

A Race Apart:  
Genocide and the Protection of Disabled Persons Under International Law  
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**Abstract:** The Convention on the Prevention and Punishment of the Crime of Genocide neglects to include persons with disabilities as a protected group. Such an omission denies the common etymological<sup>i</sup> “racial” ancestry shared by those groups included in the Genocide Convention and disabled persons. Further, it denies the historical fact that the Holocaust victimized persons with disabilities, along with other categories of groups already protected. Thus, the Genocide Convention should be amended to include disabled persons.

**Key Words:** race, disability, genocide

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“With the exception of Dr. Jekelius, I spoke to no other physicians about this matter. In any case, Dr. Jekelius was fully aware of what was happening and it was unambiguously clear from his remarks that he totally endorsed the entire operation against ‘life unworthy of life’ and that he was prepared to act as the Nazi state demanded. I finally realized that I could not save my child after this conversation. Therefore, I wanted at least to stop my child from being carried off somewhere. I also wanted to spare the child any further pain, if it had to die. For these reasons, I begged Dr. Jekelius, that if the death of my child could not be stopped, that it be quick and painless. He promised me this. I never learned whether he himself carried out the deed, or whether he let someone else do it and in what manner. I saw my child's corpse. I was struck by the look of pain on his face.” Anny Wöld, testimony before the Vienna District Court in proceedings against Drs. Ernst Illing, Marianne Turk and Erwin Jekelius, March 1, 1946 (Gallagher, 2004, p. 222).

### Introduction

On November 24, 1934, Anny Wöld gave birth to a son who could neither speak nor walk. The cause of his condition was unknown, as was the degree of suffering he might be experiencing. At the age of four, he was admitted by his mother to Gugging, a mental hospital and nursing home in Lower Austria. Ms. Wöld was fully aware of the Nazi enterprise of eliminating “life unworthy of life,” the *Euthanasie* program that would provide the bureaucratic skeleton for the mass killing of more than 70,000 mentally and physically disabled persons (Gallagher, 2004). She made several vain appeals in her attempt to halt the execution of her son, an execution made possible by the complicity of the German medical community in the Nazi national program of racial hygiene. Indeed, when she confronted Dr. Jekelius, the Director of the Vienna City Psychiatric-Neurological Clinic for Children Am Spiegelgrund from 1940-1942 and member of the Nazi Party, about sparing the life of her son, she could only capitulate in futility as he swore allegiance to the demands of the Nazi State in the commission of his civic duty. From Dr. Jekelius, she could secure nothing more than a promise that the killing of “it” would be quick and painless.<sup>ii</sup>

Many narratives of the Holocaust, both academic and popular, place principal emphasis on the severity of the atrocities committed against Jewish populations, and perhaps justifiably so given that Jewish deaths are estimated to be in the realm of 5.3 million. However, less researched is the fact that disabled persons were the first to die (Friedlander, 1995). The Nazi euthanasia maelstrom left, directly and indirectly, over 200,000 dead in its wake (Gallagher, 2004).

First, clandestine preparation for euthanizing disabled children was conceptualized, formalized, and executed. In October 1939, Hitler “enlarge[ed] the competence of certain physicians, designated by name, so that patients who, on the basis of human judgment, are considered incurable, can be granted mercy death after a discerning diagnosis” (Friedlander, 1995, p. 67). After the children, the adult disabled were killed. Those killed included persons with mental disabilities as well as physical impairments, all lumped together as degenerates and liabilities to the state. The official Nazi euthanasia program lasted from 1939 to the summer of 1941, after which it could no longer be kept secret. Hitler ordered the program halted, however the killings continued. Ironically, the killings grew more heinous after formal cessation of the program. They assumed a more ad hoc and haphazard manner, and decisions as to who would be killed became the jurisdiction of the individual physician rather than an official review committee. Sadly, the “Children’s Campaign,” the program for the killing of malformed and developmentally disabled children, and the killing of disabled adults, continued even after World War II ended.

The euthanasia and related programs were the illegitimate progeny of Darwinian evolutionary theory and the related principles of eugenics. In 1920, psychiatrist Alfred Hoche and lawyer Karl Binding published *The Destruction of Life Devoid of Value*, imploring the German medical establishment to consider not only its role as health-giver, but also as life-taker. For them, the dogma of racial hygiene required the ethical physician to impart the gift of death on any patient who was deemed terminally ill, mentally incapacitated, or otherwise diseased. The “logic” of such opinions was further buttressed, entrenched, and reproduced by cinematic portrayals of “benign” euthanasia,<sup>iii</sup> and even more surreptitiously through negative characterizations of the mentally disabled in common mathematics textbooks (Gallagher, 2004). An ideology of racial purity and Aryan supremacy permeated the German national conscience, and rendered such ethereal notions as race, nation, religion, and disability coextensive insofar as they provided a blueprint for the realization of the Nazi purification project. The echoes of the Nazi racial hygiene mantra would reverberate not only through concentration camps in Auschwitz and Birkenau, but also in the hallowed halls of the T4 euthanasia center where the medical ethics of physicians like Dr. Jekelius were compromised and perverted by a misbegotten love of country, and a concomitant piteous human agnosticism toward their patients.<sup>iv</sup>

With the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948, the United Nations memorialized its commitment to preventing and punishing “acts committed with the intent to destroy, in whole or in part” against certain social groups (United Nations, 1948, Article 2). During the Genocide Convention’s negotiations, the selection of these groups was contentious. Ultimately, four groups were chosen for protection: national, “ethnic,”<sup>v</sup> racial, and religious populations. These group monikers

have been notoriously resistant to precise definition. Far from being mutually exclusive, they suffer from significant conceptual overlap, and have historically context-specific and geospatially contingent meanings. Race, for example, is sufficiently amorphous to reasonably encompass Germans (a nationality), Jews (a religious group) and Gypsies (a darker-skinned ethnic group) (Schabas, 2000), as the story of the Nazi ideology of racial purity demonstrates. Other groups, such as linguistic, political, and, most importantly for our purposes, persons with disabilities were denied legal refuge in the Genocide Convention.

Schabas (2000) argues that the inclusion of only four groups in the Convention is appropriate for at least two reasons. First, these are the groups that Rafael Lemkin, the man widely regarded as the progenitor of genocide as a legal and political concept, intended to be protected from genocidal acts. Schabas supports this claim with Lemkin's reference to "national" groups in Lemkin's work *Axis Rule in Occupied Europe*. Schabas argues that "national" was understood to incorporate Jews, given "[t]he historical circumstances and the context of Nazi persecution" (p. 113). Second, Schabas refers to the etymology of the term "genocide" itself; it derives from the Greek word *genos* meaning "race" or "tribe." This construction comports with the desire to protect groups recognized as "national minorities" (p. 113) prior to WWI. Schabas concludes that "[d]iluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed" (p. 114).

Schabas' defense of the limited scope of protection offered by the Genocide Convention, particularly with regard to the inclusion of disabled persons, is inadequate. He argues that Lemkin entertained the protection of narrowly circumscribed "national" groups, and Jews were clearly meant to be included in "national" given the circumstances of the Nazi extermination program. However, the same Nazi ideology that targeted Jews for extermination targeted disabled persons for extermination first, subjecting both disabled children and adults to the same rituals of mass killing endured by Jews. Thus, while it is true that disabled persons were not considered a national minority prior to World War II, they should be protected under the Genocide Convention because they were killed along with the Jewish and Gypsy "races" under the same Darwinian-derived *Rassenhygiene* program. Furthermore, the practical manifestation of the construction of the *genos* in the case of Nazi Germany evidences quite clearly the fraternal nature of not only race, ethnicity, nationality and religion, but also disability. All five concepts share a common point of intellectual origin and racial animus, and international law regarding genocide should be amended to conform accordingly.

To be sure, much progress has been made in the domain of international disability law, particularly with the recent adoption of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention). The landmark convention, adopted December 13, 2006, formalized the aspirations of persons with disabilities and disability advocates who for decades pressured the United Nations to bestow the needed recognition upon the world's largest, and arguably most vulnerable, minority group. Perhaps most importantly, the Disability Convention identifies disabled persons as a legally cognizable group, although heterogeneous in its constitution, and places it among race, religion, gender, children, and national minorities in the pantheon of fundamentally persecuted world constituencies that require concerted and collective effort to achieve equality of opportunity and recognition of human rights. However,

while the Disability Convention is a landmark document, it falls short of criminalizing systematic discriminatory actions taken against persons with disabilities, actions which when taken in the aggregate, may result in mass loss of life (United Nations, 2006).

Schabas' use of the term "dilute" to describe the inclusion of additional groups under the aegis of the Genocide Convention is sadly reminiscent of the rhetoric deployed in the Nazi regime to "cleanse" Germany of the virus of "useless eaters." Indeed, the eyes of the Nazis, disabled persons had to be excluded from the polity because their very presence diluted the German gene pool. This paper argues that the inclusion of disabled persons as a group protected by the Genocide Convention would not dilute, but purify its stature as a document forged in the aftermath of World War II atrocities to prevent and punish the killing of innocents. The intellectual nexus between those groups currently protected and persons with disabilities, bound in Darwinian-derived and eugenics-based theories of race supremacy, warrants such an amendment. In addition, contemporary academic literature now recognizes disabled persons as a socially stigmatized group entitled to human rights as such, not as atomistic individuals who suffer from isolated physical and psychological afflictions.

I will first examine the text of the Genocide Convention itself, with an inspection of key terms and phrases, and with significant attention paid to positions for or against the expansion of protected groups. Second, the event that prompted the adoption of the Genocide Convention, the Holocaust, will be explored. Here, the conceptual and practical marriage between race, ethnicity, nation, religion, and disability will be discussed, as viewed through the lens of the Nazi Socialist ideology and the regime's euthanasia program. The influence of ideas of essentialized, immutable, and inevitable racial hierarchy, derived from eugenics, will be emphasized to demonstrate the common etymological ancestry of the five groups – race, ethnicity, nation, religion, and disability – and to substantiate the claim that disabled persons should also be protected by the Genocide Convention. Next, the trajectory of international disability law subsequent to the Holocaust will be traced to further bolster the argument that disabled persons have gained standing as a "group" in international law worthy of genocide protection, but that current law does not offer adequate protections. This examination will touch on the legal paradigm shift from individual "medical" understandings of disability to a more equality-based human rights posture toward disability discrimination law. Finally, I will summarize my findings and provide recommendations in my conclusion.

Before I proceed, it may be appropriate to include a note about the relationship between race and disability. Race is conceived of broadly as a social construct in this paper. I adopt Winant's (1994) minimalist definition; race is a concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies. For me, and as I interpret the racism promulgated by the Nazi regime during the Holocaust, racism operated as the "fetishism" of not only bodies, but also beliefs. Certain bodies (i.e., Roma, disabled persons) were assigned a lower value than others. Similarly, certain beliefs were assigned a lower value (i.e., Judaism). The assignment of these group values created a clear social hierarchy; those of the "pure Aryan race" were citizens while those of the "lower races" had to be eliminated.

Without question, this brief description is an oversimplification. To trace the complete intellectual history of race and its relationship to disability would be quite an undertaking. My goal here is simply to show that in the specific case of Nazi Germany, the concept of race was broad enough to encompass distinctions based on skin color (the more conventional physical trait associated with race) as well as ability. However, I do not assert that race and disability are in fact identical or coextensive, even in this particular case. Such an assertion would not only be beyond the purview of this paper, but also arguably intellectually irresponsible. This paper seeks to highlight the similarities between the two concepts and leaves the parsing of the differences for another project sufficient in depth and breadth to give such a subject the attention it deserves.

## Genocide, Eugenics, and Euthanasia

### The Genocide Convention and Group Inclusion

As defined by the Genocide Convention, genocide “means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group.
- b) Causing serious bodily or mental harm to members of the group.
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- d) Imposing measures intended to prevent births.
- e) Forcible transferring children of the group to another group” (United Nations, 1948, Article 2).

The Genocide Convention punishes not only genocide, but also conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide (United Nations, 1948, Article 3). Rulers, public officials, and private citizens may be punished under the convention (United Nations, 1948, Article 4). Whether states can be held culpable under the Convention for the act of genocide is debatable.<sup>vi</sup> The Convention does not require that the members of the group actually be killed, which has led to much confusion. However, the action taken must be taken against the group “as such” with intent to destroy, not merely against the individual members of the group, or the group for some other reason (e.g., political). To date, 133 states have ratified the convention.

The origin of the concept of genocide is found in the writings of Lemkin. For him, genocide is intended to:

“Signify a coordinated plan of different actions aimed at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed at the national group as an entity, and the actions involved are directed against the

individual, not in their individual capacity, but as members of the national group” (as cited in Rummel, 2006, p. 32).

Rummel makes it clear that the historical backdrop for Lemkin’s conception was the Jewish Holocaust and the prevention of similar mass killings that may occur in the future. Indeed, early applications of “genocide” were reserved exclusively for the Jewish Holocaust. However, subsequent interpretations have expanded the ambit of the term, making its precise nature nebulous. Genocide’s meaning has been generalized to include *any* mass murder by government, such as the mass killing of political groups and the unintentional spread of diseases to indigenous populations. The “non-killing” element of the convention has also led to “genocide” expansion, including: government policies that let one race adopt children of another race, South African apartheid, and deaths in the Soviet Gulag. To ameliorate the confusion, Rummel proposes the term *democide*, which is more restrictive than genocide because it requires that members of the group in question actually be killed and that the killing be done by a government. However, it is also broader in that it includes more groups than those articulated in the Convention (Rummel, 2006).

Like Rummel, Chalk and Jonassohn (1990) find the Genocide Convention’s definition of genocide unwieldy and bereft of academic rigor. They argue that it is of limited scholarly utility because: (1) it fails to distinguish between killing and non-killing, (2) it excludes political groups and social classes, (3) the United Nations itself is composed of sovereign states with an inherent antagonism toward international judicial institutions, and (4) “the wording of the convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it...” (p. 11). However, most problematic for Chalk and Jonassohn is the convention’s “narrow definition of what constitutes a victim group, and potential perpetrators have taken care to victimize only those groups that are not covered by the convention’s definition” (p. 11). They define genocide as a “form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator” (p. 23). This definition envisions no reciprocity from the victim group, the intent to kill all members of the victim group, an exclusion of civilian casualties of war, a strict intent requirement, and state action.

With regard to the selection of groups that may be the victims of genocide, Chalk and Jonassohn’s definition leaves the matter open; the guiding principle is the subjective view of the perpetrator. By placing no ceiling on the number of potential victim groups, their definition “allows the inclusion of groups that had not previously been considered under the United Nations convention as potential victim groups (e.g., the retarded, the mentally ill, and homosexuals...)” (p. 26). In her 37 case comparative study, Barbara Harff (2003) proposes a definition that pairs genocide with *politicide*: “the promotion, execution, and/or implied consent of sustained policies by governing elites or their agents – or, in the case of civil war, either of the contending authorities – that are intended to destroy, in whole or in part, a communal, political, or politicized ethnic group” (p. 58). This definition seems to permit fewer groups, largely restricted to ethnic/racial, religious or political groups, but does include groups that are either self or authoritatively defined.

This brief review of the Genocide Convention and related literature reveals several problematic aspects of how a “group,” which qualifies for protection under the Genocide Convention, has been and should be determined. With regard to the expansion of protected groups, any expansion of protected groups, to both strengthen the convention’s legitimacy as a deterrent against potential perpetrators of mass killing and provide a foundation for rigorous scientific analysis of the prevalence of genocidal episodes, should be undertaken with caution. Schabas’ position on expansion is too confining because he opposes *any* expansion, thus denying the dynamic temporally-contingent dimension of group naming, with a result that inhibits growth in both ideas of institutional protection for vulnerable populations and efforts at progressive scholarship production.

Conversely, Chalk and Jonassohn advocate too broad an expansion, embracing almost any group, so long as it is identified as such by the alleged perpetrator. This definition may be viscerally appealing to human rights advocates, but from a legal standpoint its lack of an objective measure by which to gauge group membership may leave it impotent in carrying out the Genocide Convention’s implicit purpose – to create an agreement under which mass killing could be condemned and those populations most susceptible to the scourge could be protected.

Likewise, Harff’s definition is too broad because a political group can be interpreted to mean almost any group, and identification of the groups is subjective. With regard to Chalk and Jonassohn, and Harff’s definitions of genocide, Rummel’s admonition that genocide has been overly generalized should be seriously considered. Thus, rather than overexpand the aegis of the Genocide Convention and reduce it to a document that becomes resistant to meaningful judicial application, the best approach may be to merely add to those groups already protected by the convention. For reasons alluded to above and further elucidated below, disabled persons should be included. Their inclusion would comport with Chalk and Jonassohn’s subjective conception of group identification because the Nazis identified disabled persons as a group and proceeded with a program for their extermination “as such.” The authors even expressly mention disabled persons as a group to be included. Finally, this position also comports with Harff’s more expansive conception of genocide.

### Eugenics and the Evolution of German *Rassenhygiene*

While the addition of groups to the Genocide Convention is controversial, inclusion of disabled persons can be justified because of the common etymological ancestry of the ideas of race, nationality, religion, and disability that pervaded intellectual thought and informed state policies during the early 20<sup>th</sup> century. In his discussion of the underpinnings of the Nazi targeting of persons with disabilities, Mostart (2002) identifies six genocidal markers: (a) Darwinism and the biology of determinism, (b) eugenics, (c) forced prevention of disability, (d) disability propagandized as life unworthy of living, (e) disability as justification for individual state-sanctioned murder, and (f) disability as state-sanctioned homicidal health policy. The rudiments of the eugenics movement were an extension of social Darwinist principles of biological superiority; biology determined which groups were dominant and environment could do little to nothing to alter these outcomes.

In the late nineteenth and early twentieth centuries, prominent eugenicists and other intellectual descendants of Francis Galton were preoccupied with control of those who were deemed “unfit.” For the American eugenics movement, this meant control of biological threats such as new Eastern European immigrants, Blacks, and other “degenerate” peoples (Tucker, 1994). Eugenicists and politicians alike believed that undisciplined reproduction by “undesirable” groups would adulterate American stock because they were inferior to the Caucasian race. Thus, eugenicists supported anti-miscegenation and segregation laws to avoid the mongrelization of America. Like Blacks and Eastern Europeans, “degenerates” were also a focus of concern for eugenicists. A degenerate was defined as one who “fail[ed] chronically in comparison with normal persons, to maintain himself or herself as a useful member of the social life of the state” (p. 61). This category included, among others, the feebleminded, insane, epileptics, diseased, those with impaired hearing or vision, and cripples. Invoking quasi-theological, ethical, and legal justifications, Herbert S. Jennings vilified the defective gene as a biological monstrosity:

“The embodiment, the material realization of a demon of evil. Such a thing must be stopped whenever it is recognized. The prevention of propagation of even one congenitally defective individual puts a period to at least one line of operation of this devil. To fail to do at least so much would be a crime” (as cited in Tucker, 1994 p. 69).

Eugenics was also practiced in many of the Nordic states: Denmark, Sweden, Finland, and Norway all had compulsory sterilization programs by 1926, before they were implemented in Nazi Germany (Barnett, 2004).

Academic discussions of race in Germany were not new; race and the study of the science of human variation had been occurring since the 1800s (Schafft, 2007). Schafft argues that Germans had utilitarian motives and deployed race to describe human difference because “the social categories of Jew, Pole, Serb, Mongol, or Gypsy were of significance to them and could be used to justify policies that furthered their economic and political goals” (p. 205). Although there was significant intermarriage de jure equality between Jews and other groups in pre-Nazi Germany, there did exist a latent anti-Semitism upon which Hitler and his compatriots were able to seize. The trope of “German blood” came to embody the essence of Germanness, the cultural conscience of the *volk*. In the context of disability, this sentiment was first memorialized in the Law for the Prevention of Offspring with Hereditary Diseases, promulgated in 1933 (Poore, 2003). As the Nazi Party took control in 1933, with Hitler appointed Chancellor, public vilification of genetic degenerates conflagrated.<sup>vii</sup> Two weeks after an address by Wilhelm Frick, Ministry of the Interior, to the Expert Advisory Council for Population and Race Politics, the Law for the Prevention of Genetically Defective Progeny was enacted (Tucker, 1994). The law allowed for the involuntary sterilization of those afflicted with “weakmindedness,” schizophrenia, insanity, epilepsy, blindness, deafness, bodily deformities and other ailments. Genetic Health Courts were to decide who should be sterilized.

The institutionalization of the Nazi program of *Rassenhygiene* continued with the creation of medical academies tasked with inculcating dedication to state and race in its graduates. The creation of these academies is emblematic of the Third Reich’s infusion of National Socialism with a scientific rationality, the combination of which supplanted

professional ethical allegiances to human life. The Nuremberg Laws were the crescendo of the Third Reich's formalized racial hygiene project, aimed specifically at the parasitic Jewish "counterrace." Adopted unanimously by the Reichstag in 1935, the laws forbade marriage and extramarital relations between Germans and Jews and disenfranchised German "subjects" who were not of German blood. A quote from Hitler's *Mein Kampf* can best help us understand the prohibition on interracial marriage:

"A folkish state must therefore begin by raising marriage from the level of continuous defilement of the race, and give it the consecration of an institution which is called upon to produce images of the Lord and not monstrosities" (as cited in Dawidowicz, 1975, p. 65).

### The Genocide of Disabled Persons Begins

Disabled children were murdered first. Shortly after the start of World War II, Hitler authorized young Nazi officers Brandt and Bouhler to implement the children's euthanasia program under the auspices of the Office of the Chancellery of the Fuhrer (KdF). The program was classified and clandestine, and operated under the deceptive moniker "Reich Committee for the Scientific Registration of Severe Hereditary Ailments" (Friedlander, 1995). KdF officials, Herbert Brack, Hans Hefelmann, and Richard von Hegener, convened a panel of academics to review registration forms to determine which children should be sterilized. Guidelines were issued by the German Ministry of the Interior (RMdI), the ministry headed by Wilhelm Frick. Under the guidelines, midwives and physicians were required to submit the following information on all newborns with medical conditions: name, age, sex, description of the illness, details on hospital stay, an explanation of how the child's function is disrupted by the illness, projected life expectancy, and chances for improvement. A subsequent decree issued by the RMdI required the reporting of religion, as well as his relatives' medical histories (Friedlander, 1995).

Three self-professed euthanasia adherents, Werner Catel, Hans Heinze, and Ernst Wentzler, were medical experts who evaluated registration forms. Those selected for the program – so-called "Reich Committee children" – would then be diverted to children's killing wards, of which Brandenburg-Gordon was the first established in July 1940. To maintain secrecy, parents were advised that their children would be receiving "therapeutic" care. Instead, the children were subjected to medical experiments by the doctors, nurses, and staff at the killing hospitals both before and after being killed. Another child killing ward was established in Bavaria later in the year and was headed by Hermann Pfanmueller. Pfanmueller had previously helped to enforce racial and eugenics legislation and conducted tours of his facility to display the degeneracy of its inmates. Such wards were eventually established throughout Germany (Friedlander, 1995).

Many of the Reich Committee children were starved to death, with rations withheld. However, the preferred method of killing was with medication, specifically luminal, an anticonvulsant with sedative and hypnotic properties. The medication was put in food in high doses or delivered via injection. The actual order to kill was issued by the Reich Committee; children with neurological disorders or physical deformities were deemed incurable and were

ethanized. The criteria used to select children were subjective. Many physicians labored under the assumption that certain disabilities prevented a child from leading a productive life when in fact, there was scientific evidence to the contrary (Friedlander, 1995).

The killing of disabled adults began in the summer of 1939. Brant and Bouler, the managers of the children's euthanasia program, again took the lead. Local governments sent reports to the RMdI listing all institutions in which mental patients, epileptics, and the feeble-minded were held. As with the children's program, registration forms were used for all potential "patients." The following patients who were unable to work and who had these conditions were registered: schizophrenia, epilepsy, senile diseases, therapy resistant paralysis and syphilis, encephalitis, terminal neurological disorders, all types of feeble-mindedness, criminal insanity, lack of German citizenship, and lack of German or related blood, including Jews, Negroes, Gypsies, hybrids, etc., (Friedlander, 1995). The collection of these data served multiple purposes, not the least of which was to determine the logistics of transporting patients from their local medical facilities to the euthanasia wards.

Just as with the child killings, the criteria for selection were subject to widely varying interpretations. Many of those diagnosed with mental disorders were instead physically impaired and had their full faculties about them. This distinction became moot, however, because the overarching motive was not to treat, but to sterilize or kill those unable to serve as productive members of society as determined by their lack of labor value. After selection by medical experts, the transport office, known as the Gekrat, arranged for the movement to the killing facility. Those of sound mind knew their fate, but had no say in the matter because: "The insane person himself is in no position to judge his situation" (Friedlander, 1995, p. 84). Relatives and guardians, and even some local facility administrators, were deceived into believing that the patients were being transported as a precaution for the war. In reality, these "cripples," "psychotics," and "psychopaths" were being relocated to T4, the killing center.

The above narrative demonstrates that the Nazi euthanasia program, as well as the genocide generally, was no singular bureaucratic proclamation or act. Rather, it was a process; the culmination of series of calculated and reinforcing acts, engineered for the particular purpose of racial hygiene and the preservation of those deemed fit. As Fitzgerald (1999) explains, "[I]n relation to people with disability, this may mean that the very narrow psychological sentiment of control of people with disability which manifested first in institutionalization (and its associated deprivations and abuses) may gain expression in decidedly more permanent infringement of human liberties; the taking of life" (pp. 274-275). In Nazi Germany, the result was indeed the taking of life, on a massive scale and with fabricated justifications. The narrative also shows how ideas of race, ethnicity, nationality, and religion cannot be extricated from ideas of disability, either in theory or practice. These phenomena have traveled similar etymological trajectories, from scientific rationales to social constructionism, and all concern the disciplining of bodies by states. Thus, the inclusion of disabled persons as a protected group under the Genocide Convention is both reasonable and necessary.

## A Convention for Disabled Persons

### Group Recognition and Human Rights

Jones and Marks (1999) remark that “[w]hat it is very important to appreciate is that even if there existed a perfect regime of human rights ... this is only going to be a small part of what is necessary to bring about true equality for people with disabilities” (p. 4). Their observation is a reflection of the sobering truth that de jure protections are simply words on paper and incapable by themselves of equalizing humanity. This impotence is made particularly palpable in the case of the United Nations, an institution with no enforcement mechanisms of which to speak. To be sure, advances in international disability theory and law have produced a seismic paradigm shift from a narrow “medical” rubric, which regarded disability as an individual affliction, to one in which disability is conceived of as a sociopolitical construct requiring a human rights response for the protection of a group. However, “[d]espite being one of the largest minority groups in the world, encompassing 600 million persons (of which two out of three live in developing countries), disabled people had been rather ignored during the first three decades of the United Nations’ existence” (Degener, 2000, p. 187).

Although progress is apparent, the identification of persons with disabilities as a group requiring protection has been glacial. The Universal Declaration of Human Rights (UDHR), negotiated and ratified amidst the backdrop of Nazi World War II atrocities, neglected to identify persons with disabilities as a protected group. Under Article II of the UDHR (1948), “[E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similarly, Article 16 of the UDHR fails to include persons with disabilities with race, religion and nationality as inappropriate limitations on the right to marriage. Article 25, which pertains to an internationally accepted standard of living, does assert that every person has the “right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.” This reference, however, conceptualizes disability as an individual condition – conforming to the medical model of disability – rather than as a sociopolitical construct, like race, ethnicity, nationality, and religion.

In 1971, the United Nations General Assembly took a step forward, proclaiming the Declaration on the Rights of Mentally Retarded Persons (Declaration on Mentally Retarded). The resolution called on member states to accord mentally retarded persons, “to the maximum degree of feasibility, the same rights as other human beings” (United Nations, 1971, paragraph [1]). The right to medical care, economic security, community integration, and the right against exploitation and degrading treatment were some of the core principles of the resolution. Four years later, the United Nations passed the Declaration on the Rights of Disabled Persons (Declaration on Rights of Disabled), effectively extending the protections of the Declaration on Retarded Persons to “any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities” (United Nations, 1975, paragraph [XXX]). In contrast to the Declaration on Retarded Persons, the Declaration on Disabled Persons placed more overt emphasis on the protection of civil and political rights (United Nations, 1975, paragraph [4]). In addition, the declaration seemed to proceed further in creating a distinct class of disabled persons, by according protection regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation...” (United Nations, 1975, paragraph [2]).

In 1982, The United Nations began implementation of its World Programme of Action Concerning Disability (World Programme on Disability). The plan, described as a “an international long-term plan based on extensive consultations with Governments, organs and bodies within the United Nations system and intergovernmental and non-governmental organizations” (World Programme of Action Concerning Disability, paragraph [9]), placed squarely on state governments the obligation of “awakening the consciousness of populations regarding the gains to be derived by individuals and society from the inclusion of disabled persons in every area of social, economic and political life” (United Nations, 1982, paragraph [1]). The programme’s three core objectives – prevention, rehabilitation,<sup>viii</sup> and equalization of opportunities were to be applied to the rising global disabled population, with particular attention paid to the plight of disabled persons in developing countries (United Nations, 1982, paragraph [4]).<sup>ix</sup> The vulnerability of women, children, the elderly, victims of torture, and refugees was also highlighted.

With regard to planned international action to ensure the protection of disabled persons, the United Nations proposed a series of measures under the World Programme. Of principal focus was the mobilization of economic resources; a trust fund was established to aid developing countries in realizing the objectives of the programme. However, the programme’s clearest statement on human rights left the matter of accountability nebulous: “[I]ncidents of gross violation of basic human rights, including torture, can be a cause of mental and physical disability. The Commission on Human Rights should give consideration, inter alia, to such violations for the purpose of taking appropriate ameliorative action” (United Nations, 1982, paragraph [9]). This statement articulates no specific punitive action that may be taken against the gross violators of the human rights of disabled persons. The vagueness of “appropriate ameliorative action” may be politically sustainable, given that it extends the necessary legal latitude to assess each instance on a case-by-case basis. However, the programme recognizes that states susceptible to violations against disabled persons should bear the substantial share of the burden of amelioration, but makes only a cursory mention of what might occur in the event those states either neglect their obligation or intentionally target disabled persons. This omission is problematic and should not be immune to both legal and moral scrutiny.

#### Toward a Convention for Disabled Persons

At the close of the United Nation’s Decade on Disabled Persons (1983-1992) a Draft Convention on the Elimination of All Forms of Discrimination against Disabled Persons was presented to, and subsequently rejected by, the General Assembly on the grounds that it would not be ratified by a majority of member states. In lieu of a convention, which would have the force of international law, the United Nations Commission for Social Development convened an expert working group that developed the Standard Rules. The Standard Rules, adopted by the General Assembly in 1993, attempted to reconcile disability as an individual’s functional impairment, and disability as social construction with implications of inferiority and consequent discrimination (Michailakis, 1999). As an instrument that is not legally binding, its influence was only moral.

The Standard Rules were followed in 1994 by the United Nations Committee on Economic, Social and Cultural Rights' adoption of General Comment Number 5, which finally turned to a human rights approach to the interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) as applied to persons with disabilities. The General Comment made plain that "[i]n order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties." However, these emendations were a far cry from a binding treaty that could formally solidify the rights of disabled persons.

In 2006, the United Nations completed the human rights shift by adopting the Convention on the Rights of Persons with Disabilities (Disability Convention). It purports to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (United Nations, 2006, Article 1). Several obligations are imposed on states: passage of appropriate legislation, the abolition of discriminatory legislation, promotion of research and development, and training for disabled persons. Certainly, the convention addresses many of the needs of disabled populations worldwide; however, it makes no mention of the historical connection between disability and genocide. Although the convention represents a formidable step in the protection of persons with disabilities and received generous support from United Nations member states,<sup>x</sup> it remains to be seen whether it can reduce the likelihood of the most vulnerable population being victimized by mass killing, or whether the convention is a substitute for inclusion among the groups protected by the Genocide Convention.

### Conclusion

This paper has attempted to demonstrate the intimate connection between disability and genocide, and the need for disability to be included as a protected group under the Genocide Convention. Some may argue that since the Holocaust, disabled persons have not been targeted as such, and thus, their inclusion is unnecessary. Unfortunately, whether this is true is unclear because disabled genocide victims rarely have their stories told, as the Nazi case evidences. Still others may argue that other international crimes, such as crimes against humanity, are sufficient to protect persons with disabilities. While this may be true, genocide is the highest of all crimes, and inclusion, even if largely symbolic, would only accelerate the human rights movement for disabled persons. It could also reinforce the international norm of equal opportunity for marginalized groups, enhance reputation effects for defectors from the Disability Convention and related instruments, as well as bring international political pressure to bear on states such as the United States, which has refused to sign the Disability Convention.

In sum, international human rights law, as well as domestic laws and regional treaties, should embrace the human rights agenda of disabled persons. This position fully acknowledges the bureaucratic fetters that inhibit international legal progress, in the form of bargaining among self-interested sovereign states, while at the same time imploring the United Nations and its member states to fulfill their roles as the vanguard of the socially marginalized and politically dispossessed. Disabled persons should no longer be a race apart from their brethren when it comes to protection from genocide.

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Endnotes

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<sup>i</sup> By “etymological,” I refer quite simply to the history of words and concepts, the sources of those histories, the relationships between histories and the evolutionary trajectories those histories might travel.

<sup>ii</sup> Ms. Wöld’s reference to her son as an “it” is indicative of the dehumanization of the disabled during the Nazi era. The disabled’s lack of standing as sociopolitical beings even translated into the post-Holocaust legal realm, preventing many victims of the Nazi euthanasia program from securing a judicial remedy. In his dissertation research, Shane Stufflett found that the killers of the disabled were treated much more leniently by courts than were the killers of Jews. “More than half of the Nazis tried for crimes against the mentally handicapped – 57 percent – were acquitted ... and only 1.6 percent received life sentences, none of which were served.” Conversely, “only 24 percent of the Nazis tried for crimes against the Jews were acquitted, with about 11 percent receiving life sentences” (Ascribe Newswire, 2005). Unlike Jews who were able to testify and potentially win judges sympathy, the mentally handicapped were unable to as a result of their limitations.

<sup>iii</sup> Gallagher describes the German film *I Accuse*, in which a physician husband kills his wife because she has multiple sclerosis.

<sup>iv</sup> The eugenics-inspired Nazi regime in Germany found a sibling in the United States, which also implemented policies aimed at “degenerates.” These policies included forced sterilization, marriage restrictions, and segregation and were supported by an alliance between the mainstream medical establishment and the eugenics movement. In the opinion of Sofair & Kaldjian (2000), “[t]he goals of eugenic sterilization in the United States and Germany were similar in that they aimed for improved genetic composition of their citizenry and hoped to create a society in which every individual was economically useful and the fiscal burden of institutionalization, crime, and charity were decreased” (p. 318).

<sup>v</sup> “Ethnicity” is a term used in the Genocide Convention.

<sup>vi</sup> See for example, *Bosnia & Herzegovina v. Serbia & Montenegro* (International Court of Justice, 2007), which held that Serbia violated its obligations under the Genocide Convention by failing to prevent genocide, but evidence was insufficient to show that Serbia committed genocide.

<sup>vii</sup> Nazi Socialist propaganda envisioned three categories of disabled: (1) disabled veterans who here valorized as war heroes; (2) physically handicapped German Civilians, portrayed as being potentially rehabilitated; and (3) those who were deemed unfit, incapable of rehabilitation and a drain on the nation’s resources (Mostart, 2002). Although the Nazis demonized the previous regime for its maltreatment of the war veterans, its record is no better. Under the Nazis, the veterans were “[s]howered with rhetoric” and “psychologically manipulated and organized to support the regimes militaristic policies – policies that created millions of new veterans, who were then left to face the ruins of a second lost war” (Diehl, 1987, pp. 705-706).

<sup>viii</sup> The issue of rehabilitation has also been addressed by conventions and recommendations by the International Labor Organization (ILO), including but not limited to pronouncements in 1983, 1955 and 1988.

<sup>ix</sup> The report estimated that more than 500 million persons were afflicted with physical, mental or sensory impairments, “and at least 25 percent of any population is adversely affected by the presence of disability” (United Nations, 1982, (4)). Factors identified as contributing the disabled person’s marginalization included wars, violence, poverty, geography, natural disasters, stress and urbanization.

<sup>x</sup> Remarking upon the Disability Convention’s precursors, Argentinean Ambassador Roberto Garcia Moritán acknowledged the quest for integration by the 7.1% of the Argentine population that self-identifies as disabled. See Statement by the Vice Minister of Foreign Affairs, Trade, and Worship Ambassador Robert Garcia Moritán (March 30, 2007). Representing the European Union, Parliamentary State Secretary in the German Ministry of Labour and Social Affairs Franz Thonnes remarked that the long-term goal of the Disability Convention was to “change the way the public perceives persons with disabilities, thus ultimately changing society as a whole.” See European Union Statement on the Occasion of the Signing of the Convention on the Rights of Persons with Disabilities (March 30, 2007). Thirty-eight other parties made statements at the signing ceremony.