of a longer forthcoming law review article.^[42] However, in this article for Human Rights Brief, I present a summary of the current state of the law and suggestions for future legal advocacy.

II. Background

People with disabilities, like people without disabilities, may file a claim for asylum, withholding of removal, or protection under the CAT as well as for humanitarian relief in order to avoid deportation. Both asylum and withholding of removal protects a person from being deported to a country where they experienced past persecution or where they have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.^[43] A person who qualifies for asylum also qualifies for withholding of removal under this same standard except that the one-year filing deadline for asylum does not apply to claims for withholding of removal.^[44] In addition to asylum and withholding of removal, the CAT, which the United States ratified in 1994, also prohibits the U.S. from transporting anyone to any country where there is reason to believe that the person will be tortured or suffer cruel and degrading treatment. This treaty is one of the very few human rights treaties that the U.S. has ratified.^[45] Persons seeking protection under the CAT, like persons seeking protection under withholding of removal, must show that it is “more likely than not” that they would be tortured if

removed to the country from which they are claiming protection. However, unlike cases involving claims for withholding of removal or asylum, a person claiming protection under the CAT must show not only persecution but also “torture.” The CAT defines torture as any intentional unlawful infliction of severe physical or mental suffering or pain, with consent of a public official, for purposes such as punishment, obtaining a confession, intimidation, or discrimination.^[46] Moreover, under the CAT, a person is not required to show that the torture is based on one of the five protected grounds. In addition, individuals with disabilities who present evidence of past persecution or a well-founded fear of future persecution or torture because of disability are also entitled to seek humanitarian relief, known as Temporary Protected Status.^[47] This status allows the immigration judge to extend protective status to those who would be harmed by returning to their country, but cannot establish the requisite criteria for refugee status or withholding of removal. This Temporary Protected Status does not provide, however, the same benefits as the status of refugee.^[48] As of 2017, there were about 320,000 people from ten countries with Temporary Protected Status in the U.S., the majority from El Salvador (195,000), Honduras (57,000), and Haiti (46,000).^[49] No records are available on which, if any, of these individuals have disabilities. Finally, in addition to these substantive claims for protection from deportation, recent case law has recognized the right of all immigrants with disabilities in deportation proceedings to counsel and to request competency evaluations, if applicable.^[50]

A. People with Disabilities as Members of a Particular Social Group

Under the INA, a “particular social group” is defined as one in which the members are “united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”^[51] In 2006, the BIA added an additional element of “social visibility” to the legal requirement of “a particular social group.”^[52] As an alternative to immutable characteristics, social visibility requires the court to determine whether or not the society perceives the particular social group as a group within society.^[53]

In recent years, the definition of a “particular social group” has been expanded to include a variety of social groups not specifically identified at the time of the immigration law’s enactment.^[54] Like other groups of people who are now protected under the “particular social group category,” people with disabilities share a common social status, and are often excluded from and mistreated by their government.^[55] People with disabilities may be deprived of their freedom, institutionalized against their will, and subjected to sterilization and eugenic policies.^[56] Accordingly, one circuit court has held that children with disabilities in Russia are members of a particular social group. In *Tchoukhrova v. Gonzales*,^[57] the Ninth Circuit Court upheld the decisions of the Immigration Judge and the BIA that a Russian child with cerebral palsy and his parents were members of “a particular social group” defined as “disabled children and their parents who provide care for them.”^[58] In addition, the Third, Seventh, and Eighth Circuit Courts and immigration judges have held that people with disabilities may qualify as members of a particular social group.^[59] However, in other cases, circuit courts have refused to find that people with disabilities qualify for membership in a particular social group.^[60]

B. Claims by People with Disabilities of Past Persecution and/or Well-Founded Fear of Future Persecution

In addition to the requirement of membership in a particular social group, individuals with disabilities seeking asylum or withholding of removal also must show past persecution or a well-founded fear of future persecution based on one of the five enumerated grounds. Although neither the INA nor its implementing regulations define persecution, courts have interpreted persecution to include any serious harm, including the loss of freedom, involuntary confinement, and other serious violations of basic human rights, as defined by international human rights instruments.^[61] Such harm may be physical as well as psychological harm.^[62] Persecution also may include discriminatory treatment that leads to substantial restrictions on an individual's right to earn a living, access to education, or a combination of harms.^[63] Moreover, if a person suffered persecution in his or her home country in the past, it is presumed that the person would be persecuted in the future.^[64]

Throughout history, people with disabilities have been subjected to persecution in the form of discrimination, segregation, stigmatization, mistreatment, institutionalization and even death on account of their disability.^[65] In the U.S. today, men and women with disabilities, particularly those with intellectual or psychosocial disabilities, are forced to undergo inhumane treatment in institutions as well as involuntary sterilization and forced abortions,^[66] which has been recognized as a violation of human rights,^[67] and as a category qualifying an applicant for refugee status.^[68] Reports by Disability Rights International (“DRI”), the leading international NGO that investigates abuse of people with disabilities in institutions throughout the world, have found widespread inhumane and degrading treatment and human rights violations of people in psychiatric hospitals, social care homes, orphanages and other segregated facilities for children and adults with disabilities that should qualify as persecution or even torture under U.S. law.^[69] Most recently, the plight of Syrian refugees has shown the particularly devastating effect of war on children with disabilities.^[70] In some cases, the Ninth and Third Circuit courts as well as immigration judges and the BIA have upheld claims for withholding of removal for people with disabilities.^[71] However, in other decisions, and for different reasons, circuit courts have denied claims for asylum or withholding of removal.^[72]

C. Claims by People with Disabilities Under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT)

In addition to petitions for asylum and withholding of removal, individuals with disabilities seeking relief from deportation may request relief under the CAT.^[73] People with disabilities experience torture in a variety of settings, as has been recognized by UN Special Rapporteurs on Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment in their respective reports to the General Assembly and the Human Rights Council.^[74] Based on such treatment, the BIA and some circuit courts have upheld claims for protection from deportation under the CAT.^[75] However, other cases requesting relief under the CAT have not succeeded.^[76]

D. Claims by People with Disabilities for Humanitarian Relief from Deportation

The final category of cases that address the rights of people with disabilities to remain in the U.S. is known as humanitarian relief.^[77] Such cases arise out of concern about the treatment of people in their homelands that allow for a finding of “exceptional circumstances” that may excuse, for example, the untimely filing of applications^[78] or warrant a review of cases for changed circumstances.^[79] For example, the First Circuit Court remanded the case of *Ordenez-Quino v.*

Holder to determine if there was sufficient evidence to substantiate a deaf man's claim of persecution at the hands of Guatemalan soldiers.^[80] Similarly, in *In re Elvin Renaldo Hartley*, the BIA upheld an immigration judge's decision to grant a waiver from an order of removal for a man with mental illness with a criminal record because of the "extreme hardship" he would endure upon his return to Jamaica.^[81]

III. Conclusion

An increasing number of people with disabilities are seeking relief from deportation by raising claims of persecution, torture or requests for humanitarian relief based on their disability. Although not all such cases have been successful, as investigative reports such as those produced by DRI substantiate claims of persecution and torture in certain countries, the BIA and circuit courts will have no choice but to conclude that such evidence warrants grants of asylum and protection from deportation for people with disabilities from those countries, and perhaps other countries as well.

The INA as well as the 1967 Optional Protocol on Refugees to which we acceded in 1968, requires the U.S. to refuse to return to his or her homeland any person who faces a well-founded fear of persecution on the basis of a particular social group, among other categories.^[82] Rejecting claims for asylum, withholding of removal or under the CAT by persons with disabilities who present at least some credible evidence of their well-founded fear of persecution or torture seems to be driven by a restrictive view of our immigration laws. Such a view is not only inconsistent with the 1967 Optional Protocol but also with the legislative intent of the INA, itself, as well as with international humanitarian standards upon which the INA is based. Denying deportation relief to people with disabilities also violates our own national agenda of achieving equality and dignity for people with disabilities, as mandated in the Americans with Disabilities Act of 1990 and its amendments, as codified in the Americans with Disabilities Amendment Act of 2008. Reports by DRI and other human rights organizations around the world continue to reveal the atrocities to which people with disabilities are subjected, particularly in state-run institutions and at the hands of others with government acquiescence. As such evidence is collected and presented in immigration proceedings on behalf of people with disabilities seeking asylum and protection from deportation, the chances for successful outcomes in their cases will increase. In the meantime, therefore, lawyers representing people with disabilities should continue to raise their clients' disability as grounds for asylum, withholding of removal, protection under the CAT, and for humanitarian relief. Moreover, even in the absence of ratification of the Convention on the Rights of People with Disabilities^[83] (which 177 countries have ratified, but not the US), our own domestic laws guarantee certain procedural protections to immigrants with disabilities, including their right to accommodations in judicial proceedings, as well as their right to competency evaluations and to counsel. Enforcement of these procedural rights, too, will help to raise awareness about the plight as well as available legal protections for people with disabilities seeking relief from deportation under U.S. immigration laws.

AUTHOR'S NOTE:

On April 17, 2018 Immigration Judge Kristin Olmanson in Minneapolis, MN I, reversed on remand the BIA decision *In the Matter of Perez Rodriguez*. Judge Olmanson granted him asylum and withholding of removal, in large part due to the expert testimony provided by Eric Rosenthal of Disability Rights International, about the conditions in institutions in Mexico.

- [2] See Eric Rosenthal and Laurie Ahern, *Segregation of children worldwide: the human rights imperative to end institutionalization*, 12 J. Pub. Health 193 (2013) (summarizing DRI's worldwide findings). See also, Catalina Devandas Aguilar (Special Rapporteur on the rights of persons with disabilities), *Report of the Special Rapporteur on the rights of persons with disabilities*, U.N. Doc. A/HRC/37/56 (Dec. 12, 2017); Juan E. Mendez (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), U.N. Doc A/HRC/22/53, para. 57-70 (Feb. 1, 2013); UN, General Assembly, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Seventieth session, U.N. Doc 15/22, A/70/213 (July 30, 2015).
- [3] See Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'*, 16 Int'l J. Law & Psychiatry 257-300 (1993)(describing protections for people in institutions under human rights treaties before the CRPD was adopted).
- [4] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, GA Res. 61/106, UN Doc. A/RES/61/106 (January 24, 2007) (Adopted on 13 December 2006, Entered into force on 3 May 2008).
- [5] *Id.* at 288.
- [6] DRI's worldwide findings from Europe, the Americas, and Asia are posted at <https://www.driadvocacy.org/media-gallery/our-reports-publications/>. DRI has brought unprecedented international press coverage of these issues. Select international press coverage is posted at <https://www.driadvocacy.org/media-gallery/>.
- [7] Brief in support of respondent's withholding of removal. -Mental Disability Rights International et al. as Amicus Curiae Supporting Respondent Ricardo De Santiago-Carrillo, U.S. Dep't of J., B.I.A., (2000) (No. A35-790-589). (unpublished decision) (brief and unpublished decision on file with the author).
- [8] Eric Rosenthal and Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19 Hum. Rts. Brief 13-17 (2012)(describing DRI's role in documenting and gaining recognition of treatment of people with disabilities as torture).
- [9] Mental Disability Rights International, *Behind closed doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey*, (2005), <https://www.driadvocacy.org/wp-content/uploads/turkey-final-9-26-05.pdf> (last visited April 8, 2018).
- [10] Mental Disability Rights International, *Torment not Treatment: Serbia's Segregation and Abuse of Children and Adults with Disabilities*, (2007), <https://www.driadvocacy.org/wp-content/uploads/Serbia-rep-english.pdf> (last visited April 8, 2018).
- [11] Mental Disability Rights International, *Ruined Lives: Segregation from Society in Argentina's Psychiatric Asylums* (2007), https://www.driadvocacy.org/wp-content/uploads/MDRI.ARG_ENG_NEW-Argentina.pdf (last visited April 9, 2018).
- [12] Mental Disability Rights International, *Human Rights & Mental Health: Hungary*, (1997), <https://www.driadvocacy.org/wp-content/uploads/Hungary.pdf> (last visited April 9, 2018).
- [13] Disability Rights International, *After the Fire Survivors of Hogar Seguro Virgen de la Asunción at risk*, (2017), <https://www.driadvocacy.org/wp-content/uploads/After-the-Fire-March-15.pdf> (last visited April 10, 2018).
- [14] Disability Rights International, *No Justice: Torture, Trafficking and Segregation in Mexico*, (2015), https://www.driadvocacy.org/wp-content/uploads/Sin-Justicia-MexRep_21_Abr_english-1.pdf (last visited April 10, 2018); Disability Rights International, *Twice Violated Abuse and Denial of Sexual and Reproductive Rights of Women with Psychosocial Disabilities in Mexico*, (2015), <https://www.driadvocacy.org/wp-content/uploads/Mexico-report-English-web.pdf> (last visited April 10, 2018).
- [15] 2006 Inter-Am C. H.R. (serc. C) No. 149 (July 4, 2006) at ¶150.
- [16] OAS, <http://www.oas.org/en/iachr/decisions/about-precautionary.asp> (last visited April 11, 2018).
- [17] In 2008, for example, the number of precautionary measures requests received by the IACHR were 301, only 28 were granted. The number of precautionary measures requests received in 2010 were 375, only 68 were granted. IACHR, statistics Precautionary Measures, <http://www.oas.org/en/iachr/decisions/about-precautionary.asp> (last visited April 11, 2018).
- [18] 458 patients at the Neuropsychiatric Hospital & Julio César Rotela y Jorge Bernal v. Paraguay, Precautionary Measures, "PRECAUTIONARY MEASURES 2003" ¶ (Inter-Am. Comm'n H.R. Dec. 17, 2003).
- [19] 334 patients at the Federico Mora Hospital v. Guatemala, Precautionary Measures, "PM 370/12 – Patients at the Federico Mora Hospital, Guatemala" ¶ (Inter-Am. Comm'n H.R. Nov. 20, 2012).
- [20] Inter-Am. Comm'n H.R., *Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II Doc. 208/17 (Dec. 31, 2017).
- [21] Hogar Seguro Virgen de la Asunción v. Guatemala, Precautionary Measures, "PM 958/16 – "Virgen de la Asunción" Residential Institution, Guatemala" ¶ (Inter-Am. Comm'n H.R. March 12, 2017).
- [22] Michael Winerip, *The Global Willowbrook*, The New York Times Magazine (January 16, 2000).
- [23] Press coverage of DRI's findings in Mexico over twenty years is posted at www.DRIadvocacy.org.

[24] Disability Rights International, *Abandoned and Disappeared Mexico's Segregation and Abuse of Children and Adults with Disabilities*, (2010), <https://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf> (last visited April 10, 2018); Disability Rights International, *Human Rights and Mental Health, Mexico*, (2000), <https://www.driadvocacy.org/wp-content/uploads/Human-Rights-Mental-Health-English.pdf> (last visited April 10, 2018).

[25] Inter-Am. Comm'n H.R., *Situation of Human Rights in Mexico*, OEA/Ser.L/V/II Doc. 44/15 (Dec. 31, 2015) See also U.N. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Mexico*, CRPD/C/MEX/CO/1 (Oct. 27, 2014).

[26] Disability Rights International, *supra* note 12 at 1.

[27] *Id.*

[28] *Id.* at 5.

[29] *Id.* at 3.

[30] U.N. Committee on the Rights of Persons with Disabilities, *supra* note 20 at 6, par. 37.

[31] Disability Rights International, *supra* note 12 at 3.

[32] *Id.* at 6.

[33] *Id.* at 4.

[34] *Id.* at 6.

[35] *Id.*

[36]

[37] *Matter of Ricardo de Santiago-Carrillo* (BIA June 15 2000) (unpublished decision) (on file with author). See Arlene Kanter, *The Right to Asylum for People with Disabilities*, (with Kristen Dadey), 73 Temple L. Rev. 1117 (2000); *The Right to Asylum and Need for Legal Representation of People with Disabilities in Immigration Proceedings*, (with R. Blake Chisam and Christopher Nugent), 25 Mental & Physical Disability L. Rptr. 511 (2002) (arguing that people with disabilities should be entitled to legal representation and due process protections in immigration proceedings).

[38] 8 U.S.C. §1101(a)(42) (2014).

[39] *Matter of Ricardo de Santiago-Carrillo*, *supra* note 2.

[40] *Id.* Mr. de Santiago Carrillo was diagnosed with schizophrenia and if returned to Mexico, he established that he would be placed in a state run institution for “*abandonados*,” people with no family and no resources. Although the uncontroverted evidence established that the conditions were so horrendous in such institutions, that any fact finder could conclude that it was more likely than not that Mr. de Santiago Carrillo would die there, the BIA reversed the Immigration Judge’s decision in favor of withholding of removal. The Ninth Circuit upheld the withholding of removal, but on different grounds.

[41] Since 2000, there have been nearly 50 cases that have raised disability as grounds for seeking asylum, withholding of removal and/or claims under the CAT. They are all listed here, arranged by circuit in reverse chronological order, followed by decisions of the Board of Immigration Appeals and immigration judges:

Ordonez-Quino v. Holder, 760 F.3d 80 (1st Cir. 2014) (remanding to determine whether an indigenous man made deaf by a military attack as a child had suffered past persecution in light of the cumulative evidence, or alternatively, whether severe harm and the long-lasting effects thereof made him eligible for humanitarian asylum); *Cano-Saldarriaga v. Holder*, 729 F.3d 25 (1st Cir. 2013) (denying petition for asylum based on petitioner’s mental disability would be “piecemeal,” and not addressing the BIA court’s decision “that any favorable considerations arising from Cano’s disability failed to outweigh the dangers posed by his significant criminal history,” because of petitioner’s new applications); *Lopez Perez v. Holder*, 587 F.3d 456 (1st Cir. 2009) (denying asylum, withholding, and CAT protection to a woman whose husband has Parkinson’s and who had been harassed in the past by her family); *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017) (finding that a mentally ill criminal deportee was not eligible for withholding or CAT protection, but remanding for reconsideration of his asylum claim as his crime was not found to bar him from relief); *Roig v. Holder*, 580 F. App’x 4 (2nd Cir. 2014) (finding a Cuban man’s claims that he would be arrested and tortured in prison, due in part to his disability, “speculative”); *Ke Lin v. Holder*, 571 F. App’x 46 (2d Cir. 2014) (denying asylum and withholding to a Chinese man with a mental disability because he failed to show that the government acquiesced to discrimination and his fear of sterilization was “speculative”); *Thiersaint v. Holder*, 464 F. App’x 16 (2d Cir. 2012) (denying CAT protection to a Haitian with a physical disability because he failed to show that he would be “singled out for torture,” despite “unduly harsh conditions” for criminal deportees); *Ibrahim v. Att’y Gen.*, 708 F. App’x 704 (3d Cir. 2017) (denying withholding on the basis of a lack of comparative evidence of country conditions to prove “material change,” and explaining that petitioner had offered no evidence as to conditions for persons with disabilities at the timing of his removal hearing); *Roy v. Att’y Gen. of U.S.*, 693 F.3d 333, 343 (3d Cir., 2012) (finding that although a lack of resources and deplorable conditions in prison do not in themselves constitute

torture, the state's willful blindness to the disparate impact on the mentally ill may constitute intention under CAT); *But see Joseph v. Atty. Gen.*, 392 F. App'x 934, 937 (3d Cir. 2010) (finding that deplorable Haitian prison conditions did not amount to torture); *Soobrian v. Atty. Gen.*, 388 F. App'x 182 (3d Cir. 2010) (finding no government intent to persecute the mentally ill (assuming they are a social group) due to lack of allocation of resources, but remanding for consideration of a CAT claim); *Tinizaray-Narvaez v. Attorney General Of U.S.*, 2009 WL 4048859 (3d Cir. 2009) (holding that the BIA had abused its discretion by not allowing a psychologist to testify as to the hardship posed to the petitioner's mentally ill citizen daughter.); *Massaquoi v. Att'y Gen.*, 313 F. App'x 483 (3d Cir. 2008) (denying withholding and CAT protection to a mentally ill Liberian man on the basis that his evidence of future persecution, a doctor's testimony, was "tenuous, speculative, uncorroborated" and did not prove a state policy against the mentally ill); *Baptiste v. Att'y Gen.*, 229 F. App'x 66 (3d Cir. 2007) (finding that petitioner's disabilities of a limp and depression were "exceedingly minor" and that conditions described as persecution and torture were only the "general upheaval" facing all Haitians); *Akhtar v. Att'y Gen.*, 138 F. App'x 481 (3d Cir. 2005) (finding that although people with disabilities are "outcasts" in Pakistan, a Pakistani man with a physical disability on the grounds that he would not suffer mistreatment amounting to persecution); *Korneenkov v. Holder*, 347 F. App'x 93 (5th Cir. 2009) (denying asylum to a Russian couple with mental disabilities on the grounds that past harassment did not rise to the level of persecution); *Fahmy v. Holder*, 576 F. App'x 524 (6th Cir. 2014) (denying withholding and CAT protection to paranoid schizophrenic person from Egypt. The unavailability of medication did not make him more likely than not to be detained and tortured because there was insufficient evidence of personal motive in medication access and targeting of people with mental illness for detention and torture); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (rejecting the social visibility argument); *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008) (remanding case to lower court to determine petitioner, who was diagnosed with severe social anxiety disorder and depression and was declared mentally incompetent, suffered past persecution); *Disha v. Gonzales*, 207 F. App'x 694 (7th Cir. 2006) (denying asylum, withholding, and CAT protection to a man from Albania who entered the U.S. on a false report and claimed to be a mental patient. The Court found that even if the proposed group, people with mental disabilities that did not receive proper treatment, was cognizable, petitioner did not prove that he belonged to it); *Estrada-Rodriguez v. Lynch*, 825 F.3d 397 (8th Cir. 2016) (seeking cancellation of removal based on extreme hardship to his child but Court ordered removal because of parent's crime of moral turpitude); *Makatengkeng v. Gonzales*, 495 F.3d 876 (8th Cir. 2007) (denying asylum, withholding, and CAT protection to an albino Indonesian man on the grounds that economic and social discrimination did not constitute persecution); *Raffington v. I.N.S.*, 340 F.3d 720 (8th Cir. 2003) (denying a mentally ill Jamaican woman's motion to reopen to apply for asylum on the bases that "the mentally ill are too large and diverse a group to qualify" as a particular social group, and that there was insufficient evidence of persecution); *Palacios-Aguilar v. Sessions*, 2018 U.S. App. LEXIS 7260; 2018 WL 1417215 (9th Cir. 2018) (denying withholding of removal due to lack of proof to show persecution based on membership in group of parents of children with disabilities); *Palma-Bello v. Sessions*, 2017 U.S. App. LEXIS 25184; 2017 WL 6349265 (9th Cir. 2018) (denying a late-filed asylum claim and withholding upheld due to lack of evidence to show persecution on the basis of disability); *Escobar v. Lynch*, 676 F. App'x 670 (9th Cir. 2017) (denying asylum, withholding, and CAT protection to the mother of a disabled 17-year-old boy); *Torres-Derichy v. Lynch*, 636 F. App'x 707 (9th Cir. 2016) (denying withholding to a mother who justified her delay in filing as "changed circumstances" based on the birth and diagnosis of her son with a disability); *Hernandez- Castaneda v. Lynch*, 671 F App'x 565 (9th Cir. 2016) (denying asylum, withholding, and CAT protection to a disabled former gang member with a disability on the basis of a lack of evidence that he would be targeted for persecution by the government or by gangs with government acquiescence); *Inda-Ulloa v. Holder*, 577 F. App'x 649 (9th Cir. 2014) (denying an appeal of an asylum denial in part due to petitioner's lack of a well-founded fear based on his mental disability); *Mendoza-Alvarez v. Holder*, 714 F.3d 1161 (9th Cir. 2013) (denying withholding to a petitioner whose proposed social group, insulin-dependent persons with mental health problems, was held to not be a particular social group); *Rusak v. Holder*, 734 F.3d 894 (9th Cir. 2013) (finding that abuse of a deaf woman in school did not rise to the level of persecution); *Meraz-Medosa v. Holder*, 501 F. App'x 706 (9th Cir. 2012) (denying asylum, withholding, and CAT protection to a man with a hearing disability whose past experiences and future fears did not rise to the level of persecution); *U.S. v. Rodriguez-Chacon*, 478 F. App'x 391 (9th Cir. 2012) (finding that a person with undefined cognitive disabilities had not proved that he was a member of a particular social group); *Tobar-Serrano v. Holder*, 338 F. App'x 682 (9th Cir. 2009) (denying asylum to an El Salvadoran man with disabilities on the grounds that his disability was not a "central reason" for past harm suffered, even if it constituted a particular social group); *Rocca v. Mukasey*, 295 F. App'x 191 (9th Cir. 2008) (remanding for consideration of whether "Peruvians with serious, chronic mental disabilities" constitute a particular social group, and denying review of a CAT claim); *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008) (denying withholding and CAT relief to a Mexican man with bipolar disorder on the grounds that his robbery was a "particularly serious crime" barring withholding, and that he did not establish the specific intent necessary for the CAT claim); *Gokce v. Gonzales*,

247 F. App'x 52 (9th Cir. 2007) (denying asylum, withholding, and CAT protection to a mentally ill Turkish man who failed to prove past persecution, a well-founded fear of future persecution, or that commitment to a mental institution constituted torture); *Boer-Sedano v. Gonzalez*, 418 F.3d 1082 (9th Cir. 2005) (finding that a gay man in Mexico is part of a particular social group, the petitioner suffered past persecution, and remanded to consider withholding claim); *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) (finding that disabled Russian children and their caretaking parents are a “particular social group”); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (holding that “inability to state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture”); *Cole v. Attn’y Gen.*, 712 F.3d 517 (11th Cir. 2013) (denying review of asylum, withholding, and CAT protection to a man with developmental disabilities on the grounds that the Jamaican government was working to protect people with disabilities); *In re Elvin Renaldo Hartley*, WL 3063581 (BIA 2009) (granting an “extreme hardship” waiver to a man from Jamaica with schizoaffective disorder despite a lack of evidence of treatment possibilities in Jamaica); *In re Gloria Moscoso Caba*, 2008 WL 339675 (BIA) (finding no evidence of torture); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (holding that “immutability is a determining factor in defining a particular social group,” and that an immutable characteristic is “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”); *In re C-A-*, 23 I. & N. 951 (2006) (holding that the “social visibility” of the claimed social group is an important consideration in determining whether the group is cognizable where petitioner voluntarily informed on the drug cartel in Columbia); *Matter of Faronda Blandon*, 78 Interpreter Releases 1173 (July 16, 2001) (granting withholding to a mentally incompetent homeless man from Colombia, and that petitioner was found likely to suffer abuse amounting to persecution, torture, or killing as part of “social purges” in Colombia); *Matter of ____*, Immig. Rptr. LEXIS 5229 (2013) (recognizing people from Ghana with severe mental illness as a particular social group and remanding to the IJ to allow excluded expert testimony and country reports).

In April 2018, the BIA reversed an immigration judges decision and ordered the case remanded, finding that a man from Senegal with schizophrenia who “exhibit[ed] erratic behavior” qualified for membership in a particular social group.

[42] Arlene S. Kanter, *Making the Case (Again) for Protection from Deportation for People with Disabilities* (forthcoming).

[43] U.S.C. §241(b)(3)(B); 8 C.F.R. § 1208.16(b) (2005).

[44] 8 U.S.C. §1101(a)(42) (2014); 8 C.F.R. § 1208.16(b) (2005).

[45] See Arlene S. Kanter, *The Failure of the United States to Ratify the UN Convention on the Rights of People with Disabilities*, in Johnson, K. and Kakoullis, E., eds., *Recognising Rights in Different Cultural Contexts: The United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, (forthcoming 2018) (recognizing that of the nine core human rights treaties that have been adopted by the United Nations, the U.S. has signed only three, giving the U.S. the distinction of the country with the “poorest record of ratification of human rights treaties among all industrialized nations”).

[46] G.A. Res. 32/62 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (Dec. 10, 1984) [hereinafter CAT]. The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Id.*

[47] In other countries, this temporary protective status is known as “complementary protection.” See 8 CFR 244 (2011); See also General Conclusion on International Protection No. 108, (k) (LIX) – 2008 EXCOM Conclusions, 10 October 2008 available at: <http://www.unhcr.org/49086bfd2.html>.

[48] See Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, Congressional Research Service RS20844, January 17, 2018, available at <https://fas.org/sgp/crs/homesecc/RS20844.pdf>; see also Jane McAdam, *Status Anxiety: Complementary Protection and the Rights of Non-Convention Refugees*, in University of New South Wales Faculty of Law Research Series 5 (2010), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1196&context=unswwps-flrps10> (last visited Jan. 21, 2013).

[49] These countries are Haiti, El Salvador, Syria, Nepal, Honduras, Yemen, Somalia, Sudan, Nicaragua and South Sudan. See Vera Cohn & Jeffery S. Passel, *More than 100,000 Haitian and Central American immigrants face decision on their status in the U.S.*, Pew Research Center (November 8, 2017).

[50] In 2011, the BIA upheld the right of immigrant detainees with mental disabilities to due process protections, including the right to be evaluated to assess competency before proceeding with deportation proceedings in *In re M-*

A-M, 25 I&N Dec. 474 (BIA 2011). Moreover, in 2013, a federal district court ordered the federal government to provide legal representation for immigrant detainees in California, Arizona and Washington who have serious mental disabilities and are unable to represent themselves in immigration court. This was the first court decision to recognize a right to appointed counsel in immigration proceedings for a group of immigrants. *Franco-Gonzalez et al., v. Holder*, 767 F. Supp. 1034 (C.D. Ca. 2013). But see *Matter of J-R-R-R-A* 26 I&N 609 (BIA 2015) in which the Immigration Judge found that the applicant with a cognitive disability was not credible with respect to the genuineness of his fear of persecution. The case was remanded to determine competency and reassess the factual findings if competency was shown to be an issue.

[51] 8 U.S.C. §1101(a)(42)(A); The first case to interpret the “particular social group” category is the 1986 case of *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985). In this case, citing the lack of guidance and using the interpretative canon of *ejusdem generis*, the BIA adopted the immutable characteristic standard, which requires that members of a particular social group share “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be to changed.

[52] *In re C-A-*, 23 I. & N. Dec. 951, 959 (2006); See Matthew Shelton Nestrud, *Misguided Interpretation is Not “Immutable”: A Critique of the Board of Immigration Appeals’ Interpretation of “Membership in a Particular Social Group” Under United States Asylum Law- A Proposed Standard*, 5 J. Marshall L.J. 597, 613 (2012).

[53] See Theories of the case – Grounds for fearing persecution – Social Group 1 Immig. L. & Defense §13:40 (2018).

[54] See e.g., *In re Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (basing asylum claim on membership in group “COTAXI,” which was formed to help members save money and purchase their own taxis); *Sanchez-Trujillo v. INS*, 801 F.2d at 1573-74 (basing asylum claim on membership in group that has not expressed support for government of El Salvador); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (basing asylum claim on immutable characteristic of former members of El Salvador national police force); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000) (finding membership for gay man with female sexual identity); *Pitcherskaia v. INS*, 118 F.3d 641, 643 (9th Cir. 1997) (finding membership for Russian lesbian); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 820 (B.I.A. 1990) (finding membership for Cuban homosexual); *In re Kasingconcluya*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (basing asylum claim on membership in group of young women who are members of Togo tribe, have not been subject to female genital mutilation, and who oppose the practice); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (basing asylum claim on membership in group of Iranian women who oppose government gender-specific laws and social norm); *Matter of A-N-*, A73603840 (IJ Dec. 22, 2000) (Philadelphia, Pa.) (Grussendorf, IJ); *Aguirre-Cervantes v. INS*, No. 99-70861, 2001 WL 274698 (9th Cir. Mar. 21, 2001); *Garcia v. Att’y Gen. of the U.S.*, 665 F.3d 496, 503–04 (3d Cir. 2011) (concerning witnesses who have assisted the government in testifying against gang violence); *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) (recognizing truckers who because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC); *Ayala v. Holder*, 640 F.3d 1095 (9th Cir. 2011) (suggesting former military officers as a particular social group, but denying the current applicant asylum for failure to establish nexus). See also Arlene Kanter, *The Right to Asylum for People with Disabilities*, (with Kristen Dadey), 73 Temple L. Rev. 1117 (2000); *The Right to Asylum and Need for Legal Representation of People with Disabilities in Immigration Proceedings*, (with R. Blake Chisam and Christopher Nugent), 25 Mental & Physical Disability L. Rptr. 511 (2002).

[55] See Arlene Kanter, *The Right to Asylum for People with Disabilities*, (with Kristen Dadey), 73 Temple L. Rev. 1117 (2000); *The Right to Asylum and Need for Legal Representation of People with Disabilities in Immigration Proceedings*, (with R. Blake Chisam and Christopher Nugent), 25 Mental & Physical Disability L. Rptr. 511 (2002).

[56] Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights*, 65-66 (2015).

[57] *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188–1189 (9th Cir. 2005), vacated and remanded on other grounds, 127 S. Ct. 57 (2006). This case is also important because it extended protection not only to a child with a disability but to his parents as well. As the court wrote: “We hold that disabled children and their parents constitute a statutorily protected group and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability. We also hold that, given the record before us, the parent who is seeking asylum and withholding in this case is eligible for the former relief and entitled to the latter. Finally, we hold that the parent’s spouse and the disabled child are eligible for asylum by virtue of their derivative applications and are also entitled to withholding of removal.” *Id.*

[58] *Tchoukhrova v. Gonzales*, 404 F. 3d 1181, 1190 (9th Cir. 2005).

[59] In 2010, the Third Circuit recognized a “mentally ill” person as a member of a particular social group in *Soobrian v. Att’y Gen. of US.*, 388 F. App’x. 182, 183 (3d Cir. 2010). Similarly, the Seventh Circuit overturned a BIA decision in 2008 which had held that mental illness was not an immutable trait in *Kholyavskiy v. Mukasey*, 540 F.3d 555, 573 (7th Cir. 2008). In another case, *Makatengkeng v. Gonzales*, 495 F.3d 876 (8th Cir. 2007), the Eighth Circuit Court

found that an Indonesian man with albinism was a member of a social group because his albinism is an immutable characteristic but denied his claim for asylum because of his failure to show fear of persecution on the basis of his albinism. *See also Matter of ___* 2013 Immig. Rptr. Lexis 5229 (Nov. 15 2013) (recognizing that people from Ghana with severe mental illness are a particular social group and remanded to the IJ to allow excluded expert testimony and country reports); *Rocca v. Mukasey*, 295 F. App'x 191, 192 (9th Cir. 2008) (remanding Petitioner's claims for asylum and withholding of removal to determine "whether Peruvians with serious, chronic mental disabilities constitute 'a particular social group'"). In addition, an Immigration Judge had held that a Pakistani boy with autism was a member of a particular social group and qualified for asylum. Letter Opinion by Robert Esbrook, A 78 642 794 (Chicago Asylum Office Feb. 21, 2001).

[60] For example, the Eighth Circuit held in *Raffington v. I.N.S.*, 340 F.3d 720, 723 (8th Cir. 2003) that a person with mental illness did not meet the particular social group requirement, as did the Seventh Circuit in *Disha v. Gonzales*, 207 F.App'x 694, 695 (7th Cir. 2006) (unpublished); *See also U.S. v. Rodriguez-Chacon*, 478 F. App'x 391 (9th Cir. 2012) (Court affirmed BIA finding that man with cognitive disability had not proven he was a member of a particular social group); *Korneekov v. Holder*, 347 F. App'x 93, 95, 99 (5th Cir. 2009) (affirming the BIA finding that petitioners would not be persecuted in Russia based on their status as people with intellectual disabilities, despite evidence that showed the discrimination and abuse that people with intellectual disabilities suffered in Russia at that time); Similarly, in *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1165 (9th Cir. 2013) (per curiam), the Court denied withholding of removal of a petitioner whose proposed social group, insulin-dependent persons with mental health problems, was held to not be a particular social group.

[61] The INA does not specifically define persecution, however the courts have held that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution." *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983). The United Nations High Commission on Refugees (UNHCR) has promulgated the following similar definition: "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./Rev.2, paragraph 5 (hereinafter "UNHCR Handbook").

[62] Sabi Ardalan and Palmer Lawrence, *The Importance of Nonphysical Harm: Psychological Harm and Violations of Economic, Social, and Cultural Rights in the U.S. Asylum Law*, 14-09 IMMIGRATION BRIEFINGS (September 2014).

[63] Deliberate imposition of severe economic disadvantage which threatens alien's life or freedom may constitute "persecution," of the kind required to support asylum claim. INA §§ 101(a)(42), 208, as amended, 8 U.S.C.A. §§ 1101(a)(42), 1158. *See e.g. Li v. Attorney General of the US*, 400 F.3d 157 (3d Cir. 2005) (finding economic persecution where a Chinese national was fined more than eighteen-months' salary, blacklisted from any government employment and from most other forms of legitimate employment, lost his health benefits, school tuition and food rations, and suffered from having his household furniture and appliances confiscated after violating China's population control policies). *See also* UNHCR Handbook at ¶54 (Discrimination may amount to persecution "if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.); *see also* nds for persecution, though the list here has definitely been taken.

[64] *See* 8 C.F.R. § 1208.13(b)(1).

[65] *See* Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* 29-31(2015). For a discussion of treatment of people with disabilities under Nazism which gave rise to the development of the entire international human rights regime; *see e.g.*, Suzanne E. Evans, *Hitler's Forgotten Victims: The Holocaust and the Disabled* (2016).

[66] For a general discussion of the mistreatment that people with disabilities face throughout the world and which the UN Convention on the Rights of People with Disabilities seeks to address, including the right to be free from forced sterilization, *see* Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* 159-220 (2015). For a discussion of the sterilization practices around the world, *see* *Torture in Health Care Report, Reflections on the Special Rapporteur's 2013 Thematic Report* at http://antitorture.org/wp-content/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf ; *Commentary, Disabled People Are Still Being Forcibly Sterilized—So Why Isn't Anyone Talking About It?* Rewire News (November 17, 2014), available at <https://rewire.news/article/2014/11/17/disabled-people-still-forcibly-sterilized-isnt-anyone-talking>. *See also* *In re Guardianship of Kennedy* (Iowa, Apr. 18, 2014) (guardian seeks to consent to vasectomy of man with intellectual disability), available at <http://caselaw.findlaw.com/ia-supreme-court/1668023.html>.

[67] Special Rapporteur on the Rights of Persons with Disabilities, *Sexual and Reproductive Health and Rights of Young Women and Girls with Disabilities*, A/72/133 (October 2017) available at http://www.embracingdiversity.net/report/sexual-and-reproductive-health-and-rights-of-girls-and-young-women-with-disabilities_1026.

[68] 8 U.S.C. § 1158(b) (1988); 8 U.S.C.A. § 1101(a)(42) (2014). *See also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 159 (1993); *see also* I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 428 n.5 (1987).

[69] Reports of Disability Rights International are available at <https://www.driadvocacy.org/media-gallery/our-reports-publications/>. *See also* Human Rights Watch reports on conditions of people with disabilities in various countries at <https://www.hrw.org/topic/disability-rights>.

[70] *See* Arlene S. Kanter and Khawla Wakkaf, *Children with Disabilities and the Syrian Conflict*, 7 Impunity Watch Annual Review (2016-17).

[71] *See Tchoukhrova v. Gonzalez*, 404 F. 3d 1181 (9th Cir. 2005), *cert granted, judgment vacated on other grounds*, 549 U.S. 801 (2006) (remanding for further consideration) (finding that “although denying medical care or education on the basis of race, ethnicity, religion, political opinion, or membership in a particular social group is, at a minimum, discrimination, where the denial seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is warranted.”); *Id.* at 1189. Although the Supreme Court vacated the Ninth Circuit’s decision on other grounds, the family was eventually granted asylum. Immigration Judge Summary Order, June 11, 2007. *See also Tinizaray-Narvaez v. Attorney General Of U.S.*, 2009 WL 4048859 (3d Cir. 2009) (holding that the BIA had abused its discretion by not allowing a psychologist to testify as to the hardship posed to the petitioner’s mentally ill citizen daughter.); *Cruz-Rendon v. Holder* 603 F.3d 1104 (9th Cir. 2009) (holding that the IJ had not granted a “full and fair hearing” on the question of hardship to petitioner’s disabled son because the IJ did not grant a continuance.). *See also Boer-Sedano v. Gonzalez*, 418 F. 3d 102, (9th Cir. 2005) (upholding the asylum eligibility of a gay man with AIDS from Mexico who suffered past persecution and for whom relocation was deemed unreasonable partly due to AIDS-related health concerns); *Matter of Faronda Blandon*, 78 Interpreter Releases 1173 (July 16, 2001) (granting withholding to a mentally incompetent homeless man from Colombia because he would likely suffer abuse amounting to persecution, torture, or killing as part of “social purges” in Colombia).

[72] For example, in a 2012 Case from Mexico, *Meraz-Medosa v. Holder*, 501 F. App’x 706 (9th Cir. 2012), the court denied asylum, withholding, and CAT protection to a man with a hearing disability on the ground that his past experiences and future fears did not rise to the level of persecution. *See also Akhtar v. Att’y Gen. of U.S.*, 138 F. App’x. 481, 483 (3d Cir. 2005) (upholding the BIA’s determination that Akhtar, who had suffered brain damage and physical disabilities as a result of a car accident, had failed to prove the mistreatment and teasing he would experience upon return to Pakistan rose to the level of persecution where there had been no incident in the four years preceding his medical trip to the United States). In 2007, the same court, held that the persecution of mentally ill parents may be imputed to their child in *Xian Chun Dong v. Att’y Gen. of U.S.*, 216 F. App’x. 209, 211-12 (3d Cir. 2007).); *Hernandez- Castaneda v. Lynch*, 671 F App’x 565 (9th Cir. 2016) (denying asylum, withholding, and CAT protection to a disabled former gang member with a disability on the basis of a lack of evidence that he would be targeted for persecution by the government or by gangs with government acquiescence); *Inda-Ulloa v. Holder*, 577 F. App’x 649, (9th Cir. 2014) (denying asylum because the petitioner failed to demonstrate a well-founded fear of future persecution in Mexico based on his mental disability); *Gokce v. Gonzales*, 247 F.Appx 52 (9th Cir. 2007) (refraining from finding that people with mental illness in Turkey are a particular social group, and finding that the petitioner failed to establish evidence of past persecution, a well-founded fear of future persecution, or that it would be more likely than not that he would be tortured upon return, citing *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) and *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995); *Massaquoi v. Att’y Gen.*, 313 F. App’x. 483, 486 (3d Cir. 2008) (denying withholding of removal and CAT protection to a mentally ill Liberian man since his doctor’s testimony, was “tenuous, speculative, uncorroborated” and did not prove a state policy against the mentally ill); *Rusak v. Holder*, 734 F.3d 894, 986 (9th Cir. 2013) (holding that a deaf woman teased by teachers and classmates failed so show persecution on account of disability and remanded to the BIA to reconsider in light of her eligibility for asylum on the basis of religion discrimination); *Tobar-Serrano v. Holder*, 338 F. App’x 682, 683 (9th Cir. 2009) (denying asylum to an El Salvadoran man because his disability was found not to be a “central reason” for past harm suffered, even if he was a member of a particular social group); *Estrada-Rodriguez v. Lynch*, 825 F.3d 397 (8th Cir. 2016) (seeking cancellation of removal based on extreme hardship to his child but Court ordered removal because of parent’s crime of moral turpitude); *Fahmy v. Holder*, 576 F. App’x 524, 529 (6th Cir. 2014) (failing to demonstrate that the Egyptian government denied medication to people with paranoid schizophrenia); *Lopez Perez v. Holder*, 587 F. 3d 456 (1st Cir. 2009) (denying asylum, withholding, and CAT protection to a woman whose husband has Parkinson’s and who had been harassed in the past by her family in Guatemala); *Cano-Saldarriaga, v. Holder*, 729 F. 3d 25 (1st Cir. 2013) (denying petition for review of cancellation of removal and CAT, which had been granted based on petitioner’s mental

disability, due to pending applications for relief); *Cole v. Attn'y Gen.*, 712 F.3d 517 (11th Cir. 2013) (denying review of asylum, withholding, and CAT protection to a man with developmental disabilities on the grounds that the Jamaican government was working now to protect people with such disabilities); *Escobar v. Lynch*, 676 F.App'x 670 (9th Cir. 2017) (denying asylum, withholding, and CAT protection to the mother of a disabled 17-year-old Ecuadorian boy). Courts also have denied claims for asylum and withholding of removal on the grounds of timeliness, see *Torres-Derichy v. Lynch*, 636 F. App'x 707 (9th Cir. 2016) (denying withholding to a mother who justified her delay in filing as "changed circumstances" based on the birth and diagnosis of disability of her son) and on the grounds of no changed circumstances to warrant review in *Ibrahim v. Att'y Gen.*, 2017 WL 4310368 (3d Cir. 2017) (denying withholding of man with physical disability from Somalia by finding that NGO report on suffering by Somalia people with disabilities was "outside of the record" and did not show "material change" in country conditions.)

[73] *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (noting that a CAT claim "is not merely a subset of claims for either asylum or withholding of removal . . . In an important sense, then, the Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured "on account of" a protected ground; it is narrower, however, because the petitioner must show that it is "more likely than not" that he or she will be tortured, and not simply persecuted upon removal to a given country").

[74] In 2008, the Special Rapporteur, Manfred Nowak, analyzed, for the first time, the meaning of torture, cruel, and inhuman treatment in the context of treatment and care for people with mental disabilities in his report entitled *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, ¶ 49, U.N. Doc. A/63/175 (July 28, 2008). For example, he wrote that the pain and suffering that is required to satisfy the first element of torture, need not be based on objective facts, but may be based on subjective evidence relating to the person's age, health, or disability. *Id.* at 186. More recently, on February 1, 2013, Special Rapporteur, Juan Méndez, issued a *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with Respect to the CRPD*. This report discusses what type of medical treatment constitutes torture. He suggests, for example, that certain medical practices, when provided to a person because of the person's disability, and without free and informed consent, can constitute inhuman and degrading treatment. Office of the High Commissioner on Human Rights, *When a Health Carer Becomes a Torturer, Key Report by the UN Special Rapporteur on Torture*, United Nations Human Rights (Mar. 5, 2013). In February 2018, the Special Rapporteur, Nils Melzer, submitted his Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Human Rights Council A/HRC/37/50 (Feb. 26, 2018). In it, he observes that "[e]ven when discounting widespread underreporting and focusing exclusively on recognized refugees and asylum seekers, this extrapolates to a staggering 7 million victims of torture, thus raising serious questions as to the compatibility of current laws, policies and practices with the universal prohibition of torture and ill-treatment." *Id.* at 4.

[75] In *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) he 9th Circuit that the failure of a man Sri Lanka to state a cognizable claim for asylum did not preclude relief under the CAT. See also *Jean-Pierre v. Atty. Gen. of U.S.*, 500 F.3d 1315, 1326-27 (11th Cir., 2007) (remanding case to the BIA to determine CAT claim by Haitian man with AIDS who claimed that he would be immediately sent to a prison for an indefinite term and that in light of his medical condition, it was highly likely that he would be subjected to physical torture by prison guards); *Roye v. Att'y Gen.*, 693 F.3d 333, 343 (3d Cir., 2012) (finding that although a lack of resources and deplorable conditions in prison do not in themselves constitute torture, the state's willful blindness to the disparate impact on the mentally ill may constitute intention under CAT).

[76] See *Joseph v. Att'y Gen.*, 392 F. App'x. 934, 937 (3d Cir. 2010) (finding that deplorable Haitian prison conditions did not amount to torture); *In re Gloria Moscoso Caba*, 2008 WL 339675 (BIA) (finding there was no torture); *Lysaire v. Atty. Gen.*, 368 F. App'x. 329, 332 (3d Cir. 2010) (finding that where government officials withheld medication until they were paid, it was not torture on account of mental illness, but "extortion of pecuniary gain."); *Villegas v. Mukasey*, 523 F. 3d 984 (9th Cir.) (finding that specific intent necessary for the CAT claim was not shown); *Thiersaint v. Holder*, 464 F. App'x 16 (2d Cir. 2012) (denying CAT protection to a Haitian man with a physical disability because he failed to show that he would be "singled out for torture," despite "unduly harsh conditions" for criminal deportees); *Harbin v. Sessions*, 860 F. 3d 58 (2d Cir. 2017) (holding that a mentally ill criminal deportee from Grenada not eligible for CAT protection); *Roig v Holder*, 580 F. App'x 4 (2d Cir. 2014) (finding that a claim of torture in Cuban prison and lack of work due to his physical disability merely "speculative."); *Ke Lin v. Holder* 571 F. App'x 46 (2d Cir. 2014) (finding that a Chinese man's fear of torture in the form of sterilization was "speculative").

[77] See e.g., *Ordóñez-Quino v. Holder*, 760 F. 3d 80 (1st Cir. 2014) (remanding the case to determine whether an indigenous man made deaf by a military attack as a child in Guatemala suffered past persecution in light of the cumulative evidence, or alternatively, whether severe harm and the long-lasting effects thereof made him eligible for

humanitarian asylum) *Cf. Kholyavskiy v. Mukasey*, 540 F.3d 555, 573 (7th Cir. 2008) (holding that Petitioner's experiences in Russia and the resulting effects on his mental health did not meet the "severe" or "atrocious" level of past persecution required under [Matter of Chen](#), 20 I. & N. Dec. 16 (B.I.A. 1989) or 8 CFR § 1208.13(b)(1)(iii)(A), the first ground for humanitarian asylum; however, since removal to Russia would result in his inability to obtain medical care or housing such "serious harms" met the second ground for humanitarian asylum under [8 CFR § 1208.13\(b\)\(1\)\(iii\)\(B\)](#), resulting in the Seventh Circuit's decision to remand the case for further consideration by the BIA). A year after *Kholyavskiy*, in *In re Elvin Renaldo Hartley*, WL 3063581 (BIA 2009), the BIA granted an "extreme hardship" waiver to a Jamaican citizen who suffered from schizoaffective disorder and required medication, entitling him to consideration under a humanitarian grant court although the BIA noted that a lack of resources was not *per se* persecution, it can cause undue hardship upon his return to Jamaica. *See also* Maria Baldini-Potermine, *Past Persecution, Mental Illness and Humanitarian Asylum: Creating the Record to Win the Claim* 86 No. 4 Interpreter Releases 261 (2009).

[78] *Disha v. Gonzales*, 207 F.App'x 694, 696 (7th Cir. 2006) (unpublished) (finding that although he did not qualify for withholding of removal because the group of "all mental patients who cannot receive proper medical treatment in Albania" was too large, the court chose to waive the one year filing deadline for his asylum claim).

[79] *But see Jaswant LAL; Shakuntla Lal; Rikesh Lal v. INS*, 255 F.3d 998 (9th Cir. 2001) amended at 268 F.3d 1148 (9th Cir. 2001) (interpreting the same language as the court did in *Matter of Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989), this court held that petitioner need not prove lasting disability to demonstrate changed circumstances to support claim of well-founded fear of future persecution).

[80] *Ordones-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014).

[81] *In re Elvin Renaldo Hartley*, WL 3063581 (BIA 2009).

[82] *See* United Nations Convention Relating to the Status of Refugees art. 33, *adopted* July 28, 1951, 189 U.N.T.S. 150, G.A. Res. 2198 (XXI) (July 28, 1951); Protocol Relating to the Status of Refugees, *adopted* January 31, 1967, 606 U.N.T.S. 267, G.A. Res. 2198 (XXI) (Jan. 31, 1967). Article 1A(2) of the Refugee Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." *See also* UNHCR, 'Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/02, para 11.

[83] The Convention on the Rights of People with Disabilities (CRPD) was adopted by the UN in 2006, entered in to force in 2008, and has since been adopted by 177 countries, but not the United States. President Obama signed the, opted 3e of the group of "ion, though the list here has definitely been taken CRPD in 2009, however, the Senate failed to garner the 2/3 votes needed for ratification. *See* Arlene S. Kanter, *The Failure of the United States to Ratify the UN Convention on the Rights of People with Disabilities*, in Johnson, K. and Kakoullis, E., eds. *Recognising Rights in Different Cultural Contexts: The United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, (forthcoming 2018). Although the CRPD does not specifically address the rights of refugees or others seeking relief from deportation on the grounds of persecution based on disability, there is general consensus that the general principles of the CRPD as well as the Preamble and specific articles in the CRPD apply in equal force to the rights of refugees and asylees with disabilities, at least in those countries that have ratified it. As scholars have written, "[t]here is nothing in the text of the CRPD to suggest an intention that the CRPD should apply only to nationals. On the contrary, the CRPD is premised on the principle of universality. The purpose of the CRPD, stated in article 1, is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'" Mary Crock, Christine Ernst, Ron McCallum, *Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities*, 21 International Journal of Refugee Law 735, 740 (2012). Moreover, the Executive Committee of UNHCR has concluded that persons with disabilities are entitled to protection as refugees and that State Parties are responsible "to take all appropriate measures to protect and assist persons with disabilities, in all situations." *See* Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR, No. 110 (LXI) – 2010, Executive Committee 61st session, United Nations General Assembly document A/AC.96/1095, UNHCR Executive Committee of the High Commissioner's Programme, 12 October 2010, available at <http://www.unhcr.org/excom/exconc/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html>.

Reimagining the Human Rights Framework on Abortion and Disability

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by Katrina Anderson*

In October 2017, the Committee on the Rights of Persons with Disabilities (CRPD Committee) issued its concluding observations from its initial review of the United Kingdom and Northern Ireland for compliance with the Convention on the Rights of Persons with Disabilities (CRPD). Two paragraphs from this set of recommendations caught the attention of sexual and reproductive rights advocates:

The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment. The Committee recommends that the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency.[\[1\]](#)

This marked the first time a human rights treaty body had called on a state to eliminate one of the legal grounds by which women can terminate a pregnancy on the basis that such provisions violate the right to non-discrimination on grounds of disability.[\[2\]](#) The approach of the CRPD Committee directly contradicted that of other human rights treaty bodies, which have found fetal impairment provisions to be consistent with ensuring safe abortion access and protecting women's rights to life and health.[\[3\]](#)

The incoherent human rights standards stem from genuine disagreements among human rights experts on this issue. They also signal a lack of alignment between the disability rights movement and the sexual and reproductive health and rights (SRHR) movement in their advocacy before human rights treaty bodies. The recent mobilization of people with disabilities to participate in global advocacy with the CRPD Committee has pushed these long simmering tensions to the fore, as disability advocates now use this new human rights forum to challenge harmful disability-based stereotypes. Though both the disability and SRHR movements share a common foundation in the principles of autonomy and self-determination, conflicts around the issue of abortion and disability have driven a wedge between advocates and policymakers and divided the broader human rights community about how the issue ought to be approached.

Continuing to avoid this impasse around the fetal impairment ground for abortion is no longer a tenable strategy for either the disability or SRHR movement. The moment has come to admit that

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current human rights standards are inadequate, and to collaborate in supporting the human rights system to develop a comprehensive legal framework that protects the right to abortion without devaluing the lives of people with disabilities.

The (II)legitimacy of the Fetal Impairment Ground

Many countries that restrict the right to abortion nevertheless allow women to access abortions under certain conditions, either prior to a certain gestational age or due to specific reasons. The category of reason-based exceptions most commonly includes situations where the life or health of the pregnant woman is at risk, rape, incest, and the detection of a fetal impairment.^[4] Abortion on the basis of fetal impairment differs from the other grounds in that it is based on the status of the fetus itself rather than the health condition of the pregnant woman or the circumstances under which pregnancy occurred.

According to the Center for Reproductive Rights, 39 countries have provisions allowing access to abortion on grounds of fetal impairment, and most of these are in contexts that are otherwise highly restrictive.^[5] Those who defend the legitimacy of fetal impairment exceptions argue that these provisions provide life-saving access to abortion in many contexts where unsafe abortion is the leading cause of maternal mortality or morbidity.^[6] Although some SRHR advocates express ambivalence about the fetal impairment exception, the broader movement has historically accepted it as necessary given the political realities for women in accessing abortion in restrictive contexts. Because the fetal impairment exception is often viewed as one of the more socially acceptable reasons for abortion, it is included in a larger political strategy to expand the legal grounds for abortion one-by-one until broader liberalization is achieved.^[7] An example of how this theory has worked in practice can be found in the case of Nepal, which decriminalized abortion in 2002 to allow abortions on demand prior to 12 weeks and thereafter in cases of rape, incest or fetal impairment, or if there is a threat to the woman's life or physical or mental health.

The legitimacy of the fetal impairment ground is often contested by disability rights advocates, who argue that such provisions reflect a legacy of eugenics entrenched in law and the medical system.^[8] They argue that the fetal impairment ground reflects the “medical model” of disability, which views a person's impairment (or the disabled fetus) as the problem, in contrast to a “social model” of disability, which problematizes the legal, economic and social barriers that demean the lives of people with disabilities and leave them vulnerable to discrimination. When future parents receive a positive diagnostic test of a fetal impairment, but do not receive information to counter their biases, it is no wonder they imagine bleak futures for their disabled children.^[9] Although disability rights advocates generally agree that disability stigma—and an inadequate healthcare and community support system—underlies the reason why many women choose to abort after a positive diagnosis of fetal impairment, they are less aligned about the role of the law in addressing this problem.

Inconsistent Human Rights Standards

The inconsistencies in the standard setting sphere reflect the fact that the SRHR movement has worked to establish sexual and reproductive rights as human rights since the early 1990s, and human rights treaty bodies have incrementally recognized the right to abortion as a fundamental aspect of women's equality and autonomy.^[10] The engagement of the disability movement with

the human rights system is relatively newer, with the establishment of the CRPD Committee in 2008. Only within the last decade has the human rights treaty body system confronted the perspective of the disability community regarding abortion on grounds of fetal impairment.

The CRPD Committee faced the issue of the fetal impairment ground for abortion early in its existence with the initial review of Spain in 2011.^[11] In that case, the CRPD Committee urged the government of Spain to amend a law that allowed women to access abortion in cases of fetal impairment later in pregnancy than was permitted for abortions sought on other grounds. The CRPD Committee expressed the view that differential treatment of fetal impairment compared to other legally permissible grounds for abortion perpetuates disability stigma. This contributes to a discriminatory environment against people with disabilities, therefore triggering a violation of Article 5's right to non-discrimination. Notably, the CRPD Committee has not found that the right to life is implicated by the fetal impairment ground. This is consistent with settled human rights law that rights attach at birth, and with the CRPD drafters' rejection of calls to define the right to life from the moment of conception.^[12] Nevertheless, the legal reasoning of the CRPD Committee is shaky: how can there be discrimination in the absence of a discriminated subject? While carefully asserting that the aim of banning abortion on this ground is not to restrict women's sexual and reproductive autonomy, the CRPD Committee offers no guidance to states on how to thread that needle.

The CRPD Committee's recommendations conflict with that of other treaty bodies, which have affirmed the legality of the fetal impairment ground as a provision that protects women's rights to life, gender nondiscrimination, and freedom from cruel and inhuman treatment.^[13] For example, the Human Rights Committee's draft General Comment on the Right to Life frames the fetal impairment ground as consistent with the state's obligation to ensure women's right to life.^[14] In 2014, the Committee that monitors the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) made a statement that affirmed the importance of the fetal impairment ground along with other common exceptions to criminalization.^[15] Concerned about the strategy of the anti-abortion movement to use disability as a wedge issue, other treaty bodies have called on states to preserve the fetal impairment ground as an important safeguard of abortion rights.^[16] Yet, these treaty bodies have strategically avoided the concerns raised by the CRPD Committee about the ways that the fetal impairment ground perpetuates disability stigma and negatively impacts the lives of people with disabilities.

A Call for a New Framework

There is no script to follow when resolving conflicts in human rights law. Nevertheless, the first step is to recognize that the current standards are unworkable. The next is to convene people with various perspectives who may disagree but are committed to a process of listening, learning, and strategizing with one another. Some steps to build trust and relationships across the two movements are happening now in the Global North, particularly the United States and Europe. But this process ought to provide for meaningful consultation with diverse members of the disability and SRHR movements, including non-lawyers as well as Global South activists who are leading voices on these issues within social movements yet are often excluded from discussions in the standard setting sphere due to resource constraints.

Those who come to the table must be clear about their non-negotiables. Ultimately, the disability movement is focused on dismantling disability stigma, not on the issue of abortion or the goal of limiting women's autonomy. Their objective is to change the way disability is viewed—from a curse that condemns a person to a lifetime of suffering towards recognition of disability as another form of human difference. Similarly, the SRHR movement's primary concern is to change the way abortion is viewed—from a sin justifying criminalization to a normalized event along a woman's sexual and reproductive life course and a protected right. At their core, both movements aim to challenge negative views of women or people with disabilities and seek to transform the structural conditions that limit their personal autonomy and collective opportunity.

Each movement must also do some internal reflection about how well their strategies have served them. Despite the fact that many in the disability community recognize the shared value of bodily autonomy with the SRHR movement, most Disability Persons Organizations will not publicly support abortion rights out of fear they may alienate some members of the disability community. This has silenced many pro-choice people with disabilities who argue that refusing to take a stand on abortion invisibilizes the fact that many women with disabilities also need abortion services.^[17] The CRPD, with its most expansive articulation of sexual and reproductive rights of any human rights treaty to date, offers an opportunity for disability rights advocates to advance a policy agenda that recognizes the sexuality and reproductive needs of women and girls with disabilities.^[18]

The disability movement must guard against co-option of its agenda by an anti-abortion opposition that cares much more for establishing fetal personhood and eroding sexual and reproductive rights than protecting the rights of disabled people. Indeed, abortion opponents have instrumentalized disability in order to build the case for fetal personhood: by arguing that the disabled fetus is a subject of discrimination, the fetus becomes a rights-bearer capable of asserting rights claims against the woman whose womb it inhabits.^[19] The CRPD's recommendations to Spain to amend the fetal impairment ground in 2011 may have given momentum to the conservative Popular Party to introduce abortion law reforms aimed at repealing the prior government's liberalization of abortion.^[20] Massive street protests in Spain ultimately prevented the law from passing, thus avoided an inconvenient scenario that human rights law could have served as a justification for abortion restrictions.

The SRHR movement has its own reckoning to do. The moment has come to openly recognize that fetal impairment exceptions make people with disabilities feel devalued and dehumanized. And they are not alone: the exceptions strategy by design creates an "abortion hierarchy" that legitimizes some reasons for abortion (rape, incest, threat to health) and stigmatizes others (poverty, later term, repeat abortions). Acknowledging the ways that this strategy has hurt people with disabilities is also an opportunity to remind the SRHR movement of its core principles and generate a more transformative vision. If women's autonomy is indeed the underlying principle for abortion rights, the SRHR movement ought to pursue a strategy that eradicates all kinds of stigma and rejects any one reason for abortion as more legitimate than any other.

Yet, the trend towards retrenchment on abortion rights is real, and SRHR advocates know that losing any legal ground for abortion jeopardizes women's lives. As they work towards broader liberalization, SRHR advocates can embrace a robust health exception—rather than a fetal impairment exception—that would provide a woman broad leeway to determine whether

continuing with a pregnancy jeopardizes her physical, emotional, social or mental health. This approach, which focuses on the woman's decision-making based on her individual and subjective experiences, and not on the condition of the fetus, has been endorsed by some disability rights organizations.^[21]

At the same time, the SRHR movement must commit to a legal framework that transforms the social and economic structures that devalue the lives of people with disabilities—and therefore constrains the ability of pregnant women to make a meaningful choice when they have indications of a fetal impairment. This will require not only new frameworks, but long-term investments in strategies to combat disability stigma in the medical system, law and policy, and society at large.^[22] The SRHR movement's policy agenda must expand to include supports and services for families raising a child with disabilities, including access to appropriate health care, inclusive education, and economic support. Allying with the disability rights movement in this effort will help the SRHR movement expand its base and build power.

Facing these challenges will require time, resources, and commitment by human rights advocates and lawmakers. However daunting that may seem, the costs of continuing to avoid this challenge are far higher. Inconsistent standards leave the human rights system vulnerable to claims that it lacks credibility to resolve complex and controversial issues. To the contrary, the human rights system is best positioned to develop a practical framework that balances competing concerns while articulating a vision for a more transformative and inclusive future.

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[1] Convention on the Rights of Persons with Disabilities (CRPD) Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland (2017), U.N. Doc. CRPD/C/GBR/CO/1 (2017), ¶¶ 12-13.

[2] As discussed *infra* in text surrounding note 11, the Committee had previously called on states to eliminate distinctions in law that allowed termination on grounds of fetal impairment to occur later in pregnancy than abortions sought for other reasons.

[3] See *infra* notes 13-16.

[4] The definition of fetal impairment varies widely by jurisdiction. Some countries distinguish between “fatal” and “non-fatal impairments” while others list specific disabilities that fall under this exception.

[5] As of 2014, 39 countries retained an exception to the criminalization of abortion for the reason of fetal impairment. See Center for Reproductive Rights, *The World's Abortion Laws* (2014), <http://worldabortionlaws.com>.

[6] Reva B. Siegel, *Abortion and the “Woman Question”: Forty Years of Debate*, 89 IND. L.J. 1365, 1365 (2012).

[7] It is worth noting that evidence does not support the theory that the fetal impairment ground paves the way towards broader abortion liberalization, at least in comparison to other grounds such as rape. E.H. Boyle, M. Kim, W. Longhofer, *Abortion Liberalization in World Society, 1960-2009*, AJS. 2015 Nov; 121(3): 882–913, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4764996/>

[8] See Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, 18 Mental Retardation & Developmental Disabilities Research Reviews 40 (2003).

[9] For more on the application of the social model and medical model to reproduction and parenting, see Alison Kafer, *Feminist, Queer, Crip* (2013).

[10] Center for Reproductive Rights, *Reproductive Rights Are Human Rights*, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRareHR_final.pdf.

[11] CRPD Committee's Concluding Observations on Spain, ¶ 18, U.N. Doc. CRPD/C/ESP/CO/1 (2011); see also Hungary, ¶ 17, U.N. Doc. CRPD/C/HUN/CO/1 (2012); Austria, ¶ 14, U.N. Doc. CRPD/C/AUT/CO/1 (2011).

[12] Carole J. Peterson, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J.L. & Health 121, 151-54 (2015).

[13] *Amanda Mellet v. Ireland*, Human Rights Committee (HRC), Communication No. 2324/2013 (2016) (finding that Ireland's law prohibiting abortion in cases of fatal fetal impairment violated Ms. Mellet's rights to privacy,

equality and non-discrimination on the basis of sex or gender, and freedom from torture or ill-treatment); CEDAW, Communication No. 22/2009, L.C. v. Peru, 50th Sess., Oct. 18, 2009, U.N. Doc. CEDAW/C/50/D/22/2009, § 8.17 (finding that Peru's failure to allow L.C. to obtain an abortion in a timely manner, which led to her paralysis, violated her rights to equality and nondiscrimination). *See accord* R. R. v. Poland, App. No. 27617/04, 53 E.H.R.R. 31, 159 (2011).

[14] *See* HRC, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 9 [Advanced Unedited Version].

[15] Statement of the CEDAW Committee on sexual and reproductive health and rights: Beyond 2014 ICPD review, <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>.

[16] Committee on the Rights of the Child, Concluding Observations on Costa Rica, CRC/C/CRI/CO/4 (2011), ¶ 64(c); Committee on Economic, Social and Cultural Rights, Concluding Observations on United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (2009), ¶ 25.

[17] *See* Generations Ahead, *A Disability Rights Analysis of Genetic Technologies: Report on a National Convening of Disability Rights Leaders*, 16 (2009), available at http://www.generations-ahead.org/files-for-download/articles/GenerationsAhead_DisabilityRightsConveningReport.pdf

[18] Convention on the Rights of Persons with Disabilities, Articles 23(1), 25(a) and 25(d).

[19] Model “disability selective” abortion bans are recent favorites of anti-abortion lobby groups in the U.S. *See, e.g.,* Americans United for Life, *Prenatal Nondiscrimination Act: Model Legislation & Policy Guide for the 2016 Legislative Year*, http://www.aul.org/downloads/2016-Legislative-Guides/Abortion/Prenatal_Nondiscrimination_Act_-_2016_LG.pdf; Nat'l Right to Life Committee, Inc., *When They Say... You Say: Defending the Pro-Life Position & Framing the Issue by the Language We Use* 17 (2014), <http://www.nrlc.org/uploads/WhenTheySayPacket.pdf> (“you can show them that aborting a child because of possible abnormality is nothing less than blatant and deadly discrimination against people with disabilities”).

[20] Peterson, *supra* note 12, at 160-61.

[21] *See, e.g.,* submission by the Center for Disability Law and Policy to the Human Rights Committee, Human Rights Committee's Half Day Discussion in Preparation for a General Comment on Article 6-Right to Life (June 2015), pp 4-5, at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WCRightToLife.aspx>

[22] Some promising models can be replicated and scaled up. For example, the global organization IPAS has developed programmatic guidance for how to address ableism within the medical system. IPAS, Access for Everybody: Disability inclusion in abortion and contraceptive care,

<http://www.ipas.org/en/Resources/Ipas%20Publications/Access-for-everyone-disability-inclusion-in-abortion-and-contraceptive-care-overview.aspx>. The Center for Reproductive Rights has developed rights-based national policy frameworks and forged partnerships with Disability Persons Organizations to advocate for improved human rights standards. Center for Reproductive Rights (CRR), Shifting the Frame on Disability Rights for the U.S. Reproductive Rights Movement, <https://www.reproductiverights.org/document/shifting-the-frame-on-disability-rights-for-the-us-reproductive-rights-movement>; CRR and Women Enabled International, Shadow Report to the Human Rights Council on the Second Periodic Review of the United States, <https://www.reproductiverights.org/document/shadow-report-to-the-un-human-rights-council-on-second-periodic-review-of-the-usa>.