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# INSTITUTIONALIZATION AND TORTURE OF PEOPLE WITH DISABILITIES IN MEXICO: A CASE FOR HOLDING STATES RESPONSIBLE FOR CRIMES AGAINST HUMANITY

by Priscila Rodríguez\*

## INTRODUCTION

Can the institutionalization of people with disabilities in Mexico constitute a crime against humanity? To answer that question, this article first outlines how Mexico's institutionalization of people with disabilities is a grave and systemic violation of international law, then addresses the definition of crimes against humanity and whether that definition is met under the International Criminal Court's Rome Statute. In the discussion, we acknowledge that while the definition is met in the case of Mexico, the definition for crimes against humanity under the Rome Statute is for the purposes of individual criminal responsibility and not State responsibility. This raises an issue that requires further analysis: the need for a specialized forum to allow for States to be held collectively responsible for such crimes on a large scale, including, for example, the Committee on Rights of Persons with Disabilities and other treaty bodies.

## I. INSTITUTIONALIZATION OF CHILDREN AND ADULTS WITH DISABILITIES IN MEXICO

For the past twenty years, Disability Rights International (DRI) has written five reports regarding the situation of persons with disabilities in institutions in Mexico.<sup>1</sup> For these reports, DRI visited over one hundred institutions in over a dozen states across Mexico where thousands of children and adults with disabilities are detained in dangerous conditions and subjected to atrocious abuses that amount to torture.<sup>2</sup>

The primary reasons for institutionalization in Mexico are the State's failure to provide community-based services and support necessary for people with disabilities to live in the community, coupled with an over-reliance on institutions as the only option for children and adults without support networks. People with disabilities without families willing or able to support them are relegated to languish in institutions without hope of returning to the community. Children with disabilities may have loving families but without support, many parents

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<sup>1</sup> Disability Rts. Int'l, *Mental Health and Human Rights in Mexico*, (Sept. 2000) [hereinafter *DRI Mental Health and Human Rights in Mexico*], <https://www.driadvocacy.org/wp-content/uploads/Human-Rights-Mental-Health-English.pdf>; Disability Rts. Int'l, *Abandoned and Disappeared*, i, vii (2010), <https://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf>; Disability Rts. Int'l, *No Justice*, 1, 5 (July 22, 2015), [https://www.driadvocacy.org/wp-content/uploads/Sin-Justicia-MexRep\\_21\\_Abr\\_english-1.pdf](https://www.driadvocacy.org/wp-content/uploads/Sin-Justicia-MexRep_21_Abr_english-1.pdf); Disability Rts. Int'l, *At The Mexico-US Border And Segregated From Society*, 1, 5 (May 2019) [hereinafter *DRI At the Mexico-US Border*], <https://www.driadvocacy.org/wp-content/uploads/MEX-Report-May-2019.pdf>; Disability Rts. Int'l, *Crimes Against Humanity: Decades of Violence and Abuse in Mexican Institutions for Children and Adults with Disabilities* (Oct. 2020) [hereinafter *DRI Crimes Against Humanity*], <https://www.driadvocacy.org/wp-content/uploads/Mexico-2020-ENG-web.pdf>.

<sup>2</sup> These include public psychiatric hospitals, private institutions for children and adults with disabilities, migrant shelters, and drug rehabilitation centers, among others.

of children with disabilities are often forced by child protection services to place their children in institutions.

The institutionalization of people with disabilities is in violation of Article 19 of the Convention on the Rights of Persons with Disabilities<sup>3</sup> (CRPD or Convention), which guarantees the “right of all persons with disabilities to live in the community with choices equal to others.”<sup>4</sup> As established by the Committee on the Rights of Persons with Disabilities (CRPD Committee), “Article 19 entails civil and political as well as economic, social and cultural rights and is an example of the interrelation, interdependence and indivisibility of all human rights.”<sup>5</sup> In the case of children with disabilities, the CRPD Committee has established that the “core” of the right to live in the community under Article 19 necessarily entails a right to live and grow up in a family (Article 23).<sup>6</sup>

For both children and adults, institutionalization in Mexico leads to other grave human rights violations. DRI reports<sup>7</sup> spanning twenty years have found that people placed in institutions are:

- Unable to make even the most basic choices over their lives (recognized as the right to legal capacity under Article 12 of the CRPD).
- Subjected to abuses that amount to nothing less than torture, including situations where people are tied down

<sup>3</sup>The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by Mexico on December 17, 2007.

<sup>4</sup>Convention on the Rights of Persons with Disabilities ¶ 7, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3. [hereinafter CRPD].

<sup>5</sup>CRPD *supra* note 4 (adopting a comment on Oct. 27, 2017 on living independently and being included in the community).

<sup>6</sup>Eric Rosenthal, *The Right of All Children to Grow Up with a Family under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes*, 25 *BUFF. HUM. RTS. L. REV.* 65, 75 (2019) (describing the development of the right to family under international law and summarizing research findings on the need and ability of all children to grow up in a family).

<sup>7</sup>DRI *Mental Health and Human Rights in Mexico*, *supra* note 1.

in painful positions for days, months and even years and placed in prolonged isolation.<sup>8</sup> DRI has also found that girls and women with disabilities frequently face sexual abuse, rape, and forced sterilization to cover up abuses — practices that can also amount to torture. People are also forced to live in filthy inhuman and degrading conditions of detention.<sup>9</sup>

- Denied access to essential medical care and exposed to grave instances of medical negligence that put their life at risk.<sup>10</sup>
- Detained indefinitely without the possibility of being reintegrated to the community and without access to rehabilitation and habilitation services.
- Left exposed to life-threatening dangers due to the lack of human rights oversight.

<sup>8</sup>Eric Rosenthal and Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19 *HUM. RTS. BRIEF* 3 (2012).

<sup>9</sup>See DRI *Mental Health and Human Rights in Mexico*, *supra* note 1.

<sup>10</sup>This has become painfully obvious in the context of the pandemic caused by COVID-19, which has particularly affected people in institutions, particularly people with disabilities. Danny Hakim, *‘It’s Hit Our Front Door’: Homes for the Disabled See a Surge of Covid-19*, *N.Y. TIMES* (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-disabilities-group-homes.html?referringSource=articleShare>; David Henderson et al., *Mortality Associated with COVID-19 Outbreaks in Care Homes: Early International Evidence*, *LTC* (Feb. 1, 2021), at 1, [https://ltccovid.org/2020/04/12/mortality-associated-with-covid-19-outbreaks-in-care-homes-early-international-evidence/?subscribe=success#blog\\_subscription-3](https://ltccovid.org/2020/04/12/mortality-associated-with-covid-19-outbreaks-in-care-homes-early-international-evidence/?subscribe=success#blog_subscription-3); Robert Booth, *Half of Coronavirus Deaths Happen in Care Homes, Data from EU Suggests*, *THE GUARDIAN* (Apr. 13, 2020), <https://www.theguardian.com/world/2020/apr/13/half-of-coronavirus-deaths-happen-in-care-homes-data-from-eu-suggests>; Oriol Güell, *Residencias y Hospitales Concentran los Nuevos Contagios por Coronavirus*, *EL PAÍS* (Apr. 11, 2020), <https://elpais.com/sociedad/2020-04-10/residencias-de-mayores-y-hospitales-acaparan-la-mayoria-de-nuevos-contagios-del-coronavirus.html>; Farah Stockman et al., *‘They’re Death Pits’: Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, *N.Y. TIMES* (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html>.

In some cases, authorities have reported extremely high death rates in institutions.<sup>11</sup> Exact death rates in Mexican institutions are hard to pin down because there is no national requirement that all deaths be reported or that independent death investigations be conducted. Indeed, any form of effective oversight or protection is impossible because state or national authorities are not required to report on the number of people who are detained. In some states, DRI has found that state authorities tolerate and openly send people with disabilities to private institutions that are entirely unregulated — lacking any form of oversight, monitoring, or quality control.<sup>12</sup> Throughout Mexico's mental health and disability service system, people detained in institutions are often under the *de facto* guardianship of the institution's director and unable to access justice and legal recourses to challenge the abuse and detention they are subjected to.

## II. “SYSTEMIC AND GRAVE” STANDARD

The jurisprudence of the CRPD Committee,<sup>13</sup> the Committee on the Rights of the Child (CRC Committee)<sup>14</sup> and the Committee on the Elimination

of all Discrimination Against Women (CEDAW Committee)<sup>15</sup> concur that, for a violation to be considered as “systemic,” it must be demonstrated that the violations are not random events but part of a pattern, ingrained in structural policies and legislation. For a violation to be considered “grave,” the Committees agree that it must cause “substantial harm”<sup>16</sup> to the victims, taking into account the scale, prevalence, nature, and impact of the violation(s).

The CRPD Committee has furthered the “grave” standard by saying that “grave” violations lead to “further segregation, isolation and impoverishment”<sup>17</sup> of persons with disabilities. In 2020, the CRPD Committee published a report on a public inquiry it carried out on the institutionalization of people with disabilities in Hungary.<sup>18</sup> In its report it recognized this standard and stated that a determination regarding the gravity of violations must take into account the “scale, prevalence, nature, and impact of the violations found.”<sup>19</sup>

In the case of Hungary, the CRPD Committee found grave violations under the Convention because the system of institutionalization “profoundly affect[ed] the lives of a substantial number of persons with disabilities, particularly discriminating against persons with intellectual or psychosocial disabilities, perpetuating segregation and isolation from society.”<sup>20</sup>

<sup>11</sup> At “El Batán” psychiatric facility in the State of Puebla, for example, authorities report that 100 of approximately 300 detainees dies in one year from the misuse of psychotropic medication.

<sup>12</sup> DRI *At the Mexico-US Border*, *supra* note 1, at 10.

<sup>13</sup> Comm. on the Rights of Persons with Disabilities, Inquiry Concerning Hungary Under Article 6 of the Optional Protocol to the Convention, U.N. Doc. CRPD/C/HUN/IR/1, ¶¶ 106-109 (2020) [hereinafter CRPD Inquiry Concerning Hungary].

<sup>14</sup> Comm. on the Rights of the Child, Inquiry Concerning Chile Under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, U.N. Doc. CRC/C/CHL/IR/1, ¶¶ 110-12 (2020) [hereinafter CRC Inquiry Concerning Chile].

<sup>15</sup> Comm. on the Elimination of Discrimination against Women, Inquiry Concerning Kyrgyzstan Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/OP.8/KGZ/1, ¶ 86 (2018); *see also* Comm. on the Rights of Persons with Disabilities, Inquiry Concerning Spain Carried Out by the Committee Under Article 6 of the Optional Protocol to the Convention, U.N. Doc. CRPD/C/ESP/IR/1, ¶¶ 78-80 (2018); CRC Inquiry Concerning Chile, *supra* note 14.

<sup>16</sup> CRPD Inquiry Concerning Hungary, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶ 107.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



In its reports over the past two decades, DRI has documented how the system of institutionalization in Mexico profoundly affects every aspect of the lives of tens of thousands of children and adults with disabilities detained in institutions. People with disabilities in institutions are effectively stripped of their rights; they are unable to exercise them as they are indefinitely locked away and abused, including their right to challenge their detention and access legal recourses to stop the abuse they are subjected to. Several studies show how institutionalization in itself is traumatizing for persons with disabilities and particularly for children, leading to intense suffering and trauma with a long-lasting negative impact.<sup>21</sup>

The suffering, abuse, and helplessness that people with disabilities face amounts to “substantial harm” and leads to “further segregation, isolation and impoverishment.”<sup>22</sup> Particularly in the case of children with disabilities, the system of institutionalization “perpetuates children’s marginalization and vulnerability by negatively affecting their lives, security, best interests, family life, integrity, education, human development, [and] well-being.”<sup>23</sup> Thus, the system of institutionalization in Mexico should be considered “grave” under the CRPD Committee’s jurisprudence.<sup>24</sup>

In relation to the term “systemic,” the CRPD Committee stated that it “refers to the organized nature of the acts leading to the violations and improbability of their random occurrence.”<sup>25</sup> This Committee has indicated that “the existence of a legislative framework, policies and practices

<sup>21</sup> John Williamson & Aaron Greenberg, *Families, Not Orphanages* 6 (2010) (Better Care Network, Working Paper, 2010); Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. OF ORTHOPSYCHIATRY 219, 220 (2014); U.N. Off. of the High Comm’r on Hum. Rts., *The Rights of Vulnerable Children Under the Age of Three: Ending their Placement in Institutional Care* 19 (2011), [https://europe.ohchr.org/Documents/Publications/Children\\_under\\_3.pdf](https://europe.ohchr.org/Documents/Publications/Children_under_3.pdf)

<sup>22</sup> CRPD Inquiry Concerning Hungary, *supra* note 13, ¶ 109.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ¶ 108.

that, by intent or through impact, adversely or disproportionately affect persons with disabilities constitute[s] systematic violations of the Convention.” The Committee has also stressed that “discriminatory or structural patterns against persons with disabilities based on impairment constitute systematic violations.”<sup>26</sup>

In the case of Hungary, the Committee found systematic violations of the rights of persons with disabilities in institutions considering they were “widespread and habitual.” These violations were the result of “deliberate patterns of structural discrimination entrenched in legislation, policies, plans[,] and practices, including resource allocation.”<sup>27</sup> In Mexico, the institutionalization of children and adults with disabilities is widespread, affecting tens of thousands of persons with disabilities.<sup>28</sup> It is mainly a result of the generalized failure of the Mexican State to create alternatives to institutions in the form of community-based support and services. This lack of community-based services coupled with an over reliance on institutionalization for any child or adult with disability in need of support, has led to the institutionalization of thousands.

The system of institutionalization is entrenched in Mexican legislation, policies and practices. In Mexico, there are thirteen states that have passed mental health laws after Mexico signed and ratified the CRPD. Each of these mental health laws allows for the involuntary detention of people with disabilities.<sup>29</sup> The General Health Law (hereinafter “LGS” for its Spanish acronym) and the Mexican Official Standard NOM-025-SSA2-2014 for the provision of health services in medical-psychiatric hospital integral care units (hereinafter NOM-025) establish that the person or “his/her” representative

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> DRI *Crimes Against Humanity*, *supra* note 1, at 17.

<sup>29</sup> Disability Rights Int’l, *Alternative Report by Mexican Civil Society Organizations*, 10 (2014-19), <https://www.driadvocacy.org/wp-content/uploads/Joint-Shadow-Report-CRPD-Jul2019-FINAL.pdf>

has the right to “informed consent,” except in cases of “involuntary admission.”<sup>30</sup> The law basically states that people who do decide that they do not want to be admitted are an exception and the right to informed consent does not apply to them. Limiting the right to informed consent to cases of “voluntary” admission effectively invalidates this right. Thus, the Mexican legal framework continues to allow the involuntary detention of persons with disabilities in institutions, contrary to what the CRPD establishes.

Furthermore, the Mexican government continues to invest in institutions and, by doing so, to perpetuate institutionalization. The Ministry of Health allocates about 1.6% of its budget to mental health with 80% allocated to the operation of psychiatric hospitals.<sup>31</sup> Psychiatric institutions across the country continue to receive federal and state funding. The near exclusive reliance on in-patient care — as reflected in part by where the government invests public resources — demonstrates that the government relies on a segregated, institutional model of care.

In the case of children, the systemic nature of the violation is consistent with what the CRC found to be the standard in the case in Chile. There, the CRC found systemic violations due:

both to the continued existence of a protection system underpinned by the State’s charity-based approach and paternalistic outlook and to persistent inaction and failure to change laws, policies and practices that, as several official reports had made clear, led to continual infringements of the rights of children and adolescents in the care of the State.<sup>32</sup>

<sup>30</sup> *Id.*

<sup>31</sup> Information provided by officials from Mexico’s Ministry of Health. Lauren Ahern et al., *Crimes Against Humanity: Decades of Violence and Abuse in Mexican Institutions for Children and Adults with Disabilities*, DISABILITY RTS INT’L 14, <https://www.driadvocacy.org/wp-content/uploads/Mexico-2020-ENG-web.pdf>

<sup>32</sup> CRPD Inquiry Concerning Hungary, *supra* note 13, at 16.

Mexico has maintained a similarly paternalistic system and failed to change laws despite twenty years of DRI’s effective international public exposure<sup>33</sup> and the very strong findings and recommendations of the CRPD Committee and the Inter-American Human Rights Commission. The segregated, abusive, and dangerous system of institutionalization in Mexico is not an isolated or random event, rather, it is the result of legislative and policy violations and omissions on the part of the State to fully guarantee the right of tens of thousands of children and adults with disabilities to live in the community, in accordance with Article 19 of the CRPD and thus, it is a systemic issue.

### III. CRIMES AGAINST HUMANITY ANALYSIS

Traditionally, crimes against humanity have been considered in the context of armed conflicts where large numbers of people are subjected to severe crimes including murder, rape, extermination, enslavement, and deportation, among others. In this context, we recognize that framing the widespread and systemic institutionalization of people with disabilities in Mexico as a crime against humanity is a cutting edge and new argument that comes with many challenges. The main challenge is to understand whether this practice rises to the level of a crime against humanity, which we aim to address in this analysis.

Under the Rome Statute, a “crime against humanity” is configured when one of the acts recognized under the Statute is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>34</sup> Four main criteria need to be met in order for a crime

<sup>33</sup> See Michael Winerip, *The Gobar Willobrook*, N.Y. TIMES MAG. (Jan. 21, 2000), <https://www.nytimes.com/2000/01/16/magazine/the-global-willowbrook.html>; Randal C. Archibold, *Abuses Found at Mexican Institutions for Disabled*, N.Y. TIMES (Nov. 30, 2010), <https://www.nytimes.com/2010/12/01/world/americas/01mexico.html>.

<sup>34</sup> Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

to recognized as a crime against humanity: 1) an intentional act, 2) recognized by the Rome Statute, 3) that constitutes an attack directed against any civilian population, and 4) it is widespread *or* systematic

#### A. *Intentional Act*

For a crime against humanity to be established, an element of intentionality must be shown. Under the definition of the Rome Statute, the intent requirement for liability is “knowledge of the attack.”<sup>35</sup> In the case of institutionalization in Mexico, Mexico has been repeatedly on notice regarding the grave violations committed in institutions and how its system of institutionalization is contrary to international law and causing great harm and suffering to thousands of people with disabilities.<sup>36</sup> Yet Mexico has taken no action to remedy the situation and chooses to act to further to further endanger people with disabilities by funding and expanding its system of improper detention.

In 2014, the CRPD Committee called on Mexico to “urgently define a strategy for the deinstitutionalization of persons with disabilities, including specific time frames and assessment measures.”<sup>37</sup> In institutions, the CRPD Committee found that women with disabilities were being sterilized and noted a particularly abusive case of girls and women in a private institution called *Casa Esperanza* documented by DRI. The Committee noted that at this institution “forced or coerced sterilization is recommended to, authorized or performed on girls, adolescents and women with disabilities.”<sup>38</sup> It also found “alarming the fact that human rights violations, such as physical restraint

<sup>35</sup> *Crime Against Humanity*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/crime\\_against\\_humanity](https://www.law.cornell.edu/wex/crime_against_humanity) (last visited March 24, 2021); see THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 306 (1999).

<sup>36</sup> See *infra* notes 38, 40 and accompanying text.

<sup>37</sup> Comm. on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Mexico, ¶ 44, U.N. Doc. CRPD/C/MEX/CO/1 (Oct. 27, 2014) [hereinafter CRPD Mexico Concluding Observations].

<sup>38</sup> *Id.* at ¶ 37.

and placement in isolation, are committed against persons with disabilities interned in psychiatric hospitals and may even amount to acts of torture or cruel, inhuman or degrading treatment.”<sup>39</sup> Finally, the Committee expressed its concern that “the mechanisms designated for the prevention of such situations do not offer effective remedies.”<sup>40</sup>

That same year, Juan Mendez, then UN Special Rapporteur on Torture, carried out an official visit to Mexico and, in relation to institutions “received credible information about poor conditions at other public and private psychiatric centers, including poor hygiene, insanitary conditions, substandard medical care, the use of prolonged restraints, and treatments or internments that do not meet international standards of informed consent.”<sup>41</sup> The Special Rapporteur drew “the Government’s urgent attention to the deplorable conditions at the Social Assistance and Integration Centre that he visited in the Federal District.”<sup>42</sup>

In 2015, in its report on the Human Rights Situation in Mexico, the Inter-American Commission on Human Rights (IACHR) highlighted:

the situation faced by persons with disabilities deprived of their liberty in long stay non-penal institutions. In this respect, pursuant to information available to the Commission, violations of the right to life and physical integrity, segregation for life, prolonged use of physical restraints and solitary confinement, isolation rooms and cages and overmedication, have been documented. The alarming situation of people with disabilities in long-stay institutions such as the

<sup>39</sup> *Id.* at ¶ 31.

<sup>40</sup> *Id.*

<sup>41</sup> Juan Mendez (Special Rapporteur), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/28/68/Add.3, ¶ 75 (2014).

<sup>42</sup> *Id.*

Centers for Assistance and Social Integration (“CAIS”) in Mexico City has been referred to by the UN Special Rapporteur on Torture, and by the Human Rights Commission of the Federal District (CDHDF).<sup>43</sup>

In relation to the forced sterilization of women with disabilities in Mexico, the IACHR indicated that it received information that:

girls and women with disabilities are forcibly sterilized in several Mexican institutions. . . . The Commission notes . . . that the United Nations Committee on the Rights of Persons with Disabilities has determined that forced sterilization constitutes a violation of the right to personal integrity and it has expressed its concern regarding the practice of forced sterilization in the institution *Casa Esperanza* in Mexico City.<sup>44</sup>

Given the CRPD’s strong findings and recommendations and those of the IACHR and the former UN Special Rapporteur on Torture, combined with DRI’s six reports over twenty years, all of which has been extensively covered by the media, the government of Mexico has long been on notice regarding the grave abuses that are being committed in institutions.

Despite this, Mexico has not taken any meaningful action to end this system; rather, it has continued to institutionalize people with disabilities and to allocate resources to the very institutions where their rights are being egregiously violated. It has also taken no action to remedy the abuses against people in institutions. In the *Casa Esperanza* case, the Mexican government transferred the survivors to other abusive institutions, after which at least two *Casa Esperanza*

<sup>43</sup> Inter-Am. Comm’n H.R., *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II, Doc. 44/15, ¶ 350 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf>

<sup>44</sup> *Id.* ¶ 351.

victims died and one continued to suffer sexual abuse.<sup>45</sup> By fostering a system of institutionalization with the knowledge that it is in violation of international standards and it causes great suffering to the people with disabilities subjected to it, Mexico is showing the level of intentionality required by the Rome Statute.

It is not enough for Mexico to argue that it is institutionalizing persons with disabilities for “therapeutic” or “protection” purposes. Former UN Special Rapporteur on Torture, Manfred Nowak, has made clear that the stated intent of a health care professional to provide treatment is no defense of a practice that meets the other elements of torture. “This is particularly relevant in the context of medical treatment of persons with disabilities,” said Nowak, “where serious violations and discrimination against persons with disabilities may be masked as good intentions on the part of health professionals.”<sup>46</sup>

When there is a long-standing pattern of practices, and a failure to correct them after repeated international condemnation, it is reasonable to infer that authorities engaging in such practices intend the natural harmful consequences of their actions and are motivated by discriminatory animus, rather than by a legitimate therapeutic purpose.

#### *B. Act Recognized by the Rome Statute*

Among the “acts” enumerated and recognized by the Rome Statute are “inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>47</sup> As argued above in the analysis on the “grave and systematic standards,” institutionalization in itself causes great suffering. In Mexico, institutionalization leads to grave violations of other rights recognized under international law. Some of these grave violations may amount to

<sup>45</sup> See *supra* notes 1-2 and accompanying text.

<sup>46</sup> Manfred Nowak (Special Rapporteur on Torture), *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 49, U.N. Doc. A/63/175 (July 28, 2008).

<sup>47</sup> Rome Statute, *supra* note 34, at art. 7.



torture, including the use of prolonged restraints, isolation,<sup>48</sup> and forced sterilization on women with disabilities.<sup>49</sup> Institutionalization in itself can constitute torture. According to Juan Mendez, former UN Special Rapporteur on Torture, “inappropriate or unnecessary non-consensual institutionalization of individuals may amount to torture or ill-treatment as use of force beyond that which is strictly necessary.”<sup>50</sup>

Mendez also found that institutionalization is particularly harmful for children, given the emotional neglect children are likely to experience in institutions.<sup>51</sup> Institutionalization can also lead to a disability given the psychological damage children are exposed to. The former UN Rapporteur on the Right to Health recognized that institutionalization of children is in itself a threat to the right to health.<sup>52</sup> Thus, it can be argued that institutionalization is an act that causes great suffering and serious injury to body and mental health, particularly in the case of children.

### *C. Attack Directed Against Any Civilian Population*

The Rome Statute establishes that an “‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>53</sup>

<sup>48</sup> Juan Mendez (Special Rapporteur), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 63, U.N. Doc. A/HRC/22/53 (2013).

<sup>49</sup> Convention on The Rights of Persons with Disabilities, *Concluding Observations on the Initial Report on Mexico*, ¶ 37, U.N. Doc. CRPD/C/MEX/CO/1 (2014).

<sup>50</sup> Mendez, *supra* note 41, at ¶ 70.

<sup>51</sup> Juan Mendez (Special Rapporteur), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 56, U.N. Doc. A/HRC/28/68 (2015).

<sup>52</sup> Paul Hunt (Special Rapporteur), *Economic, Social, and Cultural Rights: The Right of Everyone To The Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health*, ¶ 90-93, U.N. Doc. E/CN.4/2003/58 (2003).

<sup>53</sup> Rome Statute, *supra* note 34, at art. 7.

International war tribunals have determined an attack does not need to happen in the context of war or conflict; instead, an “attack” is an “unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. . . . An attack may also be non-violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner.”<sup>54</sup> Taken literally, no physical violence is necessary for an attack, “but merely multiple instances of any conduct on the list, pursuant to a state policy.”<sup>55</sup>

As established in subsection (2), the institutionalization of persons with disabilities is an unlawful act of the kind enumerated by the Rome Statute and it happens against a civilian population, in this case persons with disabilities. With regards to the criterion of “multiplicity” and “pursuant to or in furtherance of a State or organizational policy” standards, they are addressed in the following section.

<sup>54</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 581 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 70 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 205 (Jan. 27, 2000); Prosecutor v. Semanza, Case No. ICTR-97-20, Judgement and Sentence, ¶ 327 (May 15, 2003).

<sup>55</sup> Gerald L. Neuman, *What Counts As A Crime Against Humanity?*, HARV. INT’L L. J. (2019), <https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/>.

*D. Widespread or Systematic*

The Rome Statute requires that the attack be either widespread *or* systematic, not both.<sup>56</sup> Though it is not required that the system of institutionalization in Mexico be both widespread and systematic, it satisfies that criteria. The concept of “widespread” has been defined by international tribunals as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>57</sup> Institutionalization of persons with disabilities happens at a wide scale, affecting tens of thousands of victims who are indefinitely detained by the State and with the knowledge of the State. In the case of children, the Head of Mexico Child’s Protection System estimated that up to 140,000 children could be in institutions.<sup>58</sup> Mexico, however, has no clear statistics on the number of children and adults in institutions, disaggregated by disability and gender, despite calls from the CRPD Committee for these statistics to be collected.<sup>59</sup>

<sup>56</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 579 (Sep. 2, 1998) (“Customary international law requires only that the attack be either widespread or systematic.”); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 68 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 203 (Jan. 27, 2000); Prosecutor v. Semanza, Case No. ICTR-97-20, Judgement and Sentence, ¶ 328 (May 15, 2003); Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Trial Judgement, ¶ 439 (May 16, 2003); Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgement, ¶ 123 (May 21, 1999); Prosecutor v. Bagilishema, Case No. ICTR-95-1A, Judgement, ¶ 77 (June 7, 2001); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17, Judgement and Sentence, ¶ 804 (Feb. 21, 2003).

<sup>57</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 580 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 69 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 204 (Jan. 27, 2000); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17, Judgement and Sentence, ¶ 804 (Feb. 21, 2003).

<sup>58</sup> Disability Rights Int’l, *supra* note 29, at 3.

<sup>59</sup> CRPD Mexico Concluding Observations, *supra* note 37, ¶ 59-60.

The International Criminal Tribunals have defined the concept of “systematic” as:

thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.<sup>60</sup>

As stated previously, the system of institutionalization is the result of the generalized failure of the Mexican State to stop investing in institutionalization and allocate the necessary resources to create alternatives to institutions in the form of community-based support and services. This pattern of investment in institutions instead of on community services shows a policy on the part of the State to maintain a system of institutionalization of persons with disabilities and as such, the “systematic” element is met.

**CONCLUSION**

The system of institutionalization of persons with disabilities satisfies the elements embedded definition of crimes against humanity. In the case of Mexico, the grave and systemic violations affect tens of thousands of persons with disabilities in Mexico through a widespread system of institutionalization that intentionally causes great suffering and mental and psychological harm to children and adults with disabilities.

While the Mexican State is responsible for its system of institutionalization of people with disabilities and as such, must be held accountable, this Article recognizes that the legal definition of crimes against humanity is found only in the Rome Statute and the Rome Statute defines crimes against humanity

<sup>60</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 580 (Sep. 2, 1998); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 69 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 204 (Jan. 27, 2000).

for purposes of the International Criminal Court's subject-matter jurisdiction. In other words, the definition of crimes against humanity is for the purpose of individual responsibility and there is no parallel definition of Crimes Against Humanity for the purpose of State responsibility under international law, as is the case with genocide and war crimes. This raises an issue of great importance that requires further analysis: the need for a specialized forum to allow for States to be held collectively responsible for such crimes on a large scale, including, for example, the Committee on Rights of Persons with Disabilities or other treaty bodies.