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Disability, Human Rights Violations, and Crimes Against Humanity

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Abstract

Persons with disabilities have historically been subjected to egregious human rights violations. Yet despite well-documented and widespread harms, one billion persons with disabilities remain largely neglected by the international laws, legal processes, and institutions that seek to redress those violations, including crimes against humanity (CAH). This Article argues for the propriety of prosecuting egregious and systemic human rights violations against persons with disabilities as a CAH, and, in addition, asserts the necessity of ensuring the accessibility of international criminal processes to those individuals. The UN Security Council's recent acknowledgement of the enhanced risk that persons with disabilities experience during armed conflict, the growing evidence of widespread human rights violations against them, and an ongoing effort to forge a UN convention on the prevention and punishment of CAH make these arguments especially timely.

I. Introduction

Persons with disabilities, as individuals and as a population, have historically been subjected to egregious human rights violations on account of their disability. These abuses include genocide, mass murder, and targeted killing; forced sterilization; involuntary medical and scientific experimentation; use of persons with disabilities as human shields, suicide bombers, and booby traps; institutionalization, sexual violence, human trafficking, and forced disappearance; and attacks against buildings dedicated to the education, health care, and rehabilitation of persons with disabilities.[1] Yet despite these well-documented and widespread harms, persons with disabilities—a group that comprises some one billion individuals

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[1] *See* Janos Fiala-Butora, *Disabling Torture: The Obligation to Investigate Ill-treatment of Persons with Disabilities*, 45 Colum. Hum. Rts. L. Rev. 214, 219–40 (2013) (cataloging historical and ongoing severe human rights violations against persons with disabilities); Janet E. Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-torture Framework in the Convention on the Rights of Persons with Disabilities*, 33 Loy. L.A. Int'l & Comp. L. Rev. 27, 29–32 (2010) (same).

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worldwide[2]—remain largely neglected by the laws, legal processes, and institutions that seek to redress the most serious international law violations, including crimes against humanity (CAH).[3] This is in notable contrast to the increasing prosecution of other human rights abuses as CAH,[4] such as acts of horrific violence against women and children, mass rape, and the use of child soldiers.

The absence of prosecutions of heinous crimes perpetrated against persons with disabilities as CAH is also glaring in view of the greater global attention now being paid to disability-related human rights. The 2006 General Assembly adoption of the Convention on the Rights of Persons with Disabilities (CRPD),[5] which added persons with disabilities to the pantheon of groups receiving targeted human rights protection[6] after decades of neglect,[7] has impelled significant change across international, regional, and domestic institutions and frameworks.[8] Progressive initiatives have also been advanced for mainstreaming disability rights across the United Nations (UN) human rights system,[9] including the elaboration of a systemwide UN Disability Strategy in 2019.[10] Notable within the international

[2] World Health Organization & The World Bank, World Report on Disability 11 (2011), *available at* http://www.who.int/disabilities/world_report/2011/report.pdf.

[3] CAH are prohibited acts committed as a part of a widespread or systematic attack directed against a civilian population as part of a government or organizational policy. Rome Statute of International Criminal Court, Art. 7, 2187 UNTS 38544 (July 17, 1998) [hereinafter Rome Statute].

[4] *See, e.g.*, Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 Eur. J. Int'l L. 697 (2002); Christine Chinkin, *Rape and Sexual Abuse and Women in International Law*, 5 Eur. J. Int'l L. 326 (1994); Matthew Happold, Child Soldiers in International Law (2005). The evolution of CAH, including in relation to identity-specific groups, is set forth in Part IV *infra*.

[5] Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD]. For a comprehensive exploration, see The UN Convention on the Rights of Persons with Disabilities: A Commentary (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

[6] *See* Michael Ashley Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007), *reprinted in* Nussbaum and Law 3 (Robin West ed., 2015), *reprinted in* Vulnerable and Marginalized Groups and Human Rights 665 (David Weissbrodt & Mary Rumsey eds., 2011) (foundational description of the CRPD and its implications).

[7] *See* Gerard Quinn & Theresia Degener, Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability, UN Doc. HR/PUB/02/1 (2002), *available at* http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf (charting the pre-CRPD systemic neglect of disability issues by the UN human rights system).

[8] *See* Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 U. Wash. L. Rev. 449 (2008); Janet E. Lord & Michael Ashley Stein, *Prospects and Practices for CRPD Implementation in Africa*, 1 Afr. Y.B. Disability Rts. 97 (Charles Ngwena & Frans Viljoen eds., 2014); *see also* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, *available at* https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf; Council of Europe Committee of Ministers, Council of Europe Action Plan to Promote the Rights and Full Participation of Persons with Disabilities in Society: Improving the Quality of Life or People with Disabilities in Europe 2006–2015, Rec(2006)5, *at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680595206; United Nations Economic and Social Council, Economic and Social Commission for Asia and the Pacific, Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific, UN Doc. E/ESCAP/APDDP/4/Rev. 1 (Jan. 24, 2003).

[9] In September 2006, the UN System Chief Executives Board for Coordination established the Inter-Agency Support Group on the CRPD, charged with coordinating work across the UN system in promotion and implementation of the treaty. For its latest report, see Meeting Report, Annual Meeting of the Inter-Agency Support Group for the Convention on the Rights of Persons with Disabilities, UN-House, Beirut, Lebanon (May 7–8, 2015), *available at* http://www.un.org/disabilities/documents/iasg/iasg_report_may2015.pdf.

[10] UN Disability Inclusion Strategy (2019), *at* https://www.un.org/en/content/disabilitystrategy; UN General Assembly, Outcome Document of the High-Level Meeting of the General Assembly on the Realization of the

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humanitarian law (IHL) field are the adoption of guidelines on disability inclusion in humanitarian action,[11] incorporation of detailed standards on disability for disarmament, demobilization, and reintegration,[12] consideration of CRPD Article 11 (situations of risk) in operations of the International Committee of the Red Cross,[13] and proactive engagement on disability equality by actors within the UN system.[14] The increasing attention being paid to disability-related rights in the international criminal domain was most directly evident in the UN Security Council's adoption in 2019 of a resolution emphasizing the "need for States to end impunity for criminal acts against civilians, including those with disabilities" and to warrant their "access to justice and effective remedies and, as appropriate, reparation."[15]

Each of these initiatives has redounded to the benefit of individuals with disabilities and contributed toward increasing global awareness and incorporation of disability-based human rights into aspects of international law.[16] Nevertheless, systemic and profound human rights abuses against persons with disabilities remain largely unaddressed by international, regional, and national fact-finding bodies and tribunals,[17] and have usually been outside the scope of CAH prosecutions.[18] Neither has international criminal procedure garnered the full benefit of disability-related concepts that may benefit not only individuals with disabilities, including, importantly, witnesses and victims, but also other participants requiring accommodations.

Millennium Development Goals and Other Internationally Agreed Development Goals for Persons with Disabilities: The Way Forward, a Disability-Inclusive Development Agenda Towards 2015 and Beyond, UN Doc. A/68/L.1 (Sept. 17, 2013) (underlining the importance of ensuring accessibility for and inclusion of persons with disabilities in all aspects of development, and in particular the emerging post-2015 United Nations development agenda), *at* https://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/L.1 [hereinafter UN Disability Strategy].

[11] IASC Guidelines, Inclusion of Persons with Disabilities in Humanitarian Action, 2019, *at* https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/iasc-guidelines. These follow on earlier guidelines specifically on mental health issues. *See* IASC Guidelines for Mental Health and Psychosocial Support in Emergency Settings, 2007, *available at* https://www.who.int/mental_health/emergencies/guidelines_iasc_mental_health_psychosocial_june_2007.pdf.

[12] *See* Inter-Agency Working Group on Disarmament Demobilization Reintegration, Integrated Disarmament, Demobilization and Reintegration Standards (2006, revised beginning 2014), *at* https://www.unddr.org/the-iddrs/ (representing that a module on disability inclusive disarmament, demobilization and reintegration is being developed and will be released in 2021).

[13] *See* Int'l Comm. of the Red Cross, The ICRC's Vision 2030 on Disability (Aug. 6, 2020), *at* https://www.icrc.org/en/publication/4494-icrcs-vision-2030-disability (stressing its principal purpose "to transform the way the ICRC addresses disability inclusion in operations").

[14] *See, e.g.*, Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report, paras. 37–76, UN Doc. A/63/175 (July 28, 2008) (report by Manfred Nowak) [hereinafter Nowak Report]; Report of the Office of the High Commissioner for Human Rights, Expert Seminar on Freedom from Torture and Ill-Treatment and Persons with Disabilities (Dec. 11, 2007), *at* http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorturereportfinal.doc.

[15] *See* SC Res. 2475 (June 20, 2019), *at* https://undocs.org/s/res/2475(2019) [hereinafter Security Council Resolution 2475].

[16] *See generally* UN Flagship Report on Disability and Development 2018, *available at* https://www.edu-links.org/sites/default/files/media/file/UN-Flagship-Report-Disability.pdf (enumerating the situation of persons with disabilities across multiple sectors and highlighting state practice in implementation across those areas).

[17] Fact-finding bodies include those established to investigate past violations of international human rights or humanitarian law as well as their causes and consequences. *See* GA Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Sept. 24, 2012).

[18] For an explanation of this absence, see text accompanying note 104 *infra*.

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This Article makes two principal contributions. First, it argues for the propriety of prosecuting egregious and systemic human rights violations against persons with disabilities as CAH. Second, it explains the necessity of ensuring the accessibility of international criminal processes to persons with disabilities. The Article proceeds from the premise that impunity for persecution of persons with disabilities—a group explicitly protected by international law—cannot be tolerated and that greater attention must be given to ensuring that international criminal law and processes remedy gross human rights violations against that population, much as they increasingly have for populations such as women and children.

This Article proffers the first treatment of these issues in the legal literature and seeks to stimulate a dialogue among academics, policymakers, and judges on enhancing protections and accountability within international criminal law for persons with disabilities. We sketch out the processes and ramifications of incorporating a disability rights perspective within international criminal law and assess the viability of using international and domestic tribunals to prosecute human rights abuses of persons with disabilities as CAH. This is an especially opportune time for such prosecutions for several reasons: first, the UN Security Council's recent acknowledgement of the enhanced risk that the group experiences during armed conflict;[19] second, because of emerging evidence of widespread human rights violations against persons with disabilities;[20] and third, because of an ongoing effort to forge a UN convention on the prevention and punishment of crimes against humanity which is currently silent as to disability.[21] Each of these developments raises the prospect for greater scrutiny of CAH against persons with disabilities as well as the propriety of prosecuting such crimes.

Part II provides a short history of the severe human rights abuses committed against persons with disabilities, highlighting the unfortunate reality that the vast majority of these crimes have gone unprosecuted and remain all but ignored even though the international criminal law framework is meant to protect the core rights enshrined in human rights treaties. Part III examines the foundational importance of the CRPD for the understanding of disability rights and for acknowledging and prosecuting egregious human rights abuses against persons with disabilities under international criminal law, both disability-based persecution as such, as well as conduct that is especially egregious when perpetrated against persons with disabilities. Part IV describes the evolution of CAH within international criminal law, especially for sexual and gender-based crimes and crimes against children, and argues that a similar development is necessary and appropriate for egregious disability-targeted human rights violations. Part V examines the practicalities of prosecuting CAH perpetrated against persons with disabilities within current judicial forums and frameworks, concluding that at present the International Criminal Court (ICC) is potentially the most viable venue for such claims.

[19] SC Res. 2475, *supra* note 15.

[20] *See* Jae-Chun Won, Janet E. Lord, Michael Ashley Stein & Yosung Song, *Disability, Repressive Regimes, and Health Disparity: Assessing Country Conditions in North Korea*, HAGUE Y.B. INT'L L. 27 (2016) (documenting CAH-level human rights violations including involuntary experimentation, forced mass sterilization, and compelled segregation).

[21] Draft Articles on Prevention and Punishment of Crimes Against Humanity, *in* Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, at 11–21, UN Doc. A/74/10 (Sept. 16, 2019) [hereinafter Draft CAH Articles].

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II. Human Rights Abuses Against Persons with Disabilities

Disability-based persecution has a long and lurid—and yet largely marginalized—history. That past, along with contemporary manifestations of such persecutions, demonstrates both that persons with disabilities are victims of profound violations proscribed by international criminal law and that many of these atrocities reflect disability-based animus and should be—although have not yet been—interpreted as CAH. As described in greater detail in the Sections that follow, these atrocities include: genocide, mass murder, and targeted killing; forced sterilization; involuntary medical and scientific experimentation; use of persons with disabilities as human shields, suicide bombers, and booby traps; institutionalization, sexual violence, human trafficking, and forced disappearance; and attacks against buildings dedicated to the education, health care, and rehabilitation of persons with disabilities.

A. Mass Murder and Targeted Killing

Persons with disabilities are targeted for killing, often on a mass scale, during armed conflict.[22] The most notorious example occurred prior to and during World War II under Nazi killing programs.[23] Patients in all government- and church-run sanatoria or nursing homes with a wide range of physical, sensory, intellectual, and mental disabilities perceived to be hereditary in nature were targeted for extermination.[24] The mass killing of some 250,000 persons with disabilities by the Third Reich was clearly a CAH at the time of its commission under existing international law.[25]

Turning to more recent examples, evidence suggests that persons with disabilities were targeted for killing by the Khmer Rouge in Cambodia.[26] Likewise, the Rwandan genocide resulted in mass killing of persons with disabilities, including those housed in rehabilitation institutions and psychiatric hospitals built by missionaries in Kigali.[27]

[22] Alice Priddy, Disability and Armed Conflict 12 (Academy Briefing No. 14, 2019), *at* https://www.geneva-academy.ch/research/publications/detail/472-disability-and-armed-conflict.

[23] *See, e.g.*, Michael Robertson, Astrid Ley & Edwina Light, The First into the Dark: Nazi Persecution of the Disabled (2019).

[24] Janet E. Lord, *Genocide, Crimes Against Humanity and Human Rights Abuses Against People with Disabilities*, *in* Encyclopedia of Genocide and Crimes Against Humanity 253 (Dinah L. Shelton ed., 2004). Included were individuals with blindness, deafness, epilepsy, intellectual disabilities, autism, depression, bipolar disorder, mobility impairments, and congenital disabilities. *Id.*; *see also* Robert Proctor, Racial Hygiene: Medicine Under the Nazis (1988).

[25] The total figure combines murders conducted under the T-4 program with separate initiatives, continued through the end of World War II, of targeting individuals with disabilities in institutions and concentration camps. *See generally* Nazi Persecution of the Disabled: Murder of the Unfit, *at* https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-the-disabled. For the origins of the crimes of genocide and CAH, see Philippe Sands, East West Street: On the Origins of "Genocide" and "Crimes Against Humanity" (2016).

[26] Deutsche Presse Agentur, *U.N. Team Arrives in Cambodia to Investigate Khmer Rouge Genocide*, LEXIS-NEXIS(r) Academic Universe (Nov. 14, 1998); *see also* Arthur Blaser, *Always the First to Go?: People with Disabilities and Genocide*, *in* Anatomy of Genocide: State-Sponsored Mass-Killings in the Twentieth Century 78 (Alexandre Kimenyi & Otis Scott eds., 2001).

[27] *See* Art Blaser, *From the Field–People with Disabilities and Genocide: The Case of Rwanda*, 22 Disability Stud. Q. 53 (2002). According to Theodore Simburudali, a commissioner with the Rwanda National Commission on Human Rights, "Disabled people suffered intolerable horrors. They went through hell on earth. They are very few disabled who survived during the genocide." P.W. Masakhwe, *The Disabled and the Rwanda Genocide: The Untold Story*, 23 Disability World (Apr.–May 2004), *at* https://studylib.net/doc/8449781/–disability-world.

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North Korea presents another modern example of disability-based persecution. UN reports have provided compelling evidence pointing to CAH, including targeted killings of persons with disabilities through infanticide, disappearance of children with disabilities by forced removal from their parents, and willful neglect of prisoners with disabilities resulting in death.[28] Emerging evidence indicates that these violations are rooted on assumptions about genetic "purity,"[29] not unlike the claims of racial hygiene that the Nazi regime used as the basis for its program of extermination against persons with disabilities.[30] Yet, remarkably, such treatment was barely noted by the UN Commission of Inquiry established to investigate possible CAH committed by the North Korean regime.[31] These omissions highlight the lack of enforcement and awareness of international criminal law protection for disability-based crimes, including the absence of processes to collect evidence of such crimes.

Numerous instances of persons with disabilities being subjected to human rights violations that often lead to death also exist in the situation of armed conflict.[32] There is evidence of disability-targeting in contexts involving forced displacement where persons with disabilities and or their family members were killed for lagging behind.[33] Similarly, the practice of institutionalization in dangerous conditions has resulted in preventable mass deaths as

[28] *See* Janet E. Lord & Jae-Chun Won, *Missed Opportunity? UN Report Describes Human Rights Abuses but Leaves Out the Status of the Disabled,* KOR. Q. 13 (2014).

[29] *See* H. KANG & P. GRANGEREAU, THIS IS PARADISE! MY NORTH KOREAN CHILDHOOD 21 (2007) (relating the perspective of a defector that for North Korea that persons with disabilities are "seen as sub-humans, useless to society"). *See also generally* B.R. MYERS, THE CLEANEST RACE: HOW NORTH KOREANS SEE THEMSELVES AND WHY IT MATTERS (2010) (asserting that the guiding ideology of the North Korean regime is a race-based nationalism linked in part to Japanese fascist ideology).

[30] *See* Lord, *supra* note 24.

[31] UN Commission of Inquiry on Human Rights in the DPRK, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the DPRK, paras. 321–29, UN Doc. A/HRC/25/CRP.1 (Feb. 7, 2014), *at* https://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx [hereinafter UN Commission on DPRK].

[32] Parenthetically, reports on the ongoing armed conflict in Syria shed light on grave violations of international law against persons with disabilities left behind as families were forced to flee, and also for individuals in institutional facilities. *See* Nisan Ahmado, *Disabled Victims Are Syrian War's Most Vulnerable, Extremism Watch*, VOA NEWS (Mar. 15, 2019), *at* https://www.voanews.com/a/people-with-disabilities-are-most-vulnerable-as-syrian-conflict-enters-9th-year-/4833549.html; OHCHR, Persons with Disabilities "Forgotten Victims" of Syria's Conflict (Sept. 17, 2013), *at* https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E; OCHA Services, *Hidden Victims of the Syrian Crisis: Disabled, Injured, and Older Refugees*, RELIEFWEB (Apr. 9, 2014), *available at* https://reliefweb.int/report/syrian-arab-republic/hidden-victims-syrian-crisis-disabled-injured-and-older-refugees (relying on information from HelpAge and Handicap International). Relatedly, Amnesty International documented the difficulties persons with disabilities faced fleeing violence and the challenges they faced in displacement camps, including significant barriers in accessing aid, health service and inadequate living conditions. *See generally* AMNESTY INTERNATIONAL, EXCLUDED: LIVING WITH DISABILITIES IN YEMEN'S ARMED CONFLICT (2019) *at* https://www.justice.gov/eoir/page/file/1227171/download ("Documenting experiences of those living in displacement as well as in the wider community, Amnesty International h[erein] examine[s] the impact of the conflict in Yemen on children, women and men with disabilities.")

[33] For example, a representative from the Office of the High Commissioner of Human Rights reported that ISIL fighters shot dead three women and three young girls, and wounded a further four children from a village south of Mosul: "The victims were allegedly shot because they were trailing some 100 meters behind a group of other people from the same village who were being forced by ISIL to relocate to another sub-district" and "[t]he victims were lagging behind because one of the children had a disability" and was among those shot and killed. Office of the High Commissioner on Human Rights Press Release, Press Briefing Note on Iraq and South Sudan (Oct. 25, 2016), *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20753&LangID=E.

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documented in a range of instances.[34] Evidence likewise exists that government-run hospitals have deliberate policies of withholding food and water to infants and children with disabilities, and that their implementation has led to the deaths of many children with disabilities.[35]

The well-documented ritual killing of persons with albinism, and subsequent impunity for such killings and attacks, is yet another example of the targeted killing of persons with disabilities.[36] This issue is beginning to garner some attention following the appointment of an Independent Expert on the enjoyment of human rights by persons with albinism.[37] A study conducted by the Independent Expert disclosed "hundreds of cases of attacks and other related violations such as murder, mutilation, ritual rape, infanticide and trafficking of persons, organs and body parts, as well as grave robberies" reported across twenty-eight countries in the East Africa region in the past decade.[38]

All these myriad mass murders and targeted killings clearly contravene international criminal law. Yet none of them has been prosecuted as CAH, demonstrating the differential treatment accorded when victims have been persons with disabilities.

B. Forced Sterilization

Mass forced sterilization has long been visited on women, girls, and also boys and men with disabilities, often with a eugenic justification.[39] Most notorious was the Nazi legislation authorizing compulsory sterilization for persons labeled as having a broad range of physical and mental disabilities, which led to mass sterilization of some 375,000 persons.[40] This policy drew its inspiration from the bogus "science" of American eugenics and the resulting policies to impose sterilization and marriage prohibitions on persons deemed unfit; here, the Third Reich brought to scale a practice that had proliferated in the United States and other countries

[34] *See, e.g.*, *Czech Fire: Eight Killed at Disabled People's Home in Vejprty*, BBC WORLD NEWS (Jan. 19, 2020), *at* https://www.bbc.com/news/world-europe-51166732 (reporting that lack of fire detectors and shortage of staff were at fault for deaths of persons with disabilities in this institution); Steve Gutterman, *37 Killed in Pre-dawn Fire at Russian Psychiatric Fire*, REUTERS (Sept. 13, 2013), *at* https://www.nbcnews.com/news/world/37-killed-pre-dawn-fire-russian-psychiatric-hospital-flna8C11142807 (reporting that dilapidation of psychiatric hospitals was resulting in a rise in death tolls, also that a third of such facilities had been declared unfit for use since 2000).

[35] Concerns over this situation led directly to the drafting of a specific CRPD provision prohibiting withholding of food and fluids to persons with disabilities. *See* CRPD, *supra* note 5, Art. 25(1)(f) (providing, as part of the obligation on the right to the highest attainable standards of health, the prevention of the "discriminatory denial of health care or health services or food and fluids on the basis of disability").

[36] *See* Human Rights Council, Women and Children Impacted by Albinism, Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, UN Doc. A/HRC/43/42 (Dec. 24, 2019) (noting widespread killings and abuses) [hereinafter HRC, Women and Children Impacted by Albinism]; Amnesty International, *Malawi: Impunity Fuels Killings of People with Albinism for Their Body Parts* (June 28, 2018), *at* https://www.amnesty.org/en/latest/news/2018/06/malawi-impunity-fuels-killings-of-people-with-albinism-for-their-body-parts.

[37] The Human Rights Council appointed Ms. Ikponwosa Ero as the first Independent Expert on the enjoyment of human rights by persons with albinism in June 2015. For the webpage of the Independent Expert, see https://www.ohchr.org/en/issues/albinism/pages/iealbinism.aspx.

[38] United Nations, Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism, para. 16, UN Doc. A/74/190 (July 18, 2019); *see also* HRC, Women and Children Impacted by Albinism, *supra* note 36.

[39] *See generally* Robyn Michelle Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 FRONTIERS L. CHINA 53 (2016); David Pfeiffer, *Eugenics and Disability Discrimination,* 9 DISABILITY & SOC'Y 481 (1994).

[40] Disability Rights Advocates, *Forgotten Crimes: The Holocaust and People with Disabilities* 27–29 (2001) (detailing the array of abuses against children and adults with disabilities in Nazi Germany).

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prior to the onset of World War II.[41] Beyond the notorious Nazi cases, modern examples abound.[42] Documented cases of mass sterilization practices for girls and women (and sometimes boys and men) with disabilities have occurred in, and are sometimes committed by, a diverse range of countries including Australia,[43] Canada,[44] Colombia,[45] Hungary,[46] India,[47] Japan,[48] North Korea,[49] Sweden,[50] and the United States,[51] among others.[52]

Increased attention is slowly being paid to programs of forced sterilization perpetrated against persons with disabilities as CAH in human rights reporting.[53] While forced sterilization of women with disabilities ought to constitute a CAH when committed as part of a widespread or systematic attack directed against a civilian population, well documented cases of systematic sterilization of persons with disabilities have not garnered the attention of prosecutions under modern international criminal law.[54]

[41] *See* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS AND THE STERILIZATION OF CARRIE BUCK 3–5 (2016).

[42] *See* Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide* (Oct. 2011), *at* https://www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide.

[43] *See* Susan Brady, John Briton & Sonia Grover, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*, AUSTL. HUM. RTS COMM. (2001), *at* https://humanrights.gov.au/our-work/disability-rights/projects/sterilisation-girls-and-young-women-australia-issues-and.

[44] *See, e.g.*, Jana Grekul, Arvey Krahn & Dave Odynak. *Sterilizing the "Feeble-Minded": Eugenics in Alberta, Canada, 1929–1972*, 17 J. HIST. SOC. 358 (2004); Action Canada for Sexual Health and Rights, *Forced Sterilization: Not a Thing of the Past*, *at* https://www.actioncanadashr.org/news/2019-05-10-forced-sterilization-not-thing-past.

[45] *See* Colombia Constitutional Court, Decision C-133/14 (2014) (Colom.) (upholding the constitutionality of the practice of surgical sterilization of minors with intellectual and psychosocial disabilities).

[46] *See, e.g.*, Immigration and Refugee Board of Canada, *Hungary: Reports of the Forced Sterilization of Women (2000–2011)*, *available at* https://www.refworld.org/docid/4f9695202.html.

[47] Avantika Bunga & Tia Matthew, *Women with Disabilities and Forced Sterilization in India*, BASTION (Mar. 12, 2020), *at* https://thebastion.co.in/ideas/of-stigma-and-sterilization-the-layered-stigmatization-of-women-with-disabilities-in-india (reporting that 93% of women and girls with disabilities in India are subjected to forcible hysterectomies).

[48] *See* U.S. Department of State Japan Country Report on Human Rights Practices for 1998, *at* https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/japan (reporting that Japan admitted to sterilizing 16,500 women with disabilities without their consent between 1949 and 1992).

[49] Korean Institute for National Unification, *White Paper on Human Rights in North Korea* 482 (2012) [hereinafter KINU, *White Paper*] (noting that forced sterilization was often coupled with other abuses, thus in 2011, 80% of refugee respondents indicated that North Korea segregated and relocated little people, and 67% indicated that the state forced those individuals to undergo sterilization).

[50] *See, e.g.*, Sarah Ramsay, *Enforced Sterilizations in Sweden Confirmed*, 355 LANCET 1252 (2000) (substantiating Sweden's practice of forced sterilizations through the 1970s).

[51] *See* COHEN, *supra* note 41; GERALD V. O'BRIEN, FRAMING THE MORON: THE SOCIAL CONSTRUCTION OF FEEBLE-MINDEDNESS IN THE AMERICAN EUGENIC ERA (2013).

[52] For extensive documentation, see Report on Violence Against Women with Disabilities to the General Assembly by Rashida Manjoo, Special Rapporteur on Prevention of Violence to Women, UN Doc. A/67/227 (Aug. 2012).

[53] A 2014 UN interagency statement underscored ongoing human rights abuses in the form of forced sterilization, noting that the practice was visited upon particular groups, among them, persons with disabilities. *See* World Health Organization, Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (2014), *at* https://apps.who.int/iris/handle/10665/112848.

[54] Notably, Nuremberg prosecutors tried and obtained convictions for CAH in respect of several doctors who forcibly sterilized individuals as part of forced experimentation. *See* The Medical Case, I TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS 8, 13, 16 (1946–1949) (including forced sterilizations in

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C. Involuntary Medical and Scientific Experimentation

Human experimentation without consent has long been perpetrated against groups subject to historical disadvantage and discrimination, usually with impunity. Medical experimentation on persons with disabilities in the United States is documented from the late 1800s onward and includes a vast array of unethical and often harmful experiments on children and adults with disabilities without informed consent.[55] Prominently, horrific medical experiments were visited upon persons with disabilities during the Nazi era.[56] Most recently, North Korea is alleged to have performed experimentation without consent on children with disabilities under the administration of the South Hamgyong Province "Hospital 83."[57]

Medical or scientific experimentation in the absence of informed consent contravenes the prohibition against torture as set out in the International Covenant on Civil and Political Rights,[58] and affirmed by the CRPD.[59] When occurring in the context of armed conflict, as in the Nazi cases, such conduct also clearly constitutes war crimes meriting prosecution.[60] However, with the exception of Nazi-perpetrated crimes—which did, uncharacteristically, result in criminal responsibility for war crimes and CAH[61]—these egregious human rights violations targeting persons with disabilities have not been prosecuted as CAH.

indictments for crimes against humanity), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf; The Medical Case, II TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS 171, 223, 226, 228 (1946–1949) (judgment finding defendant Gebhardt guilty of crimes against humanity for his role in forced sterilizations), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf; *id.* at 235, 238, 241 (finding defendant Brandt guilty of crimes against humanity for his role in forced sterilizations); *id.* at 277–79, 281 (finding defendant Brack guilty of crimes against humanity for his role in forced sterilizations).

[55] A more recent example involved the feeding of radioactive oatmeal to children enrolled in a "science club" at the Fernald State School. *See* Lorraine Boissoneault, *A Spoonful of Sugar Helps the Radioactive Oatmeal Go Down*, SMITHSONIAN MAG. (Mar. 8, 2017), *at* https://www.smithsonianmag.com/history/spoonful-sugar-helps-radioactive-oatmeal-go-down-180962424.

[56] *See generally* VIVIEN SPITZ, DOCTORS FROM HELL: THE HORRIFIC ACCOUNT OF NAZI EXPERIMENTS ON HUMANS (2005); HUGH GREGORY GALLAGHER, BY TRUST BETRAYED: PATIENTS, PHYSICIANS, AND THE LICENSE TO KILL IN THE THIRD REICH (1995).

[57] UN Special Rapporteur, Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, paras. 32–34, UN Doc. A/HRC/31/70 (Jan. 19, 2016). The alleged atrocities included using children with disabilities for dissection of body parts and for testing the effects of biological and chemical weapons on humans. *Id.* Although not verified, the UN Commission of Inquiry logged these allegations as subjects for further investigation. *See* UN Commission on DPRK, *supra* note 31, para. 328.

[58] International Covenant on Civil and Political Rights, Dec. 16 1966, Art. 7, 999 UNTS 171. The UN Human Rights Committee in its General Comment on Article 7 specifies that special protection against such experiments is necessary in the case of persons not capable of giving valid consent, in particular those under any form of detention or imprisonment. HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para. 7 (Mar. 10, 1992), *available at* https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/a)GeneralCommentNo20Prohibitionoftortureorothercruel,inhumanordegradingtreatmentorpunishment(article7)(1992).aspx.

[59] CRPD, *supra* note 5, Art. 15.

[60] Under the Statute of the International Criminal Court, subjecting persons who are in the power of another party to the conflict to "medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons" constitutes a war crime in both international and non-international armed conflicts. Rome Statute, *supra* note 3, Art. 8(2)(b)(x).

[61] *See generally* Matthew Lippman, *The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture,* 15 LOY. L.A. INT'L & COMP. L. REV. 395 (1993).

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D. Use as Human Shields, Suicide Bombers, and Booby Traps

Mounting evidence indicates that, contrary to IHL, persons with disabilities are being used as human shields and as suicide bombers in armed conflict. Most recently this has been reflected in human rights documentation of atrocities committed by ISIS in Iraq using persons with disabilities as human shields.[62] There is also anecdotal evidence of ISIS using children with disabilities as booby traps for opposing forces.[63] The use of civilians as human shields constitutes a war crime and is a serious violation of the right to life and liberty under several IHL instruments.[64]

As with data on the recruitment of women and children for violence as suicide bombers, evidence on coercive employment of persons with disabilities for suicide bombing is limited, yet emerging.[65] Instances of forcing persons with disabilities to become agents of attacks, as in the case of human shielding and suicide bombing or booby trapping,[66] are particularly egregious crimes, especially in view of the protected status of individuals with disabilities under IHL.[67] These warrant the same attention, through prosecution of such acts as a CAH, given by international criminal law and process as that received by the forced recruitment of women and the recruitment of children, both of whom, like persons with disabilities, enjoy special

[62] Iraqi Observatory for Human Rights, *ISIS Uses Children and People with Disabilities as Human Shields*, ReliefWeb (Mar. 31, 2017), *at* https://reliefweb.int/report/iraq/isis-uses-children-and-people-disabilities-human-shields (documenting the detainment of dozens of families in Mosul by ISIS and their use by ISIS as human shields).

[63] *Id.* (reporting that "10 children with disabilities were placed within areas close to the line of contact to be shot or most likely to be booby-trapped").

[64] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Art. 23, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 (Third Geneva Convention) ("No prisoner of war may at any time be sent to or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 28, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 (Fourth Geneva Convention) ("The presence of a protected person may not be used to render certain points or areas immune from military operations."); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929; Protocol Additional to the Geneva Conventions of Aug. 12 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) , Art. 51(7), June 8, 1977; Rome Statute, *supra* note 3, Art. 8(2)(b)(xxiii) (proscribing as a war crime "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations").

[65] *Iraqi Woman Recruited Army of Female Suicide Bombers by Having Them Raped. . . Then Told Them Martyrdom Was Only Way to Escape Shame*, Daily Mail (Feb. 5, 2009), *at* https://www.dailymail.co.uk/news/article-1134976/Iraqi-woman-recruited-army-female-suicide-bombers-having-raped–told-martyrdom-way-escape-shame.html; John Sawick, *Why Terrorists Use Female and Child Suicide Bombers*, Health Progress (July–Aug. 2016), *at* https://www.chausa.org/docs/default-source/health-progress/why-terrorists-use-female-and-child-suicide-bombers.pdf?sfvrsn=2.

[66] A senior Afghan physician medical examiner, for instance, estimated that upward of 80% of suicide bombers had a physical or mental disability and noted the linkage between stigmatization of disability in Afghan society and feelings of hopelessness and depression that make individuals with disabilities vulnerable to recruitment or coercion. *See* Soraya Sarhaddi Nelson, *Disabled Often Carry Out Afghan Suicide Missions*, NPR (Oct. 15, 2007), *at* https://www.npr.org/templates/story/story.php?storyId=15276485.

[67] To be clear, if persons with disabilities can choose to deploy themselves as bombers or take on active combat roles, they should be subjected to the same prosecution in the commission of war crimes and CAH as non-disabled persons. *See, e.g.*, Hugo Kamaan, *The Disabled Suicide Bombers of the Islamic State* (Nov. 25, 2019), *at* https://hugokaaman.com/2019/11/25/the-disabled-suicide-bombers-of-the-islamic-state (documenting numerous instances of combatants with disabilities taking on active fighting roles, including, but not limited to, persons with physical disabilities such as wheelchair users operating specifically modified suicide vehicle-borne improvised explosive devices); Abdi Sheikh, *Somalia Says Blind Female Suicide Bomber Killed Mogadishu Mayor*, Reuters (Aug. 19, 2019), *at* https://www.reuters.com/article/us-somalia-security-bomber-idUSKCN1UZ1D0.

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protection.[68] Yet these human rights violations against persons with disabilities have not been prosecuted as CAH.

E. Institutionalization, Sexual Violence, Human Trafficking, and Forced Disappearance

The long-term, even permanent, institutionalization of persons with disabilities, frequently in isolated environs within rural areas or locations set apart from established communities, exposes such individuals to a variety of risks up to and including human rights violations that rise to a level of CAH and constitute violations of international criminal law.[69] This disability-targeted institutionalization and the connected crimes that follow are exacerbated during times of armed conflict as illustrated by the extermination of persons with disabilities in institutions during World War II and the Rwandan genocide.[70] Evidence supports the finding that warehousing persons with disabilities in social care homes, orphanages, and psychiatric hospitals, leaves them at risk for some of the most egregious human rights abuses.[71] Such documentation details conditions for people with physical and mental disabilities in dismal and dangerous institutions with unhygienic conditions, use of physical restraints, lack of adequate food, water, clothing, and medical care, and other life threatening conditions, including instances of patients freezing to death.[72]

Women and girls with disabilities, as well as persons with intellectual and psychosocial disabilities, are at particularly high risk for systemwide violence and sexual abuse when confined to institutions, as documented by Disability Rights International (DRI) in its report released during the conflict in Kosovo.[73] Human rights reporting by DRI in Guatemala revealed disturbing evidence of a pattern of trafficking highly vulnerable women patients in a dismal psychiatric institution across the street into a nearby male prison.[74] In another of their human rights reports, which also showed a nexus between institutionalization, disability, and human trafficking, a Kenyan official from the Ministry of Labor and Social Protection admitted that "trafficking is very high" in institutions, and that "children are being recruited and shipped

[68] *See, e.g.*, ICRC, Customary International Humanitarian Law Database, Rules 134 (Children), 145 (Women), *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

[69] *See generally* The Council of Europe Commissioner for Human Rights, The Rights of Persons with Disabilities to Live Independently and Be Included in the Community (June 2012), *at* https://wcd.coe.int/ViewDoc.jsp?id=1917847 (describing Council of Europe Human Rights Commissioner Thomas Hammarberg's work related to contemporary abuses of individuals with intellectual disabilities by member states).

[70] *See* Section II.A *supra*.

[71] For extensive documentation, see Lord, *supra* note 1; Fiala-Butora, *supra* note 1.

[72] Physical and mental abuses and gross neglect endangering the lives of people with disabilities living in institutions is widespread. For reports by Disability Rights International on such abuses, see http://www.driadvocacy.org/media-gallery/our-reports-publications. For reports by Validity on Ill-Treatment of Persons with Disabilities in Institutions, see https://validity.ngo. For reports by Human Rights Watch, see https://www.hrw.org/topic/disability-rights.

[73] *See* Mental Disability Rights International (now Disability Rights International), *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo* (2002), *available at* https://www.driadvocacy.org/wp-content/uploads/KosovoReport.pdf.

[74] Disability Rights International & Colectivo Vida Independiente de Guatemala, *Still in Harm's Way: International Voluntourism, Segregation and Abuse of Children in Guatemala* (July 16, 2018), *available at* https://www.driadvocacy.org/wp-content/uploads/Still-in-Harms-Way-2018.pdf.

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out of the country with promises of better lives but they go and they end up in brothels where they are sexually exploited."[75]

The UN Flagship Report on Disability confirms that "[t]he interplay of individual, family-related, socioeconomic and structural factors has exposed persons with disabilities, especially children with disabilities, to the risks of abuse, exploitation, trafficking and violence."[76] Also troubling are recent reports specifically documenting the clear link between foreign funding of orphanages in poor countries and volunteerism, and the practice of recruiting families to leave their children with disabilities in the care of unqualified and minimal staff in dangerous conditions; this cycle renders children with disabilities highly vulnerable to sexual exploitation and abuse and human trafficking.[77] The Lumos Foundation's work on ending institutionalization in Europe, and more recently in Haiti, reinforces these findings.[78] Anecdotal evidence points to children with disabilities being trafficked, and even intentionally harmed resulting in aggravated or secondary disability, for the purposes of begging.[79] Yet, despite increasing acknowledgment of the linkages between the institutionalization of persons with disabilities and human trafficking, such recognition has not resulted in attention by investigative bodies,[80] including UN treaty monitoring bodies.[81]

Other serious violations of the rights of persons with disabilities, with nexuses to human trafficking, are occurrences of the forced movement and forced disappearance of persons with disabilities. Some of the more grievous examples come from firsthand accounts of defectors from North Korea who indicate that persons with disabilities are forcibly removed from their families and segregated in locations inaccessible to the public.[82] Still, these atrocities against individuals with disabilities have not yet been considered for prosecution as a CAH.

[75] Disability Rights International & Kenyan Association for the Intellectually Handicapped, *Infanticide and Abuse: Killing and Confinement of Children with Disabilities in Kenya* (Sept. 27, 2018), *at* https://www.ecoi.net/en/document/1451424.html.

[76] UN Flagship Report on Disability and Development 2018, at 290, *available at* https://www.edu-links.org/sites/default/files/media/file/UN-Flagship-Report-Disability.pdf.

[77] Disability Rights International and Kenyan Association for the Intellectually Handicapped, *supra* note 75.

[78] *See* Georgette Mulheir, *Deinstitutionalizing and Transforming Children's Services: A Guide for Good Practice* (2012), *available at* https://resourcecentre.savethechildren.net/document/de-institutionalising-and-transforming-childrens-services-guide-good-practice.

[79] *See, e.g.*, Eudias Kigai, *Kenya-Tanzania: Trafficking Handicapped Children and the Economy of Misery*, Afr. Rep. (July 29, 2013), *at* https://www.theafricareport.com/5476/kenya-tanzania-trafficking-handicapped-children-and-the-economy-of-misery; *Children Forced into Beggary and Coerced to Produce Earnings*, Glob. March (Apr. 9, 2012), *at* https://globalmarch.org/children-forced-into-beggary-and-coerced-to-produce-earnings/; Susanna Korkeakivi, *Forced Begging*, Human Trafficking Search (Aug. 8, 2017), *at* https://humantraffickingsearch.org/201788forced-begging.

[80] *See, e.g.*, Eric Mathews, Eric Rosenthal, Laurie Ahern & Halyna Kurylo, No Way Home: The Exploitation and Abuse of Children in Ukraine's Orphanages (Disability Rts. Int'l, 2015), *available at* http://www.driadvocacy.org/wp-content/uploads/No-Way-Home-final2.pdf; U.S. State Department, 2014 Trafficking in Persons Report 2014 (June 2014), *at* http://www.state.gov/j/tip/rls/tiprpt/2014 (noting that "children in orphanages and crisis centers continue to be particularly vulnerable to trafficking within Ukraine").

[81] *See* 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 Buf. Hum. Rts. L. Rev. 65, 72–76 (2019) (chastising the Committee on the Rights of the Child for condoning the institutionalization of children with disabilities); Paul Harpur & Michael Ashley Stein, *The UN Convention on the Rights of Persons with Disabilities and the Global South*, 47 Yale J. Int'l L. __ (forthcoming 2021) (criticizing the CRPD Committee for not using its power of inquiry to highlight systemic abuses). For an empirical and qualitative analysis of UN treaty bodies and their recognition/non-recognition of disability over the decade following the CRPD's adoption, see Kjersti Skarstad & Michael Ashley Stein, *Mainstreaming Disability in the United Nations Treaty Bodies*, 17 J. Hum. Rts. 1 (2018).

[82] KINU, *White Paper, supra* note 49, at 482–83; Won, Lord, Stein & Song, *supra* note 20, at 30–32.

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F. Attacks Against Buildings Dedicated to Education, Health Care, and Rehabilitation

Among the violations of international criminal law that have a disproportionate effect on persons with disabilities are attacks on buildings dedicated to education, health care, and rehabilitation. When committed in the context of armed conflict, such attacks constitute war crimes under IHL.[83] These attacks contribute to multilayered human rights violations in the lives of persons with disabilities residing in or otherwise utilizing facilities such as special schools, orphanages, social care homes, or psychiatric facilities by depriving them of their basic right to life, placing them at greater risk during armed conflict, and restricting their movement.[84] When the victims are children with disabilities, the impact is compounded and suffered by a group specifically protected under IHL on two grounds: age and disability.[85] Accordingly attacks on buildings dedicated to education, health care, and rehabilitation should, but have not yet been, prosecuted as CAH.

III. Applying the CRPD Framework to International Criminal Law and Process

The CRPD set out to clarify and make applicable human rights obligations specifically as they relate to persons with disabilities, including in criminal law and process.[86] The Sections that follow clarify how the legal obligations in the CRPD are co-applicable with other domains of international law, including international criminal law. These Sections analyze the application of the CRPD framework for prosecuting CAH perpetrated against persons with disabilities; explain the role of Article 11 in addressing the protection of persons with disabilities in situations of risk; enumerate core disability rights concepts and their

[83] Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute proscribe as war crimes, in international and non-international armed conflicts, "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." Rome Statute, *supra* note 3. Indeed, the ICC Policy on children explicitly references the disproportionate impact that such attacks may have on children. *See* International Criminal Court Office of the Prosecutor, Policy Paper on Children, para. 2 (2016) [hereinafter ICC Child Policy Paper].

[84] *See generally* Priddy, *supra* note 22. For examples of how congregate living arrangements pose serious dangers to persons with disabilities, especially in armed conflict, see International Committee of the Red Cross, *Urban Services During Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People* (2015); UN High Commissioner for Human Rights Press Release, *Press Briefing Notes on Yemen, Serbia, Honduras and Albinism Website Launch*, para. 1 (May 5, 2015), *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15924; Handicap International, *Hidden Victims of the Syrian Crisis: Disabled, Injured and Older Refugees* (2014), *available at* https://www.driadvocacy.org/wp-content/uploads/romania-May-9-final_with-photos.pdf; *see also* Mental Disability Rights Int'l, *Hidden Suffering: Romania's Segregation and Abuse of Infants and Children with Disabilities* (2006), *available at* http://www.mdri.org/PDFs/reports/romania-May%209%20final_with%20photos.pdf; Mental Disability Rights Int'l, *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey* (2005), *available at* https://www.driadvocacy.org/wp-content/uploads/turkey-final-9-26-05.pdf.

[85] IHL protection is accorded under both age and in relation to disability. *See* ICRC, Customary International Humanitarian Law Database, Rule 135, *Children*, *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule135; Rule 138, *The Elderly, Disabled and Infirm*, *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule138.

[86] *See* Ambassador Don McKay, *Convention on the Rights of Persons with Disabilities: A Benchmark for Action*, 56 Rehab. Int'l Rev. 2, 2–4 (Dec. 2007) (explaining the need to create a disability-specific treaty for the purpose of clarifying how the existing human rights framework applied to persons with disabilities), *available at* http://www.unicef.org/RI_Review_2007_Dec_web.pdf.

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applicability to international criminal law; explicate accessibility requirements for legal processes; and draw conclusions as to the implications of CRPD standards for international criminal law.

A. The Disability Inclusion Mandate of Article 11

CRPD Article 11 (Situations of Risk and Humanitarian Emergencies) provides an explicit obligation to accord protection to persons with disabilities consistent with international law obligations writ large. The provision—unique in the human rights lexicon—calls for a transversal reading of human rights protection in situations of risk across the domains of international law including, but not limited to, human rights and IHL. Specifically, states must take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[87]

Article 11's text is significant given the reluctance in legal scholarship and practice to read norms from discrete areas of international law, such as IHL and human rights law, as complementary, co-applicable, and mutually supportive.[88] The explicit inclusion of Article 11 supports the proposition that perpetrators must be held accountable for violations of international law against persons with disabilities and that disability-based persecution must be prosecuted, including in international criminal process. The implications for a reading of the standards set forth in the CRPD for international criminal law are clear: Article 11 harnesses the treaty's power to achieve a disability-inclusive reading of international criminal law.

B. Core CRPD Concepts and Their Relevance for International Criminal Law

International criminal law and human rights law address different domains of accountability. The former accounts for crimes involving the international criminal responsibility of individuals. The latter addresses state responsibility in the event of a violation of enunciated human rights. Nevertheless, the jurisdiction of international criminal courts over genocide, war crimes, and CAH demonstrate that international criminal law is protective of core rights set out in human rights conventions.[89] The application and interpretation of law by these international criminal tribunals must be applied consistently with internationally recognized human rights, including the CRPD, without any adverse distinction with regard to the attribute of disability, among others.[90] Indeed, by providing the framework for recognizing persons with disabilities as equally possessing individual rights and legal capacity and expressing the specific risk and differentiated impact that human rights abuses can have on persons with

[87] CRPD, *supra* note 5, Art. 11.

[88] This, of course, strikes at the heart of the debate surrounding the interrelationship between international human rights law and international humanitarian law. For a discussion, see Ziv Bohrer, J. Dill & Helen Duffy, *Trials and Tribulations: Co-applicability of IHL and Human Rights in an Age of Adjudication*, *in* Law Applicable to Armed Conflict 15–105 (Max Planck Trialogues, p. I) (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3528156.

[89] *See* Thomas Marguerite, *International Criminal Law and Human Rights*, *in* Routledge Handbook of International Criminal Law 435, 436 (William Schabas & Nadia Bernaz eds., 2013).

[90] This is precisely the position taken by the ICC in its articulation of its child policy. *See* ICC Child Policy, *supra* note 83. The touchstone for the application of the principle of adverse distinction under IHL to the attribute of disability is the non-discrimination provision of CRPD Article 5 in combination with protection mandated in Article 11. *See* CRPD, *supra* note 5, Arts. 5, 11.

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disabilities, the CRPD provides a key roadmap that could enable international criminal law and process to avoid such impermissible distinctions. However, despite the CRPD's evident utility here, international criminal tribunals have yet to fully integrate into international criminal law and process. In so doing they fail to ensure that impunity is not tolerated for gross human rights violations that rise to a level of CAH committed against persons with disabilities.

Appeals to accommodate "vulnerable persons" collectively in the aggregate as an undifferentiated group are ineffective at best, as much work on gender, disability, children, Indigenous persons, LGBTQIA+ persons, among others, makes apparent. Indeed, notwithstanding the detailed provisions spelled out in the CRPD—tagged by the Office of the High Commissioner for Human Rights as a core international human rights convention[91]—international criminal law lags well behind the kind of age and gender considerations elevated in recent practice in the international criminal law sphere, and awaits the expression of a CRPD-informed approach in the context of disability.

There are a number of ways in which the CRPD stands to inform international criminal law and process. First, the treaty provides the framework for recognizing persons with disabilities as equally possessing individual rights and legal capacity and thus processes that break with individual decision making are highly suspect.[92] The CRPD clarifies the position that persons with disabilities have legal capacity and must recognized in all legal processes, whether as witnesses, lawyers, judges, criminal defendants, or another role. Where required in an individual case, reasonable accommodations and other accessibility supports must be provided to facilitate equal access to and participation in legal processes. This is a clear departure from traditionally medically focused and deficit-oriented conceptualization of disability that provide the rationale—still pervasive but slowly under reform in domestic law and policy—for the denial of witness or juror eligibility, exclusion from serving as lawyer or judge, and the like. Recognition of legal capacity together with provisions to guarantees procedural justice in the CRPD ought to animate international criminal process.[93]

The treaty has other implications for international criminal law. To cite but a few examples of proscribed conduct consistent with the CRPD and too often visited upon persons with disabilities with impunity: arbitrary and forced institutionalization of individuals with disabilities; the imposition of plenary guardianship removing legal capacity in relation to any and all decision making; experimentation absent informed consent of the individual with a disability (and cannot be provided via proxy); or forced treatment such as electroshock "therapy" absent consent. Such treatment is not protection, therapy, or science. The CRPD and the dynamic treaty practice it has brought about clarify that such conduct is unacceptable, contrary to human rights law, and, in certain situations, may amount to CAH. This perspective is only possible when disability is conceived in alignment with the social model understanding

[91] OHCHR, The Core International Human Rights Instruments and their Monitoring Bodies, *at* https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx.

[92] *See id.* Art. 12 (recognizing that persons with disabilities enjoy equal recognition before the law and mandating that states establish supported decision-making frameworks to facilitate the exercise of legal capacity).

[93] *See* Janet E. Lord & Michael Ashley Stein, *Contingent Participation and Coercive Care: Feminist and Communitarian Theories Consider Disability and Legal Capacity*, *in* COERCIVE CARE: RIGHTS, LAW AND POLICY 31 (Bernadette McSherry & Ian Freckelton eds., 2013) (discussing the scope of Article 12 and its reconceptualization of legal rights).

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which "results from the interaction between person with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[94] This turn is even reflected in the terminology chosen for the title of Article 11 which expresses vulnerability in Article 11 in a context such as armed conflict as a "situation of risk."[95]

This reorientation of the conceptualization of disability challenges physical and social environments—as well as legal frameworks—to accommodate impairment as an anticipated incident of human diversity.[96] In particular, the social model orientation, in combination with individual as well as collective human rights set out in the CRPD, allows disability rights abuses to be assessed against principles of non-discrimination, accessibility, autonomy, inclusion, and participation.[97] This perspective also foregrounds the barriers that persons with disabilities so often face in realizing their human rights and that make access to protection in times of crisis difficult or impossible.[98] The identification of barriers is a fundamental precondition to their dismantling and, hence, to the fulfillment of disability rights.[99] The implications for international criminal law are clear: international criminal justice process must adopt a disability-inclusive approach to ensure that barriers manifesting in international criminal law and process are accounted for and dismantled, and that allows for the full and effective prosecution of crimes perpetrated against persons with disabilities, including as CAH.

A final implication of the CRPD with salience for advancing a disability-sensitive international criminal law narrative, is its expression of the specific risk and differentiated impact that human rights abuses can have on persons with disabilities. In other words, the difference of disability means that the risk of harm may be elevated, that protection may necessitate positive, proactive measures to achieve the protection objective, and that the impact of human rights abuses may be especially acute.[100]

How, then, does the CRPD respond to these risks and how might they find expression in the international criminal law domain? The provisions set out in the CRPD affirm what is already explicit in IHL, namely, that persons with disabilities are entitled to specific care and protection and that their interests, rights, and individual circumstances must be given due

[94] CRPD, *supra* note 5, Art. 1.

[95] *Id.* Art. 11.

[96] *See* Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities* 8 HUM. RTS. L. REV. 1, 3–5 (2008) (describing how disability and human variation is addressed in the CRPD); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 496–98 (2008) (interrogating the balance between formal equality and equality of outcomes as expressed in the CRPD).

[97] CRPD, *supra* note 5, Art. 3. For a discussion of models of disability see Stein, *supra* note 8, at 82–90; Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights,* 58 HASTINGS L.J. 1203 (2007).

[98] It is important to note here that the terminology used in the CRPD to describe vulnerability and the need for protection is carefully crafted to avoid the paternalism so apparent in prior disability instruments. Article 11 speaks in terms of "situations of risk" and calls for "protection," not "special" treatment. This was intentional empowerment on the part of the drafters. *See* Stephanie Motz, *Article 11: Situations of Risk and Humanitarian Emergencies*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 314 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

[99] CRPD, *supra* note 5. The impact of accessibility is delineated by Committee on the Rights of Person with Disabilities, General Comment No. 2 (Article 9: Accessibility), UN Doc. CRPD/C/GC/2 (May 22, 2014) [hereinafter General Comment No. 2].

[100] A transversal read of CRPD provisions clarifies this point. *See* CRPD, *supra* note 5, Arts. 5, 9, 11.

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consideration and effective accommodation and support.[101] This notion finds only minimal expression in the ICC Statute insofar as it recognizes respect for the "interests and personal circumstances of victims and witnesses"[102] and requires the Office of the Prosecutor "take appropriate measures to protect the safety, physical and psychological well-bring, dignity and privacy of victims and witness."[103] No explicit recognition is given in the Statute to the specially protected status of persons with disabilities and how their interests are to be accommodated. Such recognition would include not only crimes against persons with pre-existing disabilities, but also those injured during the course of combat. By way of illustration, prosecuting those responsible for a policy of killing prisoners of war disabled through combat, would open up a new category of international criminal law relating to persons with disabilities.

One might ask why disability, as a category, has been left behind in terms of international criminal prosecutions. Several hypotheses come to mind. The first conjecture is that the CRPD is the most recent of the UN identity-specific core human rights treaties—one that was precipitated by persons with disabilities not being accorded protection under "universal" coverage—and thus the focus on disability has been slower than that accorded other groups. A second reason might be that egregious conduct perpetrated against persons with disabilities has long been the norm, and is only just becoming recognized as criminal in domestic law, for instance, the 2008 Special Rapporteur's Report on Torture, notes specific cases where certain types of treatment is not yet recognized as criminal.[104] The same is true, for example, in relation to mass rape, which was only recognized within the past score of years despite existing as a weapon of war and humiliation from time immemorial. An additional surmise is that, having been excluded from legal recognition for millennia, local groups of disability rights advocates have prioritized national level law reform rather than international criminal law reform.

While the infusion of a disability narrative into the effort to expand the reach of international criminal law and process shows little to no momentum, the rapid and significant number of ratifications of the CRPD[105] continues to provide the impetus for law and policy reform and a new wave of disability rights activism. In that vein, persons with disabilities are successfully pressing their claims as participants in law and advocacy efforts at all levels.[106] Accounting for persons with disabilities and their lived experience ought to be part of the vigorous calls for international criminal process wherever grave and systemic abuses occur, but this requires grappling with sometimes complex, multifaceted and little understood concepts around risk and protection in the context of disability.[107]

[101] *See* International Committee of the Red Cross, *How Law Protects Persons with Disabilities in Armed Conflict* (Dec. 13, 2017), *at* https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict.

[102] Rome Statute, *supra* note 3, Art. 54(1)(b).

[103] *Id.* Art. 68(1).

[104] *See* Nowak Report, *supra* note 14.

[105] For the current status on ratifications, see United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities (CRPD)*, *at* https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

[106] For more on activism, see Janet E. Lord, *Disability Rights and the Human Rights Mainstream: Reluctant Gate-Crashers?*, *in* THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 83 (Clifford Bob ed., 2010).

[107] *See* Janet E. Lord & Michael Ashley Stein, *Participation in International Agreements as Transformative Social Change: The UN Convention on the Rights of Persons with Disabilities*, *in* MAKING RIGHTS REAL: TAKING EFFECTIVE

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It is thus perhaps no surprise that the CRPD framework has yet to be systematically reflected in mechanisms to ensure impunity is not tolerated for gross human rights violations against persons with disabilities. Much like other marginalized populations it is not until society recognizes their exclusion that the turn toward substantive equality before the law can be fulfilled. Women and girls have been subjected to rape as a byproduct of war and children conscripted as child soldiers into armed conflict—neither of these garnered serious and sustained international attention until roughly a decade ago. It comes as no surprise, therefore, that the uptake of the CRPD in the specific context of international criminal law is slow in coming nor that the UN Security Council acted more than ten years following the adoption of the CRPD to recognize the its implications for armed conflict, peacebuilding, and transitional justice. It also bears mention that the attention of civil society has been focused on the nascent development of (any) sort of legal protection—the prevailing domestic disability law and policy framework post-CRPD adoption was one of breathtaking underdevelopment. As such, only recently has attention turned to the implications of the CRPD on the law of armed conflict, international criminal law, and other domains. Directing attention to explicitly discriminatory laws that mandate segregated education, segregated employment, institutionalization without consent, and disenfranchisement from the vote for persons with disabilities writ large or for subgroups of persons with disabilities has understandably been the primary focus in the first decade of CRPD implementation and advocacy. This means that organizations of persons with disabilities have tended to prioritize the righting of wrongs written into legislation (e.g., sweeping away direct discrimination) over dedication of scare resources to less familiar domains of international criminal law or the law of armed conflict, for instance.

C. Ensuring the Accessibility of International Criminal Law Proceedings

Integral to ensuring the accountability and transparency of mechanisms to investigate and sanction gross violations of human rights law is the design of accessible justice facilities, services, procedures, and materials. Accessibility is a core principle of the CRPD, expressed in Article 3 (General Principles).[108] It is also the subject of a general provision that is applicable across the treaty, Article 9 (Accessibility), according to which states must identify and eliminate "obstacles and barriers to accessibility."[109] Although these provisions have implications for both domestic and international criminal legal process, states have made some progress in ensuring such accessibility in domestic legal processes, while no such progress has been made in international criminal legal process.

The general obligations required of all states parties to the CRPD are clearly applicable in the international criminal responsibility space. The Committee on the Rights of Persons with Disabilities (CRPD Committee) has repeatedly recommended to states parties that they review their civil and criminal legislation with the objective of meeting the duty to provide procedural accommodations in all legal proceedings consistent with Article 4 (General

ACTION TO OVERCOME GLOBAL CHALLENGES 27, 31-34 (Jody Heymann & Adèle Cassola eds., 2012) (asserting that DPOs can best set their priorities).

[108] CRPD, *supra* note 5, Art. 3.

[109] *Id.* Art. 9. Of note is that Article 9, to be transversally applied across the CRPD, makes explicit reference to the identification and elimination of barriers to accessibility in a wide range of contexts, many of which have direct application to criminal law, process and its operation. *Id.* Art. 9(1)–(2). *See also* General Comment No. 2, *supra* note 99 (interpreting state accessibility obligations).

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Obligations) and Article 13 (Access to Justice).[110] This might include, for example: engagement with organizations of persons with disabilities in the review of the criminal justice system against CRPD principles; ensuring that criminal procedures recognize their right to serve as witnesses, making disability-based persecution an aggravated offense; and specifically addressing the accessibility of criminal processes and victim reparation procedures, including the work of investigative bodies, truth commissions, and transitional justice efforts. Some headway has been made in enhancing access to justice for persons with disabilities at the domestic level across a diverse range of countries,[111] yet international criminal legal process significantly lags in considering specific requirements for accessible justice aligned with the CRPD. Of particular note is the work of the South African NGO, Child Witness Institute, which works to train and sensitize stakeholders in the legal system—from police to prosecutors—about the specific needs of vulnerable witnesses, including children, victims of sexual violence, and victims with disabilities.[112] Another example is witness intermediary schemes, initiated in England and Wales and New South Wales, Australia, the purpose of which is to facilitate communication with, and specifically the questioning of, vulnerable people, which often includes persons with disabilities, particularly individuals with intellectual disabilities.[113]

In effectuating reviews of the legal framework against CRPD requirements, states must abolish or amend existing laws, regulations, customs, and practices that discriminate against persons with disabilities. This would include, for instance, redressing laws that deny legal capacity to persons with disabilities and thus undermine their ability to serve as a witness in a criminal proceeding or on juries.[114] The explicit recognition in Article 12 (Equal Recognition Before the Law) that persons with disabilities possess legal capacity and, further, that states must enable their exercise of legal capacity through supportive measures—in

[110] *See, e.g.*, CRPD Committee, Concluding Observations, UN Doc. CRPD/C/KEN/CO/1, para. 26(b); UN Doc. CRPD/C/ECU/CO/1, para. 27(c) (requiring Kenya to "[d]efine explicitly in legal instruments the duty of the judiciary to provide procedural accommodations"); UN Doc. CRPD/C/CHN/CO/1, para. 24 (chiding China to "reviews its procedural civil and criminal laws in order to make mandatory the necessity to establish procedural accommodation for those persons with disabilities who intervene in the judicial system can do it as subject of rights and not as objects of protection"). *See generally* UN Global Initiative for Inclusive ICTs, *Inclusive Courts Checklist* (June 2014), *at* https://g3ict.org/publication/inclusive-courts-checklist; Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. Int'l & Comp. L. 281 (2011).

[111] The Constitutional Court of Colombia and the Supreme Court of Mexico have each called for the translation of judgments concerning the rights of persons with disabilities into easy read formats for the benefit of the petitioners and other persons with intellectual disabilities. *See* Decision T-573/2016; Resolución Judicial de la Primera Sala de la Suprema Corte de la Nación en el Amparo en Revisión 159/2013. The national police in Finland have designed their website to provide a range of accessible formats, such as plain language, content and videos in sign language (some captioned), and a complaint form in large print. Azerbaijan amended its Code of Civil Procedure to permit witnesses with disabilities to testify at their place of residence, when appropriate. Argentina has adopted a Protocol for Accessing Justice by Persons with Disabilities. In Australia, a Disability Access Bench Book was developed to provide recommendations and guidance on how to provide procedural accommodations to individuals with disabilities, including in criminal law process. *See* OHCHR, Right to Access to Justice Under Article 13 of the Convention on the Rights of Persons with Disabilities, Report of the Office of the United Nations High Commissioner for Human Rights, paras. 22, 30, UN Doc. A/HRC/37/25 (Dec. 27, 2017).

[112] *See* Child Witness Institute, *at* https://childwitness.net/the-child-witness-institute.

[113] Penny Cooper & Michelle Mattison, *Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model*, 21 Int'l J. Evidence & Proof 351–370 (2017).

[114] CRPD, *supra* note 5, Art. 4(2).

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contrast to denials of legal capacity and substituted decision making— avows this recognition of agency in the context of criminal law and process.[115] Given that Article 12 affirms, and explicitly presumes the legal capacity of persons with disabilities,[116] it follows that the exercise of legal capacity must be appropriately facilitated, for instance in terms of providing accessible court processes, providing plain language materials for individuals seeking access to justice or benefits. It is in this way that Article 12 is directly responsive to firmly held presumptions in law and practice, as to the legal incapacity of individuals with disabilities and their unreliability and credibility as witnesses.[117] The implications for international criminal process are suggested in the CRPD, yet they remain unaddressed in any meaningful way by international criminal law proceedings and tribunals.

Fundamental to the development of inclusive and accessible law, policy and programming is the CRPD requirement in Article 4(3) that states parties "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."[118] In the protection context, such as in situations of risk, the interests, rights, and personal circumstances of individuals with disabilities must be given due consideration. Much like the calls for international criminal law bodies, transitional justice mechanisms, and other processes to be inclusive of women as well as children in their design and operation,[119] effective disability inclusion hinges on the participation of persons with disabilities. Here, of course, it behooves organizations of persons with disabilities to engage in international criminal law decision-making or fact-finding processes to ensure appropriate government responses to decisions impacting their interests.[120]

Disability-inclusive protections must inform international criminal process in much the same way that the ICC Office of the Prosecutor, in its *Policy on Children*, has given explicit recognition to the Convention on the Rights of the Child in delineating the contours of that policy and the accommodation of children in its operations.[121] Indeed, the CRPD provides specific recognition that states must undertake measures to ensure the accessibility of justice mechanisms to persons with disabilities, on an equal basis with others. It underscores

[115] *Id.* Art. 12.

[116] *Id.* Art. 13.

[117] *See* Committee on the Rights of Persons with Disabilities, General Comment 1 (Article 12: Equal Recognition Before the Law), UN Doc. CRPD/C/GC/1 (2014).

[118] CRPD, *supra* note 5, Art. 4(3).

[119] *See* Dixon, *supra* note 4.

[120] A Zambian case concerning a Deaf boy wrongly accused of murdering his mother spent months in prison without access to a sign language interpreter and thus no access to effective legal counsel until a disability organization intervened. Janet E. Lord & Michael Ashley Stein, *Deaf Identity and Rights in Africa: Advancing Equality Through the Convention on the Rights of Persons with Disabilities*, *in* CITIZENSHIP, POLITICS, DIFFERENCE: PERSPECTIVES FROM SUB-SAHARAN SIGNED LANGUAGE COMMUNITIES 200 (Audrey C. Cooper & Khadijat K. Rashid, eds., 2015). The Constitutional Court of Benin found that the denial of an accessible version of the examination to become a judge to a blind applicant was wrongful and discriminatory, but the legal system offered no remedy for that violation. Décision DCC 12-106 du 3 Mai 2012, La Cour constitutionnelle du Bénin. For discussion of this case, see Faraaz Mohamed, Janet E. Lord & Michael Ashley Stein, *Transposing the Convention on the Rights of Persons with Disabilities in Africa: The Role of Disabled Peoples' Organisations*, 27 AFR. J. INT'L & COMP. L. 335 (2019).

[121] ICC Child Policy, *supra* note 99, reflects principles of the CRC, for instance, in recognizing that children are capable of giving evidence, that child-sensitive approaches must be taken in criminal justice contexts, and that CRC principles must be harnessed in all the activities of the Office of the Prosecutor.

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specifically that states are obliged to "facilitate their effective role as direct and indirect participants, including as witnesses."[122] Persons with disabilities—who have a long history of being denied personhood in the form of non-recognition as witnesses—may participate, directly or indirectly, in "all legal proceedings" including as witnesses and including investigative fact-finding or other preliminary stages.[123] Further, the provision requires states to undertake measures to that end, "including through the provision of procedural and age-appropriate accommodations."[124] And Article 13(2) requires states to promote training for those working in the field of administration of justice.[125] There is thus a framework in place for addressing access to justice for persons with disabilities and the CRPD Committee has repeatedly expressed its concern about the lack of procedural, gender and age-appropriate accommodation in judicial procedures for persons with disabilities and the need training of justice personnel on the human rights-based approach to disability.[126]

Whereas accessibility is a measure to facilitate participation and inclusion collectively to persons with disabilities, the CRPD also recognizes the need for *individualized* measures of accommodation and support. Thus, in order "to promote equality and eliminate discrimination," states parties are required to "take all appropriate steps to ensure that reasonable accommodation is provided."[127] This accommodation duty applies equally to all rights and applies in all contexts including, of course, criminal proceedings. As UN agencies work to develop reasonable accommodation procedures across the Organization as part of the UN Disability Strategy, it stands to reason that international criminal mechanisms should respond in like measure.[128] These efforts for disability-inclusion, of course, should track with protocols developed in international criminal process to mitigate the risk of women survivors of rape being retraumatized during the course of serving as witness before their accusers and those to accommodate child witnesses.[129] While the ICC Rules of Procedure do specifically reference

[122] CRPD, *supra* note 5, Art. 13(1).

[123] *Id.*

[124] *Id.* Art. 13(1).

[125] *Id.* Art. 13(2).

[126] CRPD Committee Report to the UN General Assembly, Supp. No. 55, UN Doc. A/72/55) (in rendering justice processes more accessible, the Committee called for "including the provision of sign language interpretation and other accessible formats and modes of communication" and noted the "the lack of accessibility of the judicial system; the lack of legal assistance; the restrictions on the validity of evidence of persons with disabilities; and the lack of protection of persons with disabilities, particularly women with disabilities who are victims of violence"). *Id.*, para. 35.

[127] *Id.* Art. 5(3).

[128] Reasonable accommodation features as a core element of the UN Disability Strategy as Indicator 7, wherein entities are required to develop a specific reasonable accommodation policies. *See* UN Disability Strategy, *supra* note 10, at 15.

[129] Report of the Special Rapporteur on Violence Against Women, Mission to Sierra Leone, paras. 76, 127, UN Doc. E/CN.4/2002/83/Add.2 (2002) (supporting the establishment by courts of victim and witness units with expertise in trauma related to sexual violence); Report of the High Commissioner for Human Rights, Pursuant to Human Rights Council Resolution 9/11, paras. 60–61, UN Doc. A/HRC/12/19 (Aug. 21, 2009) (supporting protocols to avoid retraumatization). *See also* ESCOR, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, paras. 10–19, 29–34, 38–46, Res. No. 2005/20 (July 22, 2005) (promoting the rights of children victims and witnesses to be treated with dignity and compassion, to be protected from discrimination, to be informed, to be heard and to express views and concerns, to affective assistance, to privacy, to protection from hardship during the justice process, to safety, to reparation, and to special preventative measures; as well as the corresponding need to make training, education, and information available to professionals who work with such children).

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disability as an aspect of a victim or witness requiring consideration by the court of their special needs, no disability-specific measures have been formally put into place, which given that disability is not homogenous is problematic in light of the ICC's recognition of non-discrimination with regard to victims.[130]

D. The CRPD's Mandate to End Impunity for Gross Human Rights Violations

While the efforts of the CRPD's drafters to end impunity for gross violation of human rights against persons with disabilities have begun to inform domestic legal practice and process, the law and process of international criminal law must also be informed by disability rights principles and conform to the requirements of accessibility in respect of legal proceedings. Much like the failure to tailor international criminal proceedings to the needs and circumstances of women victims—a practice that was changed with the two ad hoc criminal proceedings of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY)—the CRPD contemplates positive measures in order to ensure access to justice, which must be enacted to arrest international criminal process' failure to tailor proceedings to the needs and circumstances of persons with disabilities.[131] The additional element of non-discrimination in the CRPD, via the requirement of reasonable accommodation, affords persons with disabilities with protection in all stages of legal process. Together with Article 13, addressing state obligations in respect of ensuring accessibility throughout all aspects of the justice system, non-discrimination and the duty to provide reasonable accommodation must inform international criminal proceedings. The failure to do so can result in impunity, revictimization of survivors, and an undermining of the legitimacy of criminal process.

In sum, even when emendation would seem patently obvious, the international criminal law system has generally been silent in addressing individuals with disabilities and has not tailored its law or process to them. Worse, in the rare instances where international law has explicitly addressed the protection of individuals with disabilities (as in the Nuremberg Code), those protections were removed in subsequent instruments.[132] The necessity of such protection is recognized overtly in the CRPD's preamble, which affirms that "the observance of applicable human rights instruments are indispensable for the full protection of persons

[130] Rules of Procedure and Evidence, reproduced from Office Records of the Assembly of States Parties to the Rome Statue of the International Criminal Court, Rule 86, ICC-ASP/1/3 and Corr.1 part II.A, First Session, New York (Sept. 3–10, 2002), *available at* https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf [hereinafter ICC Rules of Procedure and Evidence].

[131] *See* CRPD, *supra* note 5, Art. 13(2). The two tribunals are discussed in Section III.B *infra*.

[132] Strikingly, successive instruments have rendered contingent the right to informed consent, either in the context of medical research and experimentation or in the context of medical treatment, for persons with disabilities. *Compare* The Protection of Persons with Mental Illness and the Improvement of Mental Health Care, GA Res. 46/119, prin. 1.2 (Dec. 17, 1991), *with* Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Oviedo Convention) , Art. 17, Council of Europe Treaty Series No. 164, *entered into force* Dec. 1, 1999, *and* the Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research, Council of Europe Treaty Series No. 195, Art. 19, *entered into force* Sept. 1, 2007. Concerns continue, as evidenced by the opposition of the CRPD Committee to the proposed draft Protocol, to the Oviedo Convention. *See* CRPD Committee, Statement by the Committee on the Right of Persons with Disabilities Calling State Parties to Oppose the Draft Additional Protocol to the Oviedo Convention Additional Protocol to the Oviedo Convention, CRPD Committee, adopted during the Committee's 20th session, Aug. 27–Sept. 21, 2018, Geneva.

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with disabilities."[133] Moreover, inasmuch as the CRPD provides a framework for the acknowledgement and recognition of the lived experience of disability, including crimes against persons with disabilities, it is incumbent on the international criminal law system to explicitly account for such violations. Meaning that such violations must be recognized and accorded the same seriousness as other crimes involving vulnerable groups, as has been done through the recognition of crimes involving women and children as CAH.

IV. Elevating Crimes Against Persons with Disabilities to CAH

CAH has evolved in application since its inception after World War II. CAH now comprises sexual and gender-based claims, as well as crimes against children. At present, the International Law Commission (ILC) has recommended the elaboration of a convention on CAH by the UN General Assembly or diplomatic conference on the basis of draft articles that currently are silent as to disability.[134] The same rationales for broadening the application of CAH as regards non-disabled persons militate for elevating CAH claims in response to targeted and egregious human rights violations in the disability context.[135] These Sections examine the historical development of CAH, the application of the CAH framework to recognize and prosecute sexual and gender-based crimes and crimes involving children, establishes how and why the same should be done for crimes against persons with disabilities, and notes a potential opportunity to achieve that recognition through the push for a convention on CAH.

A. Evolution of Crimes Against Humanity

At the close of World War II, CAH emerged as a legal term and was codified in the Nuremberg Charter.[136] The definition of CAH has since evolved and been refined as a legal concept, starting first with the Statutes of the ICTY and ICTR, and followed by the Statute for the Special Court of Sierra Leone (SCSL) and then the Extraordinary Chambers in the Courts of Cambodia (ECCC).[137] Today, the current iteration of the international definition of a CAH is contained in Article 7 of the Rome Statute governing the ICC (Rome Statute).[138] Illustrating why the current definition of CAH must be understood as

[133] CRPD, *supra* note 5, pmbl. (u).

[134] Int'l L. Comm'n, Report of on the Work of the Seventy-First Session, ch. IV, para. 42, UN Doc. A/74/10 (2019).

[135] Although not what is being suggested by the authors in the Article, some have argued that international criminal law should be expanded to include "banal" violence, similar to that suffered by asylum seekers in Greece. *See* Ioannis Kalpouzos & Itamar Mann, *Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece*, 16 Melb. J. Int'l. L. 1 (May 5, 2015), *available at* https://ssrn.com/abstract=2601844 (The authors suggest that the widespread and inhuman and degrading treatment of asylum seekers within Greek detention centers and their knowing exposure to such conditions by the European Union agency Frontex should be considered a CAH, but that is unlikely to happen because that treatment is not considered a radically evil act.).

[136] *See* Charter of the International Military Tribunal, Art. 6(c), Nuremberg Trial Proceedings Vol. 1, *available at* https://avalon.law.yale.edu/imt/imtconst.asp (noting that, although CAH emerged from World War II, it encompassed not only acts committed against any civilian population during the war but also those committed before the war as well). *See also* William A. Schabas, Genocide in International Law 119 (2d. ed. 2009) (asseverating that the codification of CAH responded to a lacuna left by the Genocide Convention). *See generally* Sands, *supra* note 25.

[137] *See* Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AJIL 334, 342–43 (2013).

[138] "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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encompassing disability-related crimes—even though it has not generally been so-applied in practice—requires tracking its evolution through the legal incubators of many ad hoc tribunals spanning the twentieth century.[139]

Initially what constituted a CAH mirrored the definition set forth by the Nuremburg Charter, while narrowing the temporal scope of actions to those occurring during an armed conflict, as exemplified by the ICTY Statue.[140] The armed conflict nexus was soon removed by the ICTR Statute and replaced with the requirement that the act be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[141] The type of acts able to be charged and prosecuted as CAH was expanded by the SCSL, eight years later, to include specific sexual crimes that were committed as part of a widespread or systematic attack against any civilian population.[142] The establishment of the ECCC signaled the final coalescence as to the definition and usage of CAH within international criminal law by relying on the ICC Rome Statute.[143]

The prosecution of CAH by ad hoc tribunals reveals a few significant factors. First, in light of the strict interpretation of genocide and war crimes, CAH allow prosecutors and victims to seek legal redress for horrific crimes involving those groupings overlooked by the Genocide Convention and lacking the conflict-nexus.[144] Second, changes made to the legal requirements for an action qualify as a CAH has not impacted the ability to prosecute and secure convictions. Third, even when courts take a more restrictive view regarding the crimes that can fulfill the legal requirements of a CAH, the majority of the charges and convictions in the tribunals came under the framework of CAH. Most importantly, taken as a whole, the

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international laws; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violation of comparable gravity; (h) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender. . . (i) Enforced disappearance of persons; (j)The crime of apartheid; (k) Other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute, *supra* note 3, Art. 7.

[139] *See generally* Guénaël Mettraux, 2 International Crimes: Law and Practice: Crimes Against Humanity (2020); Benjamin Ricci, Crimes Against Humanity: A Historical Perspective (2004).

[140] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 5 (May 25, 1993) (although more limited in applicability, CAH was nonetheless widely used by the ICTY prosecutors with 670 individuals being charged with CAH, comprising some 40% of all indicted offenses and likewise of all convictions. *See* Sadat, *supra* note 137, at 342–43.

[141] Statute of the International Criminal Tribunal for Rwanda, Art. 3, SC Res. 955, Arts. 2–4, annex (Nov. 8, 1994). This removal and replacement of the armed conflict nexus with a requirement that the act be widespread or a systematic attack led to 282 individuals being charged with CAH before the ICTR, of whom about 43% were convicted. By comparison, 254 individuals were charged with genocide, of whom some 37% were convicted; and 99 individuals were charged with war crimes, of whom some 16% were convicted. *See* Sadat, *supra* note 137, at 347 (Table 2).

[142] Statute of the Special Court for Sierra Leone, Art. 2(g) (Jan. 16, 2002).

[143] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Art. 9, June 6, 2003, 2329 UNTS 117. Although not as prolific, the ECCC to date has convicted three individuals each for CAH among other crimes and has no acquittals. *See* ECCC, *Case Load, Extraordinary Chambers Cts. Cambodia*, *at* https://www.eccc.gov.kh/en/case-load *Cf.* Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia* (2016), *at* https://www.justiceinitiative.org/publications/performance-and-perception-impact-extraordinary-chambers-court-cambodia (praising the prosecution of the top Khmer Rouge leaders while also criticizing the impact on lesser known figures and the pervasive air of corruption).

[144] *See* Sadat, *supra* note 137.

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current framework of CAH provides the flexibility, efficacy, and jurisprudence necessary to prosecute crimes against persons with disabilities. How and why CAH must encompass disability-related crimes is best illustrated by the deployment in cases involving sexual and gender-based crimes and crimes against children for actions that in prior eras did not garner legal repercussions.[145]

B. Sexual and Gender-Based Crimes

The concept of rape as a crime punishable by international criminal law has undergone a significant evolution; from a condoned byproduct of conflict, if not an outright spoil of war, to a universally reviled international crime.[146] Best highlighting the acceptance of rape as a prosecutable action, the ICTR found Jean-Paul Akayesu guilty of encouraging the commission of rape—and punishable because "outrages on personal dignity, notably rape, [are] degrading and humiliating treatment and indecent assault."[147] This direct recognition of rape as an act that violated and degraded an individual did more than simply elevate it to an actionable crime, it established the legal precedent and analytical framework necessary for international criminal tribunals to seek prosecution crimes of sexual violence.[148]

The convictions by the ad hoc tribunals established clear precedents that have been codified into international criminal law by the Rome Statute, which lists rape as a specifically enumerated act that can constitute a CAH.[149] Further solidifying rape as crime that can constitute a CAH, the ICC Office of the Prosecutor has published a policy paper that sought to "ensure effective investigation and prosecution" of sexual and gender-based crimes, including rape as a CAH, through the continued advancement of international jurisprudence.[150] Recognition of the crime of rape, and more specifically sexual and gender-based crimes,[151] lends credence to the idea that certain heinous crimes are protected against by international criminal law, even if that action was previously ignored or accepted and that such an act must be prosecuted as an independent crime of international importance. This same rationale applies to targeted and systemic egregious acts against persons with disabilities, having been overlooked previously by the international criminal law regime, now being prosecuted as CAH.

[145] For an overview of the doctrinal development of the Rome Statute and its applications, see CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2009).

[146] *See* UN DIV. FOR ADVANCEMENT OF WOMEN, DEP'T OF ECON. & SOC. AFFS., SEXUAL VIOLENCE AND ARMED CONFLICT: UNITED NATIONS RESPONSE (Apr. 1998), *at* http://www.un.org/womenwatch/daw/public/cover.htm. *See generally* Richard J. Goldstone, *Prosecuting Rape as a War Crime,* 34 CASE W. RES. J. INT'L L. 277 (2002); DARA KAY COHEN, RAPE DURING CIVIL WAR (2016).

[147] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Chamber I, Judgment, 24, 181 (Sept. 2, 1998).

[148] *See* James R. McHenry III, *The Prosecution of Rape Under International Law: Justice that Is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269, 1272 (2002) (recognizing Akayesu as precedent).

[149] *See* Rome Statute, *supra* note 3, Art. 7(1)(g).

[150] *See* ICC Child Policy Paper, *supra* note 83, at 10–11.

[151] The Statute of the ICC expressly lists numerous sexual and gender-based crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. Additionally, it provides that those sexual and gender-based crimes can fall under the Court's jurisdiction if the acts rise to the level of genocide or CAH. ICC Off. of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* 26, para. 1 (June 2014) [hereinafter ICC Sexual and Gender-Based Crimes]. *See* Valerie Oosterveld, *Gender-Based Crimes Against Humanity*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 78 (Leila Nadya Sadat ed., 2011).

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C. Crimes Against Children

Parallel to the evolution of the crime of rape within international criminal law is the initiative to prosecute crimes against children, and in particular the gross violation of human rights through use of child soldiers.[152] The judicial foundation for crimes committed against children first emerged when the ICTY took the age and sex of victims into account "as an aggravating factor in the process of sentencing."[153] Finding relevance in the fact that "offenses were committed against particularly vulnerable and defenceless girls and a woman," the ICTY Trial Chamber, in *Kunarac*, held that certain factors make a crime more abhorrent for the purposes of sentencing.[154] Of relevance is the fact that the crimes were charged under the CAH framework with the tribunal relying on age as an aggravating factor to those crimes.[155]

The recognition by the ICTY that an individual's personal characteristic, such as age, as an aggravating factor in sentence for a CAH created a legal precedent that has been codified by the ICC in Rule 145 of the Rules of Procedure and Evidence.[156] The most prominent progress to prosecute crimes against children as CAH has been the Rome Statute's prohibition on the recruitment and use of child soldiers,[157] the only specifically enumerated crime against children in international criminal law. Its codification cements the acceptance of the need to successfully prosecute crimes against children.[158] Illustrating this is the ICC Office of the Prosecutor's policy paper on children, which notes that it will investigate, charge, and prosecute a number of crimes that impact and involve children, in addition to the use of child soldiers, as crimes against humanity.[159]

Strikingly, as the recognition of the crime of rape has led to the prosecution of sexual and gender-based crimes being recognized as an independent CAH, there also has been a progression for the prosecution of crimes against children. Prior to this, both sets of crimes had been accepted as collateral and/or unfortunate aspects of armed conflict. It is evident that special consideration as to personal characteristics of victims is a proven method through which to prosecute crimes that target groups historically disenfranchised by the international criminal

[152] *See generally* HAPPOLD, *supra* note 4.

[153] Christine Bakker, *Prosecuting International Crimes Against Children: The Legal Framework*, IWP 2010-13, UNICEF Innocenti Research Centre 16 (2010). The 1990 African Charter on the Rights and Welfare of the Child, which prohibited the recruitment or direct participation in hostilities or internal strife of anyone under the age of eighteen, was also significant as a regional instrument. *See* African Charter on the Rights and Welfare of the Child, July 1, 1990, *at* https://au.int/en/treaties/african-charter-rights-and-welfare-child.

[154] Prosecutor v. Kunarac et al., Case No. IT-96-23T and IT-96-23/1-T, Trial Judgment, para. 874 (Feb. 22, 2001); The ICTY Appeals chamber upheld that finding by the Trial Chamber that certain factors as to the victim's personal identity make a crime worst allowing for harsher sentencing. Prosecutor v. Kunarac et al., Case No. IT-96-23 and IT-96-23/1-A, Appeals Judgment, para. 355 (June 12, 2002) (sustaining "an inherent discretion of the Trial Chamber to consider the victim's age of 19 years as an aggravating factor").

[155] Bakker, *supra* note 153, at 6.

[156] ICC Rules of Procedure and Evidence, *supra* note 130, Rule 145.

[157] Rome Statute, *supra* note 3, Arts. 8(2)(b)(xxvi), 8(2)2(e)(vii).

[158] *See* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901 (July 10, 2012) (charging and convicting a military commander of the war crimes of enlisting and conscripting children under the age of fifteen and using them to actively participate in hostilities); Prosecutor v. Germain Katanga, ICC-01/04-01/07-717 (Oct. 14, 2008) (charging, for the first time by the ICC, a military commander with the crimes of rape and sexual slavery as crimes against humanity) [hereinafter *Prosecutor v. Katanga*]; Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12, (Dec. 18, 2012) (charging a military commander with a number of war crimes including the use of children under fifteen to actively participate in hostilities).

[159] *See* ICC Child Policy Paper, *supra* note 83, at 37–52.

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system as CAH. Seen in this light, the prosecution of disability-based crimes as CAH is not creating new or "special" protections but instead, as with women and children, giving recognition to and realizing the full coverage of persons with disabilities as considered by international criminal law.

D. ILC Draft Articles for a CAH Convention

From 2014[160] to 2019, the UN ILC's developed draft articles, with commentary, for possible use in the creation of "a global convention on prevention, punishment and inter-State cooperation with respect to crimes against humanity," which its special rapporteur described as "a key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law."[161] However, the special rapporteur also made it explicit that the draft articles by the ILC would focus exclusively on CAH and not endeavor to "address other serious crimes, such genocide or war crimes, which are already the subject of widely-adhered-to global treaties relating to their prevention and punishment."[162] Earlier work on this issue was also pursued by the CAH Initiative at the Whitney R. Harris World Law Institute.[163] In 2019, the ILC adopted the final text of the draft articles and recommended elaboration of a convention by the UN General Assembly or by a diplomatic conference on the basis of the draft articles.[164]

The draft articles retain the definition of CAH found within the Rome Statute, but the focus is on the improving of national laws and jurisdiction for the prevention and punishment of CAH, as well as promoting interstate cooperation on matters such as extradition and mutual legal assistance.[165] Notably absent in the definition is any express reference to disability or any other personal characteristic, although the catch-all of "other grounds"[166] presumably includes disability (even if it has not yet been applied as such by the ICC). Significantly, though, a group of UN special rapporteurs and independent experts recommended to the ILC without success that the act of persecution should be expanded and updated to include disability, as well as a host of other individual identities.[167]

[160] Report of the International Law Commission, Chapter XIV, Sect. A.1, UN Doc. A/69/10 (May 5–June 6, July 7–Aug. 8, 2014).

[161] Sean D. Murphy, First Report of the Special Rapporteur on Crimes Against Humanity, International Law Commission, para. 12, UN Doc. A/CN.4/680 (Feb. 17, 2015). *See also* M. Cherif Bassioui, *Crimes Against Humanity: The Case for a Specialized Convention,* 9 WASH. U. GLOB. STUD. L. REV. 575 (2010).

[162] Murphy, *supra* note 161, para. 15.

[163] FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 151. For updates, see *Crimes Against Humanity Initiative*, WASH. U. ST. LOUIS, *at* https://sites.wustl.edu/crimesagainsthumanity.

[164] Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, at 10, para. 42, UN Doc. A/74/10 (Sept. 16, 2019); *see also* Draft CAH Articles, *supra* note 21.

[165] Comprehensive accounts of what motivated aspects of the CAH Convention are contained in *Special Issue: Laying the Foundations for a Convention on Crimes Against Humanity*,16 J. INT'L CRIM. JUST. 679, 679–957 (2018).

[166] Draft CAH Articles, *supra* note 21, Art. 2(h).

[167] Sean D. Murphy, Fourth Report of the Special Rapporteur on Crimes Against Humanity, International Law Commission, ch. 1, E(1), paras. 60–61, UN Doc. A/CN.4/725 (Feb. 18, 2019) (The experts and UN special rapporteurs recommended expanding and updating the explicit list of acts considered persecution to include "persecution on grounds of language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics and indigenous, refugee, statelessness or migratory status." In response, the ILC special rapporteur noted that the catch-all phrase used "embraces other and evolving grounds on which persecution may be found" and did not consider it necessary to include additional explicit mention of disability and other individual identities.

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The decision not to expressly include disability as one of the grounds of prohibited persecution in the draft articles is regrettable—it is a missed opportunity to overtly ensure more inclusive justice. It also undercuts the role that progressive developments in international human rights law can and should play in shaping international criminal law. As demonstrated in the above Sections, the definition of CAH has evolved in reference to previously marginalized groups.[168] Furthermore, CRPD Article 11 is clearly aimed at precipitating the incorporation of the human rights of persons with disabilities across all realms of international law, including criminal prosecutions.[169] Hence, the draft articles clearly miss the mark in reflecting on and responding to developments in IHL, international criminal law, and human rights law. The omission of an explicit mention of persons with disabilities likewise overlooks the history of egregious and systemic abuses faced by that population, significantly the largest and among the most vulnerable minority groups in the world. That said, if governments do proceed on the recommendation of the ILC, the negotiation of a CAH Convention presents a genuine opportunity to explicitly recognize and enforce accountability for disability-based crimes in-line with the protections envisioned by and provided to other marginalized groups by international criminal law.

V. Domestic, Hybrid, and International Courts for Disability-Based CAH Prosecutions

Domestic courts have produced some memorable successes in the prosecution of CAH since World War II and newly emergent hybrid courts have been billed as the potential successors to the now-closed ad hoc tribunals.[170] However, these two judicial fora face significant obstacles and challenges in mounting successful disability-based CAH prosecutions, leaving the ICC as the seemingly most capable adjudicative body for such prosecutions.[171] This circumstance underscores the need of urgent redress of the ICC's failure to prosecute disability-

Nonetheless, the ILC special rapporteur did recommend that the ILC "may wish to consider adjusting the commentary so as to provide a fuller account of what is meant by 'other grounds that are universally recognized as impermissible under international law.'").

[168] *See* Sections IV.B–C *supra*.

[169] *See* Sections III.A–C *supra*.

[170] While not addressed in the text, ad hoc tribunals were considered but ultimately not included due primarily to the lack of international support or interest as demonstrated inability to established ad hoc tribunals for the situations in Syria and Myanmar. *See* Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, Guardian (Mar. 17, 2015), *at* https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria; *Syria Investigator del Ponte Signs Off with a Sting*, Reuters (Sept. 18, 2017), *at* https://www.reuters.com/article/us-mideast-crisis-syria-investigator-idUSKCN1BT29Q; David Brunnstrom, *Human Rights Law Group Calls for Tribunal on Crimes Against Rohingya*, Reuters (Dec. 3, 2018), *at* https://www.reuters.com/article/us-usa-myanmar-rohingya-idUSKBN1O21K8; Scott Neuman, *UN Official: Evidence Myanmar Using Live Ammunition Against Protestors*, NPR (Feb. 12, 2021), *at* https://www.npr.org/2021/02/12/967291621/u-n-official-evidence-myanmar-using-live-ammunition-against-protesters.

[171] The identification of the ICC as the seemingly most effective judicial forum within which to prosecute disability-based crimes as CAH is not meant to suggest that if prosecution of crimes against persons with disabilities were to take place in domestic, regional, or hybrid courts that such developments would be unwelcome. To the contrary, any movement toward recognizing, investigating, and prosecuting crimes against persons with disabilities, as well as increasing access to justice mechanisms particularly in post-conflict situations, would be seen as a significant advancement and not opposed by the authors as long as it is done in the manner considered by the CRPD. The ICC was chosen based primarily on its codification of the CAH framework established by the above-mentioned ad hoc tribunals, understanding the resource and judicial limitations facing the court. *See* Dr. Ewelina U. Ochab, *As The International Criminal Courts Faces More Challenges, We Need It More Than*

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related human rights crimes. These Sections will examine the potential benefits and disadvantages of domestic and hybrid courts, assess the viability of utilizing the ICC definition of CAH, suggest the creation of a disability policy by the ICC prosecutor, and outline the important roles for the CRPD Committee and special rapporteur on the rights of persons with disabilities in international criminal prosecutions.

A. Domestic Courts

The suggestion that "[t]he prosecution of crimes under international law . . . is primarily the obligation of individual states and should be dealt with at the level of national jurisdiction,"[172] finds some validity in the fact that there are a number of states that maintain criminal code provisions or statutes that allow for the domestic prosecution of CAH.[173] One of the earliest examples of national courts exercising jurisdiction over international crimes, and specifically CAH, was the prosecution under French domestic law of Klaus Barbie, the Gestapo chief in Lyons during World War II who ran "a campaign of torture and death against Resistance leaders" and sent "uncounted other people, most of them Jews" to extermination at Auschwitz.[174] This case is notable because it illustrates the flexibility of a national court to assess the legal interpretation of what constitutes an act considered a CAH.[175] Domestic courts have also been at the forefront in the use of innovative national laws, such as universal jurisdiction, to prosecute international crimes such as CAH.

Since the close of the Nuremburg trials, the use of domestic laws to prosecute CAH has demonstrated a level of judicial fearlessness within national courts.[176] Of these, the

Ever, FORBES (Sept. 13, 2020), *at* https://www.forbes.com/sites/ewelinaochab/2020/09/13/as-the-international-criminal-court-faces-more-challengs-we-need-it-more-than-ever.

[172] Pavel Caban, *Gaps in the Legal Regime of Interstate Cooperation in Prosecuting Crimes Under International Law*, 6 CZECH Y. B. PUB. & PRIV. INT'L L. 289, 290 (2015).

[173] The European Union has a statute relating to crimes against humanity. By the nature of the Treaty of Rome, all nations that have joined the EU zone are legally bound and therefore indirectly maintain statutes on crimes against humanity. *See* Council Framework Decision 2008/913/JHA of Nov. 28, 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 OJ (L 328) 55; Council Decision 2003/335/JHA of May 8, 2003 on the Investigation and Prosecution of Crimes of Genocide, Crimes Against Humanity and War Crimes, 2003 OJ (L 118) 12; Council Decision 2002/494/JHA of June 13, 2002 (December 16, 2008), Setting Up a European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes Against Humanity and War Crimes, 2002 OJ (L 167) 1; *see also Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries*, LIBRARY OF CONGRESS (LAW), *at* https://www.loc.gov/item/2018298838/.

[174] A member of the German SS force known as the Butcher of Lyons. Wolfgang Saxon, *Klaus Barbie, 77, Lyons Gestapo Chief*, N.Y. TIMES (Sept. 26, 1991), *at* www.nytimes.com/1991/09/26/world/klaus-barbie-77-lyons-gestapo-chief.html.

[175] Cass. Crim., Jan. 26, 1984, JCP 1984 II 20,197 (submission of French Advocate Dontenwille), *translated in* 78 ILR 125–48, 147, *reprinted in* INTERNATIONAL CRIMINAL LAW: CASES & MATERIALS 762 (Jordan J. Paust, et al., 4th ed. 2013). The French law that included the charge of crimes against humanity was incorporated into the county's legal code through the law of December 26, 1964 by reference to the Nuremberg principles. *See, e.g.*, Public Prosecutor v. Barbie, Trial Judgment (Cour d'assises [assize court] du Rhône July 4, 1987) (Fr.) [hereinafter Public Prosecutor v. Barbie]; Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010). However, since then, France has amended the legislation to better comply with that of the ICC after the ratification of the Rome Statute. *See* Book II Felonies and Misdemeanors Against Persons, Title I Crimes Against Humanity and Against Persons, Subtitle I Crimes Against Humanity, Chapter II Other Crimes Against Humanity, Art. 212-1.

[176] *See* Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 INT'L J. TRANSITIONAL JUST. 384, 384 (2009); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311 (2001).

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prosecutions for CAH by the national courts of France, Spain, Peru, and Guatemala are noteworthy examples.[177] However, their use has also been fraught with concerns over the influence of politics and public opinion, raising questions of impartiality and fairness.[178] The reality is that the adoption of national laws related to CAH has been uneven at best and at worst non-existent.[179] A July 2013 study found that "at best 54 per cent of States Members of the United Nations (104 of 193) have *some form* of national law relating to crimes against humanity," with the "remaining Member States (89 of 193) appear[ing] to have no national law relating to crimes against humanity."[180] Relatedly, an in-depth qualitative analysis of eighty-three UN member states found that "only 41 per cent of States . . . actually possessed a national law specifically on 'crimes against humanity' (34 of 83)."[181] Unlike the judicial structure and precedent of the former ad hoc tribunals, the recognition and acceptance of the legal interpretation of what constitutes a CAH by national laws has been far from universal.[182] Even among states parties to the Rome Statute, "at best 66 per cent . . . (80 of 121) have *some form* of national law relating to crimes against humanity, leaving 44 percent of Rome Statute parties (41 of 121) without any such law."[183] This lack of consistency in the adoption or existence of national laws has significant consequences on the effective prosecution of CAH by domestic courts as well as on state obligations to assist, extradite, and prosecute alleged perpetrators "on the basis of the principle *aut dedere aut iudicare*."[184]

Further, while the CRPD is approaching global ratification, a significant gap remains between the rights enumerated in the treaty and the protections accorded to persons with disabilities by national governments, both in law and in practice.[185] Accordingly, even if a national government were to acknowledge and be willing to prosecute disability-based CAH—improbable, given the historical record—the domestic legal framework would be unlikely to provide a specific charge for prosecuting crimes against persons with disabilities. Instead, in the best case, prosecution would occur based on the underlying act (e.g., rape, torture, false imprisonment, etc.) leading to a haphazard approach and a likely perpetuation of impunity. This, taken in concert with the uneven adoption of national laws on CAH,

[177] *See, e.g.*, Public Prosecutor v. Barbie, *supra* note 175; David Sugarman, *The Arrest of Augusto Pinochet: Ten Years On*, OPEN DEMOCRACY (Oct. 29, 2008), *at* https://www.researchgate.net/publication/327369337_The_Arrest_of_Augusto_Pinochet_Ten_Years_On_In_Open_Democracy_wwwopendemocracy-netarticlethe-arrest-of-augusto-pinochet-ten-years-on; Burt, *supra* note 176, at 384; *Efrain Rios Montt & Mauricio Rodriguez Sanchez Before the National Courts of Guatemala: Background*, INT'L JUST. MONITOR, *at* www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-background; Sophie Beaudoin, *Will Former President Perez Monlina Face Investigation for Wartime Atrocities?*, INT'L JUST. MONITOR (Sept. 8, 2015), *at* www.ijmonitor.org/2015/09/will-former-president-perez-molina-face-investigation-for-wartime-atrocities.

[178] *See* Sadat, *supra* note 137, at 354 n. 146; Murphy, *supra* note 161, para. 56.

[179] *See* Murphy, *supra* note 161, paras. 52–63. *See generally* Elies van Sliedregt, *Criminalization of Crimes Against Humanity Under National Law,* 16 J. INT'L CRIM. JUST. 729 (2018).

[180] Murphy, *supra* note 161, para. 58 (emphasis added).

[181] *Id.*, para. 59. *See also* Caban, *supra* note 172, at 191–92.

[182] Murphy, *supra* note 161, paras. 5–55.

[183] *Id.*, para. 58 (emphasis added).

[184] Caban, *supra* note 172, at 290. *Aut dedere aut judicare,* or extradite and prosecute, is a provision found in numerous international treaties that seeks to secure "international cooperation in the suppression of certain kinds of criminal conduct." M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995).

[185] *See generally* Committee on the Rights of Persons with Disabilities Concluding Observations, *at* https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5.

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makes it untenable to use domestic courts as the primary avenue to prosecute disability-based CAH crimes and could harm efforts to legitimize such an approach.

B. Hybrid Courts

Hybrid courts, a relatively recent development in post-conflict accountability, have emerged as a potential alternative to the standard international ad hoc tribunals because they "combine the best of two worlds, the purely domestic and the purely international prosecution of international crimes, and transcend the shortcomings of each world taken separately."[186] This transcendence, of sorts, is said to be necessary because within "a post-conflict situation domestic trials often lack legitimacy because the judicial institutions are not impartial . . . [and] purely international courts . . . lack legitimacy because those who have been most directly affected by crimes lack 'ownership.'"[187] It has also been suggested that hybrid courts help to rebuild the capacity of domestic institutions and strengthen national norms within a country by incorporating the higher standards of international laws and jurisprudence.[188]

However, hybrid courts are not a monolith; there is no single definition of what constitutes a hybrid court, rather there is a spectrum of judicial bodies that are neither purely international nor purely domestic in nature.[189] The creation of hybrid courts is varied and highly dependent on the buy-in of the national government even when there is significant interest in, and pressure by, the international community.[190] Hybrid courts are also diverse in their foundational instruments and documents, leading to a variety of legal bases for the investigation, charging, and prosecution of crimes.[191] Most notably, the mixture of domestic and international law used by hybrid tribunals varies significantly. For instance, one hybrid court may require nexus to a conflict to prove a CAH charge, while in another, the charge of CAH may not even be available because it does not exist within the relevant domestic law.[192]

With no framework for deciding applicable law and the inherent challenges in prosecuting international crimes generally, the efficacy of hybrid courts is unpredictable.[193] Further, the reliance on the support of the national government, the domestic judicial system, and interstate cooperation all pose significant obstacles to the use of hybrid courts to prosecute

[186] Sarah M.H. Nouwen, *"Hybrid Courts": The Hybrid Category of a New Type of International Crimes Court*, 2 UTRECHT L. REV. 190, 190–91 (2006).

[187] *Id.* at 191.

[188] Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AJIL 295, 305 (2003).

[189] Nouwen, *supra* note 186, at 193. *See also generally* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS (2008).

[190] *See* Nouwen, *supra* note 186, at 194–99.

[191] *See id.* at 200–02; Dickinson, *supra* note 240, at 307.

[192] "In Bosnia and Herzegovina, legislation has been amended to include international crimes. In Kosovo the panels' jurisdiction theoretically extends from annulling contracts to prosecuting genocide, but the FRY Criminal Code, which is applicable to crimes committed during the armed conflict, does not include [CAH] or the international law important concept of command responsibility." Nouwen, *supra* note 186, at 207.

[193] *See* MICHAEL E. HARTMANN, SPECIAL REPORT: INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO (U.S. Institute of Peace, Oct. 13, 2003). *See generally* Hansjörg Strohmeyer, *Collapse and Reconstruction of A Judicial System: The United Nations Mission in Kosovo and East Timor*, 95 AJIL 46 (2001); Roger F.M. Lorenz, *The Rule of Law in Kosovo: Problems and Prospective*, 11 CRIM. L. F. 127 (2000).

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disability-based CAH crimes.[194] Thus, as with domestic courts, it would be untenable to use hybrid courts as the primary avenue to prosecute disability-based CAH crimes.

C. The International Criminal Court

Since its inception—and as a court of last resort—the ICC has sought to prosecute the most serious of international crimes. Currently the ICC is investigating fourteen situations, all but one of which involve alleged CAH.[195] Of the thirty cases it has brought to date, the ICC has charged twenty individuals, or 66 percent, with CAH.[196] The high rate at which the ICC charges individuals with CAH very much parallels the pattern exhibited by the ad hoc tribunals, and has solidified the fact that "crimes against humanity prosecutions have quickly emerged as central to the ability of the ICC to fulfill its mandate."[197]

These developments, coupled with the ICC's reliance on the foundational jurisprudence of the ad hoc tribunals and legal framework for prosecuting CAH, makes the ICC the most promising legal forum in which to pursue, and successfully prosecute, disability-based CAH.[198] However, using the ICC in this manner—to fully realize the prosecution of crimes against persons with disabilities as a CAH—will require an expansion of the strict interpretation of Article 7(2)(a) and the development of a policy on persons with disabilities. These two impediments, unlike those mentioned for domestic and hybrid courts, can be more easily overcome. Indeed, their elimination is required by the CRPD.

1. Current Interpretation of Article 7(2)(a)

Article 7(2)(a) of the Rome Statute contains three preconditions necessary to successfully charge and prosecute an individual with crimes against humanity before the ICC. First, the crime must be part of a widespread or systematic attack; second, the crime must be directed against a civilian population; and third, the individual charged must have knowledge of the attack.[199] Additionally, the Rome Statute defines such attack as "a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."[200] This required nexus, between the crime and an organized policy, in some ways strips the flexible nature of the charge of CAH that previously allowed for the prosecution of crimes otherwise overlooked by the frameworks of genocide and war crimes.

The Pre-Trial Chamber opinion in the *Katanga* case best illustrates the current interpretation as to what constitutes an "organizational policy" by stating that "even if carried out over

[194] *See* Jason Burke & Amantha Perera, *UN Calls for Sri Lanka War Crimes Court to Investigate Atrocities*, GUARDIAN (Sept. 16, 2015), *at* www.theguardian.com/world/2015/sep/16/un-seeks-special-court-to-investigate-sri-lanka-war-atrocities.

[195] *See* ICC, *Situations Under Investigation*, *at* https://www.icc-cpi.int/pages/situation.aspx (The only situation not involving CAH is the Situation in the Republic of Mali (ICC-01/12), which is investigating alleged war crimes committed in Mali since January 2012.).

[196] *See* ICC, *Cases*, *at* https://www.icc-cpi.int/Pages/cases.aspx.

[197] Sadat, *supra* note 137.

[198] Kai Ambos, *Crimes Against Humanity and the International Criminal Court*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 151, at 279.

[199] Rome Statute, *supra* note 3, Art. 7(1).

[200] *Id.* Art. 7(2)(a).

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a large geographical area or directed against a large number of victims" the CAH "must still be thoroughly organised and follow a regular pattern."[201] Possibly realizing the high standard of proof necessary to prove a systematic attack, the Pre-Trial Chamber attempted to clarify the type of organization that could be found to implement such an organized plan by stating that the policy "may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population."[202] This statement suggests that the group developing and carrying out the atrocities as part of some overarching policy is not required to be a state itself, but must otherwise maintain some governing control of the region or have the power to commit such widespread atrocities. However, confusing the point, the Chamber went on to claim that the "policy need not be explicitly defined by the organizational group."[203] In a final attempt to bring clarity to the requirements of what action constitutes a CAH, the Chamber stated that "an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this [Article 7] criterion."[204]

Although government action no longer seems to be a requirement under Article 7(2)(a) to constitute a CAH, there is now an obligation to show that an organization or group has a zone of control and an organized policy or plan of action for an act to be considered a CAH. Consequently, the somewhat murky logic of what constitutes an action or plan, that can be both highly organized without being explicitly defined but at the same time not spontaneous or isolated, could possibly raise some doubts on the ability to use CAH as the framework for charging and prosecuting crimes against persons with disabilities committed by non-state actors.[205] While the nexus requirement may appropriately pose an impediment to charge certain disability-related acts as CAH (for instance, the actions of private individuals, including family members, in isolating, sterilizing, or torturing persons with disabilities), as stated above, a majority of the systematized violence and abuse committed against persons with disabilities is pursuant to domestic laws and policies and perpetuated by state and non-state actors thereby making such acts *prima facie* eligible under Article 7.[206] Thus, the actions of state and non-state actors, as well as their armed forces, who have a zone of control over a geographic area, that target persons with disabilities either through systemic violence or abusive policies likewise fall within the current conception of CAH even if they have not as yet been prosecuted as such.

[201] *Prosecutor v. Katanga*, *supra* note 158, para. 396.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See* Guénaël Mettraux, *The Definition of Crimes Against Humanity and the Question of a "Policy" Element*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 151, at 142.

[206] By maintaining the requirement of a nexus between government action and the crime, Article 7 seemingly prevents the charging of non-state actors and private individuals with CAH. *See* Machteld Boot, Rodney Dixon & Christopher K. Hall, *Article 7: Crimes Against Humanity*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 117, 123 (Otto Triffterer ed., 1999). Additionally, there is disagreement over whether, for a crime to be considered a CAH, the crime's motive must be related to an attribute of the victim, like their religion, political affiliation, race, or other social or cultural attribute. *See* John E. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 19–20 (1999). Currently, the ICC has not accepted the assertions that a broader interpretation regarding legal limits of what acts constitute CAH should prevail.

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The numerous examples of disability-based persecution found in Part II can be categorized into three types of situations that constitute disability-based CAHs. First, are acts that directly target persons with disabilities on the basis of their disability. Examples of this include the torture, killing, forced sterilization, involuntary institutionalization,[207] infanticide, disappearance of children with disabilities, and willful neglect of prisoners with disabilities precipitated through policy, encouragement, or tacit support from authorities. Second, are acts that have a disparate impact on persons with disabilities. Examples of this include attacks on or destruction of independent living facilities, rehabilitation centers, specialized schools, and psychiatric hospitals. Third, are acts that have an incidentally larger impact on persons with disabilities. Examples of this include attacks on or destruction of hospitals, utility services, public transportation, schools, orphanages, and other public institutions. As detailed in Part II, persons with disabilities are more likely to use and rely on these facilities and are therefore placed at a much higher risk of harm by their destruction or inoperability, whether purposeful or not.[208]

It is important that all three types of situations be recognized as CAH to provide appropriate recourse for and to end impunity of gross human rights violations perpetrated against persons with disabilities. The successful incorporation and prosecution of disability-based CAH by the ICC requires no jurisprudential leap of faith given the direct similarities between crimes targeting persons with disabilities and the established CAH of gender-based crimes and crimes against children, even setting aside the fact that Article 11 of the CRPD mandates a disability-inclusive reading of international criminal law.

2. Policy on Persons with Disabilities

To date, the ICC does not have a policy on persons with disabilities to match its policies on sexual and gender-based crimes and children. The lack of policy on persons with disabilities is surprising given the adoption of the CRPD in 2006 the provision in Article 11 that tie CRPD principles not only into human rights law, but also into IHL and other international law domains including international criminal law. Accordingly, the adoption of a specific policy on persons with disabilities is long overdue and should be a top priority for the Office of the Prosecutor (OTP). As a first step, the OTP should lay out the strategic goal of creating a disability-focused perspective that spans all of the areas of the OTP's work, just as it has done for sexual and gender-based crimes and children.[209] The policy on persons with disabilities should—as per the policies on sexual and gender-based crimes and children—focus on building the necessary institutional capacity of the ICC to "conduct preliminary examinations,

[207] The authors note there exist a limited range of instances involving the involuntary confinement or treatment of persons with disabilities not amounting to CAH. For a variety of views on the human rights implications of such matters, see *Mental Health, Legal Capacity, and Human Rights* (Michael Ashley Stein, Faraaz Mahomed, Vikram Patel & Charlene Sunkel eds., 2021).

[208] The authors note that in the context of an armed conflict the acts listed in the second and third situations may in all likelihood also be war crimes. We further note that IHL does not make the categorization of an act as mutually exclusive (i.e., a war crime may and can also be a CAH, even if a CAH may not also be a war crime and vice versa due to the nexus requirement to an armed conflict for war crimes). *See, e.g.*, ICRC, Customary International Humanitarian Law Database, *Rule 156, Definition of War Crimes*, *at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

[209] *See* ICC Off. of the Prosecutor, *Strategic Plan 2019–2021* (July 17, 2019), *available at* https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf.

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investigations and prosecutions" of crimes against or affecting persons with disabilities and require that its engagement with persons with disabilities meets with disability rights principles of accessibility non-discrimination and the duty to provide reasonable accommodation, among others.[210]

Notably, the basis for the creation of an ICC policy on persons with disabilities rests within Article 21 of the Rome Statue, which establishes the applicable law to be used by the ICC.[211] In both the sexual and gender-based crimes and child policies, the OTP cites directly to Article 21(3) as establishing the regulatory framework for the development of each policy. Further, the OTP finds that gender and children are considered covered as part of the "other status" designation of Article 21(3).[212] Going even further, the OTP states that it will apply and interpret the Rome Statute according to human rights standards and will "take into account the evolution of internationally recognised human rights."[213] The CRPD, like the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW) are *core* human rights instruments—so designated by the Office of the High Commissioner for Human Rights—and each establish protection for groups recognized as disadvantaged and at high risk for discrimination. Persons with disabilities also fall within the "other status" category under Article 21(3) and the Rules of Procedure and Evidence for the ICC recognize victims of sexual or gender violence, children, and persons with disabilities as requiring special procedures and treatment as victims and witnesses.[214] Therefore, the creation of an OTP policy for persons with disabilities is not only necessary but feasible, building on the same legal foundation used for sexual and gender-based crimes and crimes against children. The formulation of such a policy aligns with the explicit mandate of the UN and the newly adopted Organization-wide UN Disability Strategy and can be supported by the CRPD Committee and the UN special rapporteur on the rights of persons with disabilities.[215]

3. *Role of the CRPD Committee and UN Special Rapporteur on the Rights of Persons with Disabilities*

While the reforms needed in international criminal law and process to effectuate the aims of the CRPD fall within the purview of international criminal law institutions, nonetheless, the CRPD's institutional arrangements have a role to play in this effort, one that has not to date been taken up proactively. Notably, unlike other core human rights conventions, the CRPD enjoys two co-secretariats (the Office of the UN High Commissioner for Human Rights and UN Department of Economic and Social Affairs) and an annual Conference of

[210] *See* ICC Child Policy Paper, *supra* note 83, at 5.

[211] "3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status." Rome Statute, *supra* note 3, Art. 21.

[212] *See* ICC Child Policy Paper, *supra* note 83, at 51; ICC Sexual and Gender-Based Crimes, *supra* note 151, at 26.

[213] ICC Sexual and Gender-Based Crimes, *supra* note 151, at 26; *see also* ICC Child Policy Paper, *supra* note 83, at 37.

[214] *See* ICC Rules of Procedure and Evidence, *supra* note 130, Arts. 17(3), 19, 86, 112(4)

[215] UN Disability Strategy, *supra* note 10.

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States Parties. The latter body meets to elect members of the CRPD Committee and, pursuant to Article 40 of the CRPD, to consider "any matter with regard to the implementation of the present Convention."[216] The Conference has to date been more of a promotional vehicle for states, INGOs, and civil society to spotlight treaty-related activities and less the kind of generative body that supports the development of the treaty.[217]

The CRPD Committee can and should play an important role in amplifying the implications of the CRPD for international criminal law and process, especially at the ICC. For example, the Committee's concluding observations and recommendations to states parties represents an opportunity to shed light on a disability-inclusive approach to international crimes such as CAH, to understand how the CRPD's standards apply to the lived experiences of persons with disabilities, and to promote accessibility and inclusivity in international criminal proceedings.[218] In addition, the Committee's general comments regarding the interpretation and implementation of the CRPD could, in the future, be used to highlight the interrelationship between the treaty and international criminal law and process.[219]

Similarly, the UN special rapporteur on the rights of persons with disabilities holds a broad mandate for investigating disability-related human rights abuses and can investigate, report, and make recommendations relating to CAH and/or international criminal law and process more generally.[220] The current mandate holder has made the protection of persons with disabilities in armed conflict a particular focus, inclusive of ensuring that war crimes and crimes against humanity perpetrated against persons with disabilities are addressed.[221] The practice of issuing joint letters among mandate holders calling for an end to human rights violations or for reparations has been taken up by the special rapporteur on the rights of persons with disabilities, including support for a statement in relation to the call for reparations for sexual abuse by the Catholic Church.[222] The role of the special rapporteur could likewise be harnessed to help shape international investigative mandates in ways that could better ensure appropriate coverage of disability-based persecution and crimes. A joint report, not currently standard practice among mandate holders, could help analyze strategies for advancing a

[216] CRPD, *supra* note 5, Art. 40.

[217] Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS. Q. 691 (2010) (arguing for the Conference of States Parties to take on an active role in the development of the treaty, parallel to Conferences of States Parties in the international environmental law domain).

[218] For more on the potential of the CRPD monitoring system to foment implementation of disability human rights, see Ashley Stein & Lord, *supra* note 217; Michael Ashley Stein & Janet E. Lord, *The Committee on the Rights of Persons with Disabilities*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 547 (Philip Alston & Frédéric Mégret eds., 2020).

[219] CRPD, *supra* note 5, Art. 39 (providing authority for the CRPD Committee to issue recommendations as part of its reporting obligation to the UN General Assembly).

[220] The scope and purpose of the mandate is explicated on the OHCHR's website. *See* Special Rapporteur on the Rights of Persons with Disabilities, *at* https://www.ohchr.org/en/issues/disability/srdisabilities/pages/srdisabilitiesindex.aspx.

[221] Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/HRC/46/27 (Jan. 19, 2021).

[222] Joint Letter of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Special Rapporteur on the Sale and Sexual Exploitation of Children, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Special Rapporteur on the Rights of Persons with Disabilities to the Holy See (Apr. 7, 2021), *at* https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26316.

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disability inclusive approach to international criminal law, and follows naturally on the special rapporteur's recent report analyzing the adoption of a gender perspective in transitional justice.[223]

VI. Conclusion

Long overdue is the acknowledgement that persons with disabilities compel specific attention in international law and the appraisal of how international criminal law and its process can appropriately account for the ways in which men, women, and children with disabilities experience gross human rights violations. The charge in Article 11 of the CRPD to ensure the rights of persons with disabilities are realized in every domain, including IHL, is very much a call to action for international criminal law and process. The UN Security Council's recognition of "the particular barriers faced by persons with disabilities in accessing justice, including access to effective remedies and, as appropriate, reparation" regarding IHL violations amplifies this point.[224]

In a sense, then, the implications of the CRPD are clear for international criminal law. As with the mainstreaming of sexual and gender-based crimes and crimes against children, an earnest effort to have international criminal law and process fully recognize and successfully prosecute gross human rights violations against persons with disabilities must commence. This mainstreaming of disability starts with the human rights framework in the CRPD to elevate the status of persons with disabilities and disability-based persecution within international criminal law through accessibility to justice mechanisms. Simultaneously, impunity for the innumerable human rights violations committed against persons with disabilities can only be overcome by recognition and prosecution of such specific actions as CAH, as has been done for other groups like women and children. Of the various legal fora that could accomplish this task, the ICC may likely be the most viable choice given its recognition and prosecution of gender-based crimes and crimes against children as CAH. However, the use of the ICC for such a purpose also requires the development of a disability-specific policy, which is essential, as it was for children and sexual and gender-based crimes, to understand and meaningfully address the specific protection needs of persons with disabilities within the international criminal law process. When the ILC draft articles and recommended elaboration of a convention are taken up by the UN General Assembly or by a diplomatic conference, the language of the act of persecution must be updated to explicitly reference disability. This will account for the reality that persons with disabilities are persecuted on the basis of their disability, necessitating particular protection and recognition, as have occurred for women and children.

As international criminal law progresses toward accommodating disability-based crimes, engagement with the special rapporteur on the rights of persons with disabilities and the CRPD Committee will assist in guiding much needed reforms. Interaction and collaboration between the larger disability and international criminal law communities will be essential to translate the requirements of the CRPD into actionable prosecution strategies, accessible

[223] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Fabián Salvioli, The Gender Perspective in Transitional Justice Processes, UN Doc. A/75/174 (July 17, 2020), *at* https://undocs.org/A/75/174.

[224] SC Res. 2475, *supra* note 15.

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court procedures, and disability-specific policies. It will also be necessary to develop research and investigative techniques to uncover disability-based crimes while also empowering persons with disabilities and their representative organizations to report and document human rights violations against them. Social prejudices and biases, structural barriers, and a general lack of awareness regarding disability will remain impediments that must be directly addressed and overcome throughout this process. Nevertheless, allowing for successful prevention and prosecution of crimes against persons with disabilities as CAH, including through the individual accountability framework of international criminal law, does not create new protections or crimes; it merely realizes full accountability within the international criminal law framework.

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