

# No longer the “forgotten victims of armed conflict”: Operational and legal considerations for accountability mechanisms regarding crimes affecting persons with disabilities

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## Abstract

*Despite the fact that persons with disabilities comprise, according to current statistics, a significant portion of conflict-affected communities and are disproportionately affected by armed conflict, the lack of inclusion in accountability mechanisms for acts amounting to crimes under international law is notable. The Convention on the Rights of Persons with Disabilities (CRPD) provides a framework for mainstreaming inclusive investigation practices and promoting greater accountability, through application of the principles of autonomy, non-discrimination and accessibility. This article makes suggestions for the operationalization of this CRPD framework through specific recommendations for accountability mechanisms, alongside legal opportunities for recognition of crimes affecting persons with disabilities and crimes resulting in disability. A case study of the so-called Islamic State of Iraq and the Levant and persons with disabilities in Iraq is used to illustrate the application of recommendations to ensure that persons with disabilities are no longer the “forgotten victims of armed conflict”.*

**Keywords:** accountability, crimes against humanity, disability, genocide, inclusivity, investigations, mainstreaming, war crimes.



## Introduction

This article addresses the means through which the complementary role of international criminal law can and should prioritize violations of international humanitarian law and human rights that rise to the level of applicable international crimes for survivors, victims and other witnesses with disabilities, arguing that the inclusion of and accessibility for persons with disabilities at all investigative and legal phases is critical for achieving this aim. This is key both for persons with disabilities prior to conflict and for those who become disabled as a result of conflict. The United Nations (UN) system has repeatedly called for an interpretation of international law in light of a human rights-based approach to disability – as required under Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD) – noting that this would in turn “lead to substantive changes in policy and practice”.<sup>1</sup> Though persons with disabilities are disproportionately affected by conflict, the lack of international criminal prosecutions involving persons with disabilities as survivors, victims or other witnesses is startling.

Operationalizing the CRPD principles of autonomy, non-discrimination and accessibility<sup>2</sup> within UN fact-finding and investigative bodies and

1 *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies*, UN Doc. A/HRC/31/30, 30 November 2015, para. 4.

2 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), Art. 3(a)(b)(f).

international criminal courts and tribunals (hereafter referred to as “accountability mechanisms”)<sup>3</sup> can help to realize fully inclusive accountability processes for persons with disabilities. Recommendations for accountability mechanisms will be considered within the intelligence analysis cycle in order to facilitate the mainstreaming of a CRPD-compliant approach across the full range of investigative activities.<sup>4</sup> Potential avenues for prosecutions of crimes affecting persons with disabilities, along with crimes resulting in disability, that can provide recognition for such suffering will then be discussed to highlight the opportunities for accountability that could be pursued. This discussion will then be applied to a case study regarding the so-called Islamic State of Iraq and the Levant and persons with disabilities in Iraq in order to illustrate the application of recommendations within the CRPD framework.

Utilizing the CRPD as the framework for mainstreaming inclusive investigative practices and promoting greater accountability for crimes affecting persons with disabilities, along with crimes resulting in disability, can help to ensure that persons with disabilities will no longer be the “forgotten victims of armed conflict”<sup>5</sup>.

## The CRPD as relevant to accountability mechanisms

### The scale of impact of conflict on persons with disabilities

Persons with disabilities comprise, based on statistics alone, a significant portion of conflict-affected communities. More than 1 billion people, or 15% of the world’s population, are living with some form of disability,<sup>6</sup> not accounting for the fact that impairments are often not reported or not recorded due to prevalent discriminatory attitudes, social stigma or inadequate data collection.<sup>7</sup> Of the 274 million people who are in need of humanitarian protection and assistance in 2022,<sup>8</sup> then, a conservatively estimated 41 million are people with disabilities.

3 This categorization was first utilized to classify crimes affecting children in Federica D’Alessandra *et al.*, *Advancing Justice for Children: Innovations to Strengthen Accountability for Violations and Crimes Affecting Children in Conflict*, Save the Children and University of Oxford, March 2021, p. 19 fn. 6.

4 UN Office on Drugs and Crime (UNODC), *Criminal Intelligence: Manual for Analysts*, Vienna, 2011, p. 10.

5 Office of the UN High Commissioner of Human Rights, “Persons with Disabilities ‘Forgotten Victims’ of Syria’s Conflict – UN Committee”, 17 September 2013, available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E> (all internet references were accessed in September 2022).

6 World Health Organization and World Bank, *World Report on Disability*, Geneva, 2011, p. 44.

7 Alice Priddy, *Disability and Armed Conflict*, Academic Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, p. 11; see also *Protecting the Rights of Persons with Disabilities in Armed Conflict and Humanitarian Emergencies*, UN Doc. CRPD/CSP/2021/2, 30 March 2021, paras 20, 28.

8 UN Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Overview 2022*, New York, 2021, p. 7.

Further, of the 84.2 million people who have been forcibly displaced as a result of conflict, persecution, human rights violations or events seriously disturbing the public order as of 2021,<sup>9</sup> approximately 12 million are persons with disabilities, with available data confirming that the prevalence and impact of disability in internal displacement has increased.<sup>10</sup> This illustrates the stark intersectionality of disability and potential situations involving international crimes.

Within armed conflict and humanitarian emergencies, persons with disabilities are documented as being disproportionately affected, but this is not reflected in their involvement in accountability mechanisms that lead accountability efforts for alleged international crimes. Persons with disabilities, particularly within these contexts, are often overlooked: their needs are not adequately identified, and they are frequently deprived of protections and their rights,<sup>11</sup> with specific violations that could amount to international crimes. Persons with disabilities can be amongst the first to be targeted during attacks by non-State actors,<sup>12</sup> and they are uniquely vulnerable to being used as human shields and hostages.<sup>13</sup> Indiscriminate attacks and attacks on populated areas, together with the particular challenges that persons with physical, mental and/or psychosocial disabilities face in escaping active hostilities, have disproportionately harmful consequences for persons with disabilities.<sup>14</sup> This is in addition to persons who acquire disabilities during or whilst fleeing from armed conflict, and those who experience psychological distress resulting in longer-term impacts.<sup>15</sup>

Humanitarian assistance actors have made steps forward, albeit with room for improvement, in ensuring that service provision takes the needs of persons with disabilities into account. Key amongst these initiatives is ensuring that considering the needs and inclusion of persons with disabilities occurs across all humanitarian sectors, not only humanitarian protection actors, through “mainstreaming”.<sup>16</sup> However, inclusion of persons with disabilities has not yet been realized, at least publicly, in investigative teams working towards documentation of or accountability for international crimes, despite the fact that persons with disabilities statistically comprise a significant number of survivors, victims and other witnesses of international crimes.

9 Office of the UN High Commissioner for Refugees, *Global Trends: Forced Displacement in 2021*, Geneva, 2020, p. 2.

10 *Ibid.*, p. 28.

11 *Protecting the Rights of Persons with Disabilities*, above note 7, para. 16.

12 *Ibid.*, para. 16; UNICEF, *Children with Disabilities in Armed Conflict*, New York, November 2018, p. 11; Global Protection Cluster, *Silver Linings: Mental Health and Wellbeing in the COVID 19 Era*, February 2021, p. 7.

13 Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, para. 67.

14 *Ibid.*, paras 29, 67.

15 *Ibid.*, paras 30, 31; Global Protection Cluster, above note 12, p. 7.

16 *Protecting the Rights of Persons with Disabilities*, above note 7, paras 13, 14; G. Quinn, above note 13, paras 69–76.

## The CRPD as a framework for change

The CRPD, which was adopted in 2006 and entered into force in 2008,<sup>17</sup> is a crucial tool for realizing the full protection of rights for persons with disabilities. With 185 States Parties,<sup>18</sup> it provides undeniable recognition that persons with disabilities are full and equal rights holders, with the autonomy and right to access and participate in justice processes, in furtherance of ending impunity.<sup>19</sup> Critically, the CRPD applies across the peace–conflict continuum and does not allow for derogation or suspension of its provisions during national emergencies, foreign occupations, natural disasters or armed conflict.<sup>20</sup> It additionally creates a framework of disability-informed principles that aim to ensure equality, inclusion, participation, non-discrimination and full accessibility for persons with disabilities throughout the Convention’s interpretation or application.<sup>21</sup> While the CRPD in itself is not binding on accountability mechanisms, as they cannot be a party to the Convention, the principles set out for States are still applicable to mechanisms that maintain mandates inclusive of international human rights law (IHRL), and those mechanisms should act in accordance with IHRL, as IHRL sets up baseline standards for the rights which people are due. These fundamental principles should inform a strategy within the accountability mechanisms, taking into account current recommendations on the matter. This is to ensure that efforts to increase the inclusivity of and accountability for persons with disabilities are guided by a common, human rights-based framework.

As many accountability mechanisms hold a whole or partial UN mandate,<sup>22</sup> recent UN Security Council or Secretariat calls to action are an important recognition of the need for such steps forward and can serve as relevant guidance. The Security Council’s historic Resolution 2475 on the protection of civilians with disabilities during armed conflict was the first to specifically espouse the duty to assist and enable the meaningful participation of persons with disabilities and to consult those with expertise on disability mainstreaming, in concert with ending impunity for criminal acts against civilians with disabilities.<sup>23</sup> Additionally in March 2019, the UN Secretary-General adopted the *United Nations Disability Inclusion Strategy* (UNDIS) to enable the UN system to support the implementation of the CRPD and

17 CRPD, above note 2.

18 As of 1 September 2022.

19 William I. Pons *et al.*, “Disability, Human Rights Violations, and Crimes against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022, pp. 79–80.

20 CRPD, above note 2, Art. 11; G. Quinn, above note 13, para. 84.

21 *Thematic Study*, above note 1, paras 3, 4; *Protecting the Rights of Persons with Disabilities*, above note 7, paras 8–11.

22 UN Security Council, “Commissions and Investigative Bodies”, available at: [www.un.org/securitycouncil/content/repertoire/commissions-and-investigative-bodies](http://www.un.org/securitycouncil/content/repertoire/commissions-and-investigative-bodies); Human Rights Council, “List of HRC-Mandated Commissions of Inquiries/Fact-Finding Missions and Other Bodies (as of May 2022)”, available at: [www.ohchr.org/en/hr-bodies/hrc/list-hrc-mandat](http://www.ohchr.org/en/hr-bodies/hrc/list-hrc-mandat).

23 UNSC Res. 2475, 20 June 2019, paras 2, 4, 6.

mainstream a human rights-based approach to disability.<sup>24</sup> However, no specific data on implementation of the Strategy for UN investigative teams has been included in the corresponding first report on disability inclusion in the UN system to establish a baseline for tracking progress.<sup>25</sup>

In July 2021, the *Report of the Special Rapporteur on the Rights of Persons with Disabilities* noted that there is “low to no visibility” of persons with disabilities within international criminal law in the peace–conflict continuum.<sup>26</sup> The report included specific recommendations for a greater focus on the disability dimension of existing and future accountability efforts, such as increasing the attention paid by States and multilateral institutions to disability within existing and future investigations of, commissions of inquiry into and trials regarding relevant crimes;<sup>27</sup> more research on how international criminal law bodies across the board are addressing crimes affecting persons with disabilities and recommendations on how they can ensure accessibility and responsiveness to their investigations or related processes;<sup>28</sup> a more intentional focus by investigators and prosecutors on the disability impacts of conflicts and suspected criminal activity;<sup>29</sup> the routine and visible advancement of investigations into alleged instances of harm involving persons with disabilities;<sup>30</sup> and prosecutions where appropriate, particularly in cases where the criminal act specifically targets persons with disabilities or could be anticipated to have a devastating impact on such persons.<sup>31</sup> The report stressed the need to end impunity, as called for in the CRPD, and the relevance of the CRPD across the peace continuum.<sup>32</sup>

In line with recent calls to action within the UN system, accountability mechanisms should utilize the CRPD as a normative framework for beginning and accelerating accountability processes for international crimes affecting persons with disabilities and international crimes resulting in disability. This can result in the creation and implementation of policies and methodologies that better protect and realize the autonomy of persons with disabilities, ensuring that their individual and collective voices and experiences are fully included across all workflows in furtherance of inclusive accountability, as envisaged in the CRPD.<sup>33</sup> Utilizing the CRPD as a framework for operational change can additionally promote a broader, deeper conception of equality, inclusion and participation<sup>34</sup> – all principles and rights enshrined in the CRPD – and contribute

24 G. Quinn, above note 13, para. 26; UN Secretary-General, *United Nations Disability Strategy*, New York, June 2019 (UNDIS), p. 1.

25 UN Secretary-General, *Disability Inclusion in the United Nations System: 2020 Programme Year*, New York, October 2021.

26 G. Quinn, above note 13, p. 16.

27 *Ibid.*, para. 92.

28 *Ibid.*, para. 106(c).

29 *Ibid.*, para. 94.

30 *Ibid.*, para. 68.

31 *Ibid.*, para. 68.

32 *Ibid.*, paras 84, 92–94.

33 CRPD, above note 2, preambular paras (u), (y), Art. 13.

34 G. Quinn, above note 13, para. 12.

to the end of the historic invisibility of persons with disabilities in law enforcement processes.<sup>35</sup>

## The nexus between international criminal law and the CRPD

In addition to UN system calls to action and policies, there is a nexus between international criminal law and the CRPD that can further ground the use of the CRPD as a framework for accountability processes. Article 11 of the CRPD clarifies that, in taking all necessary measures to ensure the protection and safety of persons with disabilities, the CRPD principles are linked not only to other human rights law, but also to international humanitarian law and other international law fields – including international criminal law.<sup>36</sup> All realms of international law should be sensitive to the barriers that persons with disabilities often face in vindicating their human rights.<sup>37</sup> In addition, investigative team mandates often specifically include a provision to act in accordance with relevant international law, including IHRL.<sup>38</sup>

## The CRPD framework for increasing accountability

Accountability mechanisms can use the following specific principles from the CRPD as a framework for developing specific, operational actions, furthering accountability efforts for persons with disabilities.<sup>39</sup> While these principles do comprise fundamental human rights principles, accountability mechanism staff may not be familiar with some of the nuances<sup>40</sup> of how they should be put into practice in the context of persons with disabilities. Working within this framework can bring meaningful steps toward disability inclusion, defined by the UNDIS as the meaningful participation of persons with disabilities, and the promotion of their rights and the consideration of disability-related perspectives in compliance with the CRPD.<sup>41</sup> It can also ensure that future policies and practices are CRPD-compliant – or that they follow the general principles and obligations underlined in the Convention, along with the standards of the Committee on the Rights of Persons with Disabilities<sup>42</sup> – and that a consistent

35 *Ibid.*, para. 16.

36 CRPD, above note 2, Art. 11; W. I. Pons *et al.*, above note 19, pp. 85, 91; G. Quinn, above note 13, para. 66.

37 Stephanie Motz, “Art.11 Situations of Risk and Humanitarian Emergencies”, in Ilias Bantekas *et al.* (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford Scholarly Authorities on International Law, Oxford, 2018, pp. 316–317.

38 See UNSC Res. 2379, 21 September 2017, para. 6; UNGA Res. 71/248, 11 January 2017, para. 1; HRC Res. 39/2, 27 September 2018, para. 22.

39 W. I. Pons *et al.*, above note 19, pp. 77, 78.

40 See A. Priddy, above note 7, p. 25, regarding the CPRD as an “implementing convention” that “sets out a detailed code [for how existing rights] should be put into practice” for persons with disabilities.

41 UNDIS, above note 24, p. 20.

42 *Ibid.*

and systematic approach to disability inclusion in all areas of operations and programming is achieved through mainstreaming.<sup>43</sup>

The following is an overview of the core CRPD principles that can be used to guide the creation and operationalization of a strategy for accountability mechanisms, namely (1) autonomy, (2) non-discrimination and (3) accessibility. These core principles are interlinked, and they underpin the rights espoused in the CRPD, such as the substantive rights found in Article 12 (right to equal recognition before the law), Article 5 (right to equality and non-discrimination) and Article 9 (right to accessibility). As these principles serve to guide the CRPD’s interpretation and implementation, they should guide all legislative and policy developments that relate to persons with disabilities.<sup>44</sup> Together, these principles can achieve the full and effective participation and inclusion<sup>45</sup> of persons with disabilities within accountability mechanisms.

## Autonomy

As a necessary foundation for the participation and inclusion of persons with disabilities within accountability mechanisms, the CRPD affirms the legal capacity of such persons.<sup>46</sup> This provision was included to ensure that persons with disabilities’ acts and decisions are treated as legally effective within a particular legal system.<sup>47</sup> This provides a legal foothold for accountability mechanisms to support their work with persons with disabilities as survivors, victims and other witnesses, and for advocacy regarding persons with disabilities’ equal recognition before the law, should national jurisdictions benefiting from cooperation maintain a discriminatory, status-based approach of denial of legal capacity.<sup>48</sup> The exercise of legal capacity should then be appropriately facilitated through operationalizing the principles of non-discrimination and accessibility, which will be discussed more at length below, in order to achieve inclusion and participation.<sup>49</sup>

## Non-discrimination

The CRPD principle of non-discrimination,<sup>50</sup> in furtherance of achieving participation and inclusion,<sup>51</sup> is interwoven throughout the Convention and can guide the core framework for developing initiatives to promote accountability for victims and survivors with disabilities in accountability mechanisms. Discrimination on the basis of disability, the key inhibiting factor for

43 *Ibid.*

44 A. Priddy, above note 7, pp. 27, 28.

45 CRPD, above note 2, Arts 3(c), 29, 30.

46 *Ibid.*, Arts 3(a), 12.

47 S. Motz, above note 37, p. 352.

48 *Ibid.*, pp. 352–354.

49 Committee on the Rights of Persons with Disabilities, General Comment No. 1, “Article 12: Equal Recognition before the Law”, UN Doc. CRPD/C/GC/1, 19 May 2014, para. 17.

50 CRPD, above note 2, Arts 3(b), 5.

51 *Ibid.*, Art. 2.



participation and inclusion, means any distinction, exclusion or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of human rights on an equal basis with others.<sup>52</sup> A novel innovation for achieving non-discrimination is the provision for reasonable accommodation,<sup>53</sup> which is relevant for accountability mechanisms' work with persons with disabilities in all respects in order to ensure that participation and inclusion is possible at all stages of the accountability process.

### *Duty to provide reasonable accommodation*

The CRPD not only recognizes that failure to provide reasonable accommodation amounts to unlawful discrimination,<sup>54</sup> but goes further by enshrining the right to reasonable accommodation as a stand-alone legally enforceable right by way of CRPD Article 2.<sup>55</sup> As an integral part of non-discrimination, the duty to provide reasonable accommodation, one of the CRPD's most innovative aspects, requires the provision of

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>56</sup>

The CRPD further enshrines the duty to provide reasonable accommodation within access to justice.<sup>57</sup> A CRPD-compliant assessment of the reasonableness of accommodation and what would be considered an undue burden on the accountability mechanism requires consideration of the proportional relationship between the means employed to provide the accommodation and its aim, through objective criteria and considering factors such as the availability of resources, financial implications and third-party benefits.<sup>58</sup>

Overall, reasonable accommodation is a tool of substantive equality,<sup>59</sup> focusing on individual needs in differing contexts. Its application requires an assessment of individuals' needs on a case-by-case basis, as individualized and contextualized responses are core components of the concepts of equality and non-discrimination.<sup>60</sup> As UN agencies work to develop reasonable

52 *Ibid.*, Arts 3(c), 29, 30.

53 *Ibid.*, Art. 5(3).

54 *Ibid.*, Art. 2; A. Priddy, above note 7, p. 29.

55 CRPD, above note 2, Art. 2.

56 *Ibid.*, Arts 2, 5(3).

57 *Ibid.*, Arts 14(2), 27(1)(i).

58 Committee on the Rights of Persons with Disabilities, "General Comment No. 6 (2016) on Equality and Non-Discrimination", UN Doc. CRPD/C/GC/6, 26 April 2018, paras 26(e)(f)(g), 17; Committee on the Rights of Persons with Disabilities, *Michael Lockery v. Australia*, Communication No. 13/2013, UN Doc. CRPD/C/15/D/13/2013, 30 May 2016, para. 8.5.

59 A. Priddy, above note 7, p. 31.

60 *Ibid.*, p. 32; Committee on the Rights of Persons with Disabilities, General Comment No. 2, "Article 9: Accessibility", UN Doc. CRPD/C/GC/2, 22 May 2014, para. 26.

accommodation procedures as part of the UNDIS,<sup>61</sup> UN-affiliated accountability mechanisms in particular should begin to work towards this goal.<sup>62</sup> Although reasonable accommodation is in principle an individual measure, teams can take into account the potential beneficial effects of such accommodation for ongoing inclusion of other persons with disabilities in order to achieve the widest impact possible.<sup>63</sup>

For example, survivors, victims and other witnesses with disabilities may require venue adjustments of the in-person premises or technology used for taking evidence or for legal proceedings, such as a wheelchair ramp or specific equipment to ensure that visual or hearing disabilities are not an obstacle to participation and inclusion.<sup>64</sup> There may also be a need to arrange for evidence to be taken in a familiar or otherwise accommodating environment within a longer time frame – slowly and with more breaks – in the case of either physical or mental disability.<sup>65</sup> The environment may need to be made suitable to the individual for reasons that are not immediately apparent, such as certain kinds of lighting affecting those with epilepsy.<sup>66</sup> In addition, a modified communication approach by the use of physical aids or other techniques may be required, and an interpreter may be needed to assist with speech impairments. Training to enable staff within the accountability mechanism to recognize disabilities, particularly those that may not be immediately apparent, could further work towards ensuring that those needing reasonable accommodation can receive it.<sup>67</sup> Such training could potentially be facilitated by specialized UN agencies or non-governmental organizations.

## Accessibility

Accessibility is one of the key principles of the CRPD as a precondition for the effective and equal enjoyment of all rights by persons with disabilities.<sup>68</sup> Article 9 provides an obligation to take appropriate measures to ensure access on an equal basis with others to the physical environment, transportation, information and communications (including information and communications technologies and systems), and facilities and services.<sup>69</sup> This obligation applies to private as well as public actors,<sup>70</sup> and is separate from the duty to provide reasonable

61 UNDIS, above note 24, p. 8.

62 W. I. Pons *et al.*, above note 19, p. 78.

63 Committee on the Rights of Persons with Disabilities, General Comment No. 6, above note 58, paras 24 (b), 26(e); Committee on the Rights of Persons with Disabilities, *Marie-Louise Jungelin v. Sweden*, Communication No. 5/2011, UN Doc. CRPD/C/12/D/5/2011, Joint Opinion of Committee Members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (Dissenting), 14 November 2014, para. 5.

64 Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, p. 28.

65 *Ibid.*, pp. 28, 39.

66 *Ibid.*, p. 28.

67 *Ibid.*, pp. 29, 30.

68 CRPD, above note 2, Arts 3(f), 9, 13.

69 *Ibid.*, above note 2, Art. 9.

70 Committee on the Rights of Persons with Disabilities, above note 60, para. 13.

accommodation; accessibility obligations relate to groups and apply *ex ante*,<sup>71</sup> while reasonable accommodation applies on an individual basis, in a particular context, and thus is normally considered an *ex nunc* duty.<sup>72</sup> The duty to ensure accessibility is considered unconditional, and the entity providing accessibility may not excuse its omission to do so by referring to any burden.<sup>73</sup> This is particularly relevant to investigative teams seeking to develop CRPD-compliant assessments and policies, which can work towards accomplishing accessibility within this framework, *ex ante*.

Article 13 builds on Article 9, requiring that effective access to justice for persons with disabilities is ensured on an equal basis with others, including through the provision of procedural and age-appropriate accommodations to facilitate their effective role as direct and indirect participants.<sup>74</sup> This can include as witnesses in legal proceedings, specifically at investigative and other preliminary stages.<sup>75</sup> The CRPD is the first international human rights treaty to explicitly guarantee a right to access justice, but the Committee on the Rights of Persons with Disabilities has since articulated persistent concerns about the lack of accommodation in judicial procedures for persons with disabilities, along with the need for training of justice personnel on the human rights-based approach to disability.<sup>76</sup>

Accessibility for survivors, victims and other witnesses with disabilities within accountability mechanisms could, for example, utilize the “universal design” concept of the CRPD, involving the “design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design”.<sup>77</sup> The benefit of a universal design approach is that it helps to ensure full, equal and unrestricted access for all users, including persons with disabilities.<sup>78</sup> Examples include providing information in an understandable format, such as easy-to-read or plain language formats, as well as the capacity to provide Braille translations, audio recordings of information, or professional sign language translation.<sup>79</sup>

## Operationalization of the CRPD framework

### The intelligence analysis cycle and disability

This section proposes practical suggestions for accountability mechanisms on how to operationalize the CRPD framework in order to realize an inclusive approach and

71 *Ibid.*, para. 25.

72 *Ibid.*, para. 26.

73 *Ibid.*, para. 25.

74 CRPD, above note 2, Art. 13(1).

75 *Ibid.*

76 *Report of the Committee on the Rights of Persons with Disabilities*, UN Doc. A/72/55, 2016, para. 35; see also *Report of the Committee on the Rights of Persons with Disabilities*, UN Doc. A/74/55, 2018, para. 58.

77 CRPD, above note 2, Arts 2, 4(1)(f).

78 J. Beqiraj, L. McNamara and V. Wicks, above note 64, p. 25.

79 *Ibid.*, p. 24.

address current access to justice challenges for persons with disabilities. Noting the importance of mainstreaming the CRPD principles,<sup>80</sup> suggested actions are placed within the intelligence analysis cycle, which is broadly recognized as the foundation of the intelligence analysis process and can encompass the full range of investigative activities.<sup>81</sup> Depending on the specific accountability mechanism, the utilization of the cycle may differ in terms of the exact steps or team configuration, but in general this is a baseline process that will feature in any investigation, leading to prosecutions as appropriate. The permutation of the intelligence analysis cycle used here includes five core phases: (1) planning and direction, (2) collection, (3) processing and collation, (4) analysis and (5) dissemination and feedback. This provides a structure for recommendations on how to overcome barriers from the beginning of the investigation process, noting that the way the intelligence is used for law enforcement purposes, including discovery and evidence considerations, will be determined based on applicable jurisdictions and the statutes, mandates, terms of reference and standard operating procedures of the specific investigative team.<sup>82</sup>

### *Planning and direction*

Planning and direction are crucial to all investigation stages, from the formation of a specific investigation unit, including initial hiring of staff, to preparing for trial. The principles of non-discrimination, participation and inclusion, along with autonomy and accessibility, are all relevant for assessing how measures can be taken to mainstream disability considerations within planning and direction activities.<sup>83</sup> Three interrelated suggestions are presented below to begin ensuring that persons with disabilities can actively and equally participate in international criminal law mechanisms.

The first suggestion is to create a CRPD-compliant organizational policy, along with a disability-inclusive investigative strategy or plan at a more micro level. A guiding organizational policy can build the necessary institutional capacity of the organization to conduct preliminary examinations, investigations and prosecutions of crimes (according to the mandate scope) against persons with disabilities and require that its engagement with persons with disabilities is supporting autonomy and non-discrimination and the duty to provide reasonable accommodation along with accessibility.<sup>84</sup> In addition, the mandating body of any newly established accountability mechanism can require provisions highlighting the need to consider the experiences of persons with disabilities in

80 UNDIS, above note 24, p. 1; Inter-Agency Standing Committee, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, July 2019, p. 10.

81 UNODC, above note 4, p. 10.

82 *Ibid.*

83 For discussion on the importance of mainstreaming for crimes affecting children and sexual and gender-based violence (SGBV) crimes, see F. D'Alessandra *et al.*, above note 3, paras 57, 60, 62.

84 For a discussion of how a policy on persons with disabilities fits with the structure of the International Criminal Court (ICC) in particular, see W. I. Pons *et al.*, above note 19, pp. 91–92.

terms of reference, such as the current provisions mentioning survivors of sexual and gender-based violence (SGBV) crimes and crimes against children.<sup>85</sup> The more micro-level investigative strategy or plan will usually include the who, what, where and why of an investigation, and it is particularly crucial that persons with disabilities are featured in each part of this strategy or plan. This should include employment issues to be considered at the outset or at later phases of review, such as employment of persons with disabilities, potential outreach strategies, and collaboration with representative or specialist organizations, along with time and personnel resources dedicated to initial leads or uncovering leads.<sup>86</sup>

Organizational policies at any level developed at the start of or during an investigation should ensure that risks are mitigated and accommodation measures are in place, as recommended by the UNDIS,<sup>87</sup> much like policies developed regarding SGBV crimes and crimes against children.<sup>88</sup> Disability-inclusive policies can refer to the CRPD and Committee on the Rights of Persons with Disabilities jurisprudence to provide the framework for specific policy provisions, such as the International Criminal Court (ICC) Office of the Prosecutor has included in its Policy on Children, citing the Convention on the Rights of the Child and its related Committee decisions.<sup>89</sup> To facilitate further participation, to the extent that confidentiality allows and memorandums of understanding or similar collaboration mechanisms can be enacted, representative organizations or specialized UN agencies can be consulted and provide input into these policies.<sup>90</sup> This document can also concretely articulate the international investigative team's commitment to disability inclusion and mainstreaming throughout its sub-units (such as the witness protection and support unit) and investigation processes,<sup>91</sup> as detailed in the remaining components of the intelligence cycle and when moving toward legal proceedings. Additionally, such a policy should include accessibility considerations,<sup>92</sup> particularly regarding mechanism staff, survivors, victims and other witnesses with disabilities.

85 *Independent Investigative Mechanism for Myanmar: Terms of Reference*, UN Doc. A/73/716, 21 January 2019, paras 25, 30; *Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold Islamic State in Iraq and the Levant (Da'esh) Accountable for Acts that May amount to War Crimes, Crimes against Humanity and Genocide Committed in Iraq, established pursuant to Security Council Resolution 2379 (2017)*, UN Doc. S/2018/118, 14 February 2018, para. 15; *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, 19 January 2017, para. 19, 41.

86 UNDIS, above note 24, p. 18.

87 *Ibid.*, para. 26(a).

88 See ICC Office of the Prosecutor, *Policy Paper on Children*, November 2016; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

89 W. I. Pons *et al.*, above note 19, p. 77.

90 UNDIS, above note 24, para. 26(d).

91 *Ibid.*, p. 13.

92 *Ibid.*, p. 15.

The second suggestion is to hire in-house expertise that is inclusive of staff with disabilities, who can themselves lead the development and operationalization of policies to be mainstreamed.<sup>93</sup> These staff could preferably act as embedded experts within investigation and analysis teams in order to further ensure the day-to-day integration of such considerations and provide on-hand capacity-building.<sup>94</sup> Thirdly, to ensure both feasibility and accountability for mainstreaming initiatives, funding proposals and team budgets should have dedicated funds. In parallel to the investigative strategy and plan, donor-funded investigations can include specific, yet realistic, targets with the funding’s logframe, including number of leads, lines of inquiry or witnesses (including survivors and victims) related to crimes affecting persons with disabilities and crimes resulting in disability. This can also help to ensure that donors are invested in such mainstreaming, along with holding accountability mechanisms accountable for reaching certain indicator targets. Donors already familiar with humanitarian funding should be well placed to facilitate this and will be furthering their compliance with UN Security Council Resolution 2475.

### *Collection*

The scope of the collection phase of the intelligence analysis cycle may differ depending on the phase of the investigation, as there will be a wider net cast toward the beginning, with likely a wide variety of information and evidence brought in, versus strategic gap-filling later to address gaps in the required crime elements. While acknowledging the realistic operational difficulties of reaching persons with disabilities on the ground and building enough trust with affected communities to have productive and trauma-informed discussions, this is not a justification for a lack of resource dedication. Persons with disabilities should be a focus in the collection phase, regarding both witness information and evidence and other types of data, including open- and closed-source datasets.

To realize autonomy, non-discrimination and accessibility within the investigation, for all types of information and evidence available, accountability mechanisms should work with specialized organizations<sup>95</sup> – including relevant humanitarian protection organizations, as well as camp management actors for displacement sites – as partners for reaching persons with disabilities. Actors specialized in disability in the local context should also be consulted and collaborated with prior to and during communications with persons with disabilities and for institutional learning, to the extent possible. If and when persons with disabilities are willing to engage, accountability mechanisms should

93 For a discussion of this suggestion in the context of achieving accountability for crimes affecting children, see F. D’Alessandra *et al.*, above note 3, paras 72, 77.

94 *Ibid.*, paras 78, 79.

95 UNDIS, above note 24, p. 14.

make reasonable accommodations for survivors, victims and other witnesses in the collection phase, within remote or in-person discussions and outreach, including witness screenings or interview processes.<sup>96</sup> Further, a record of reasonable accommodations requested and provided, along with feedback on the provided accommodation by the requester, is recommended to ensure that lessons learned can be shared and improvement can be achieved.<sup>97</sup>

### *Processing and collation*

This intelligence analysis cycle framework combines processing and collation into one phase, whereby the data collected is organized into a format from which it can be retrieved and analyzed.<sup>98</sup> This may involve organizations' chain of custody or evidence life-cycle management process, remote information and evidence management platform interfaces, e-discovery tools or manual information management by staff.<sup>99</sup> Without relevant data processing and collation, the information and evidence collected will not be able to facilitate further analysis of crimes affecting persons with disabilities and resulting in disability.

Suggestions to ensure a non-discriminatory investigative process include having appropriate data tags and biographical information questions, along with search terms (in all relevant languages) for open- and closed-source data searches. In-house expertise, along with relevant humanitarian, development and other civil society actors, can assist with biographical information and other data tags; humanitarian protection actors in particular should hold relevant experience with such data collation and processing in their own systems that is inclusive of persons with disabilities, in consultation with the accountability mechanism's information systems staff.

### *Analysis*

The analysis phase of the intelligence cycle entails the in-depth examination of the meaning and essential features of the available information<sup>100</sup> within the overall aims and objectives of the investigation. Suggestions to ensure that autonomy, non-discrimination and accessibility for persons with disabilities can be championed include proper information tagging, along with advice from staff and consultant analysts in the investigation on considerations involving persons with disabilities, to ensure that patterns, correlations and inferences<sup>101</sup> involving

96 *Ibid.*, para. 26(f). An example of this includes the disability ramp access construction for the Baghdad office of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). Publicly available information on this is available at: [www.ungm.org/Public/Notice/145472](http://www.ungm.org/Public/Notice/145472).

97 UNDIS, above note 24, p. 15.

98 UNODC, above note 4, p. 13.

99 See UNITAD's Evidence Lifecycle Management System, Shuhud online crime reporting tool and use of e-discovery platforms, as referenced in UNITAD, *Harnessing Advanced Technology in International Criminal Investigations*, Baghdad, 2021.

100 UNODC, above note 4, p. 13.

101 *Ibid.*, pp. 14–15.

crimes affecting persons with disabilities or resulting in disability can be found using the analytical methods and tools available. This is the step which can most accelerate access to justice by ensuring that such topics are of analytical priority and are included in case-building.

### *Dissemination and feedback*

The dissemination phase entails the release of the results of analysis to the relevant members of the accountability mechanism.<sup>102</sup> This should, in turn, fit into a continual review of the entire intelligence cycle to identify ways it should be improved or to re-assess priorities and actions according to operational needs.<sup>103</sup> Inclusion can be achieved by ensuring that there is space within all levels of the accountability mechanism to receive information and further discussion on crimes affecting persons with disabilities and resulting in disability. Suggestions include highlighting relevant results focused on the experiences of survivors, victims and other witnesses with disabilities through analysis products and briefings, and creating opportunities for the affected communities themselves to provide feedback, to the extent feasible given the mechanism’s confidentiality procedures. Sharing lessons learned between accountability mechanisms,<sup>104</sup> whether formal or informal, could also accelerate disability inclusion best practices and help to ensure that autonomy, non-discrimination and accessibility can be achieved across international justice institutions.

### Legal opportunities for accountability

The aim of the intelligence analysis cycle within accountability mechanisms is to utilize the results in case-building for relevant prosecutions, and as such, a crime base is often considered throughout investigations as lines of inquiry are pursued. The extent to which the crime base is narrowed may depend on the specific leadership of the investigation, resources, and legal expertise, but in any event, the crime base considered at the investigation stage will have a significant impact on the likelihood of achieving criminal accountability for certain groups of victims and survivors.<sup>105</sup> Accountability mechanisms often represent the first, and at times only, attempt to raise recognition for victim groups.<sup>106</sup> Highlighting the legal opportunities for pursuing accountability for crimes against persons with disabilities is critical to ensuring that they will be included in investigation priorities,<sup>107</sup> as guided by leads and evidence collected, and included in the intelligence analysis cycle at whatever

102 *Ibid.*, p. 15.

103 *Ibid.*, pp. 15–16.

104 UNDIS, above note 24, p. 18.

105 For a discussion of this factor in the context of achieving accountability for crimes affecting children, see E. D’Alessandra *et al.*, paras 24, 58, 60, 77.

106 *Ibid.*, para. 5.

107 *Ibid.*, paras 58, 72.



points are most appropriate for the particular investigation in order to realize the CRPD principles and as a key step in the ultimate call for action to end impunity.<sup>108</sup>

There are opportunities for prosecution available for crimes affecting persons with disabilities and resulting in disability within war crimes, crimes against humanity and potentially genocide. The term “crimes affecting persons with disabilities” is used to denote both acts against persons with disabilities that are constituted if the victim is a person with a disability, and generic crimes against the civilian population that disproportionately affect persons with disabilities.<sup>109</sup> While any current international crime may be committed against persons with disabilities, this article highlights how new crimes might be pursued to bring recognition for their specific suffering, along with crimes that can recognize the disproportionate effects of attacks on persons with disabilities. The term “crimes resulting in disability” refers to disability caused by unlawful acts that may amount to international crimes. There are different legal implications for each, but the full realm of possibilities should be considered by accountability mechanisms in order to ensure the inclusion of survivors, victims and witnesses with disabilities.

This overview analysis focuses on international crimes previously found to be part of customary international law by international courts (and specifically mentioned in the Rome Statute of the ICC),<sup>110</sup> in order to provide the most impactful and practicable analysis, particularly given the jurisdictional uncertainties that many accountability mechanisms face. While no international prosecution to date has publicly mentioned persons with disabilities, with the exception of the ICC Chambers noting the need to take into account the “particular special needs” of victims with disabilities in the abstract,<sup>111</sup> potential future prosecutions can follow the trajectory of the development of prosecution of SGBV-related crimes.<sup>112</sup>

### *Crimes affecting persons with disabilities*

*Persecution.* Persecution can serve as the legal foothold for developing specific recognition of crimes targeting persons with disabilities, on the basis that persecution can occur on “other grounds that are universally recognized as impermissible under international law”.<sup>113</sup> The International Criminal Tribunal

108 W. I. Pons *et al.*, above note 19, p. 80.

109 This categorization is utilized in F. D’Alessandra *et al.*, p. 29 fn. 11.

110 Such crimes can be specifically found in Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 6, 7(1)(a)(f)(h), 7(1)(d), 8(2)(a)(i)(ii-1), 8(2)(b)(i)(ii)(ix)(x-1)(xxi), 8(2)(c)(i-1)(i-2)(i-4)(ii), 8(2)(e)(i)(iv)(xi-1).

111 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation (Trial Chamber I), 18 January 2008, para. 127; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to Be Applied to Reparations (Trial Chamber I), 7 August 2012, para. 189; ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, para. 144(c).

112 W. I. Pons *et al.*, above note 19, pp. 80–82; F. D’Alessandra *et al.*, paras 96–99.

113 ICC, *Elements of Crimes*, 2011, Art. 7(1)(h)(3).

for the former Yugoslavia (ICTY) has stated that its list of persecutory grounds is also not exhaustive,<sup>114</sup> noting that “the experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5(h), such as physical or mental disability, age or infirmity, or sexual preference”.<sup>115</sup> The ICC has not yet dealt with the question of how to define the “other grounds that are universally recognized as impermissible under international law”. The standard of “universally recognized” was developed as a compromise between those in favour of an open list of prohibited persecution grounds and those fearing a subsequent violation of legality.<sup>116</sup>

It has been suggested that the high standard of “universally recognized” can be interpreted by considering *jus cogens* norms, customary international law and treaty law, to the extent that IHRL is to be relied on for interpretation.<sup>117</sup> Regarding *jus cogens*, there is no consensus that discrimination based on disability reaches this threshold.<sup>118</sup> If following a consensus among scholars that interpretation of “universally recognized” that the ground in question should be recognized as impermissible in all countries and societies is too high, then an *eiusdem generis* interpretation supports a lower standard than *jus cogens*: that it must be recognized by customary international law.<sup>119</sup> Given the widespread ratification and accession of the CRPD,<sup>120</sup> the ground of disability may find favourable recognition in future judicial proceedings when analyzing the required state practice and *opinio juris*.<sup>121</sup> The phrase “under international law” could also spur debate on whether it is required to meet the customary international law threshold of examining state practice and *opinio juris*, instead of relying on the practice and interpretation of human rights treaty bodies, for example.<sup>122</sup> Using a lower standard than customary international law can further be supported by taking into account the Rome Statute drafting history, which reveals that the term “universally recognized under customary international law” was rejected because the standard was seen as too high.<sup>123</sup> Scholarship has also suggested that

114 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 285.

115 *Ibid.*

116 Valérie V. Suhr, “Persecution on ‘Other Grounds that Are Universally Recognized as Impermissible under International Law’”, in *Rainbow Jurisdiction at the International Criminal Court: Protection of Sexual and Gender Minorities under the Rome Statute*, Springer, Berlin, and T. M. C. Asser Press, The Hague, 2022, p. 287; Gideon J. Boas, “Crimes against Humanity”, in Gideon J. Boas et al. (eds), *International Criminal Law Practitioner Library: Elements of Crimes under International Law*, Vol. 2, Cambridge University Press, Cambridge, 2009, pp. 107–108; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge University Press, Cambridge, 2019, p. 253.

117 V. V. Suhr, above note 116, p. 288.

118 *Ibid.*

119 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, pp. 198–199; A Widney Brown and Laura Grenfell, “The International Crime of Gender-Based Persecution and the Taliban”, *Melbourne Journal of International Law*, Vol. 4, No. 2, 2003, p. 358.

120 *Ibid.*, p. 198 fn. 413.

121 V. V. Suhr, above note 116, pp. 289–290.

122 *Ibid.*, pp. 292–293.

123 *Ibid.*, p. 292.

disability may have already reached the threshold needed,<sup>124</sup> despite the lack of any judicial recognition of a prohibition under customary international law.

It is likely that a finding of crimes against humanity would emerge after many years of evidence collection and analysis, along with key evidence through which can be inferred discriminatory intent.<sup>125</sup> Due to the complexity of satisfying the requisite contextual elements for crimes against humanity, mainstreaming considerations for persons with disabilities is crucial from the start. This includes ensuring engagement with survivors and victims with disabilities, appropriate data tagging, and relevant search terms for non-testimonial evidence.<sup>126</sup>

*Murder/killing, torture, outrages upon personal dignity, attacks against civilians and civilian infrastructure, and forcible transfer or deportation.*<sup>127</sup> The crimes of murder/killing, torture, outrages upon personal dignity, attacks against civilians and civilian infrastructure, and forcible transfer or deportation are of note, as they are likely to have a more significant impact on persons with disabilities<sup>128</sup> and have all been recognized as crimes under customary international law.<sup>129</sup> Persons with disabilities have reportedly been the subject of targeted killings,<sup>130</sup> in addition to being more likely to be killed or injured due to inaccessible emergency information, evacuation procedures and shelters.<sup>131</sup> For allegations of torture,<sup>132</sup> torture as a war crime<sup>133</sup> provided an opportunity for increased recognition of SGBV, most notably rape as torture,<sup>134</sup> through inclusion of discrimination on any ground (including gender) as a prohibited purpose under customary international law.<sup>135</sup> The same legal methodology could be used to recognize acts amounting to torture committed against persons with disabilities, because they

124 W. Schabas, above note 119, p. 198; Evelyne Schmid, *Taking Economical, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, Cambridge, 2015, pp. 137–138.

125 ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment (Appeals Chamber), 17 September 2003, para. 184.

126 W. I. Pons *et al.*, above note 19, p. 91.

127 The author notes that whether the crimes fall under crimes against humanity or war crimes would depend on the fact patterns meeting the requisite contextual elements, and for war crimes, which acts are prohibited in international and non-international armed conflicts. Recognition of specific targeting of persons with disabilities due to their disability would then be covered under the crime against humanity of persecution, if applicable.

128 W. I. Pons *et al.*, above note 19, p. 91.

129 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 16 November 1998, paras 128–135; ICTY, *Prosecutor v. Kunarac*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, para. 480; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR73.3, Decision (Appeals Chamber), 11 March 2005, paras 29, 30; ICTY, *Krnojelac*, above note 125, paras 222–230.

130 W. I. Pons *et al.*, above note 19, pp. 62–64.

131 A. Priddy, above note 7, p. 24.

132 *Ibid.*, p. 92; W. I. Pons *et al.*, above note 19, p. 66.

133 Regarding the crime against humanity of torture, the author notes that no specific purpose may need to be proved for this crime, and thus discrimination on the ground of disability would not be applicable. ICC, above note 113, Art. 7(1)(f), in contrast to Arts 8(2)(a)(ii)-1(2) and 8(2)(c)(i)-4(2).

134 ICTY, *Prosecutor v. Delalić and Others*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 493; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 597.

135 ICTY, *Kunarac*, above note 129, para. 485.

are persons with disabilities, under the war crime of torture. Regarding outrages upon personal dignity, persons with disabilities may have particular gauges of personal dignity depending on their circumstances.<sup>136</sup> Outrages upon personal dignity was another crime through which accountability for SGBV crimes gained increasing recognition,<sup>137</sup> and thus might be an opportunity to highlight the experiences of, and pursue accountability for such acts that violate the dignity of, persons with disabilities.

Attacks on civilian infrastructure may also have a disproportionately high impact on persons with disabilities,<sup>138</sup> and this should be acknowledged through evidence presented and the participation of victims with disabilities, if this crime is pursued. Examples include attacks on or destruction of independent living facilities, rehabilitation centres, specialized schools, hospitals, utility services, public transportation, orphanages and other public institutions. 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.<sup>139</sup> As such, persons with disabilities should be included within information and evidence collection, in particular from victim and witness accounts, in order to fully capture the impact of these crimes on the affected communities.

Additionally, for persons with disabilities who do flee from conflict zones, displacement is a complicating factor that poses numerous threats to their physical and mental health and well-being, which can further aggravate existing disabilities or lead to secondary ones.<sup>140</sup> This could be acknowledged through the crimes of forcible transfer or deportation, depending on fulfilment of the required crime elements.

### *Crimes resulting in disability*

*Genocide.* While this may be the most novel suggested connection between crimes related to persons with disabilities and potential prosecutions, due to the potential application to multiple current contexts it will be initially explored. The crimes of causing serious bodily or mental harm, along with measures intended to prevent births among a protected national, ethnical, racial or religious group, in whole or in part, could provide accountability for crimes resulting in disability. This is considered in the context of the use of chemical weapons in particular, but could also include biological and nuclear weapons should their deeply unfortunate and abhorrent use become a fact of the future.

136 ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Judgment (Trial Chamber), 2 November 2001, para. 167: “subjective criteria must be taken into account, including a particular victim’s temperament or sensitivity”.

137 W. I. Pons *et al.*, above note 19, p. 82.

138 G. Quinn, above note 13, para. 53; W. I. Pons *et al.*, above note 19, p. 91.

139 W. I. Pons *et al.*, above note 19, pp. 62–70.

140 *Protecting the Rights of Persons with Disabilities*, above note 7, para. 2.

Those who survive a chemical weapon attack are left with disabilities that have yet to be formally recognized within an international criminal tribunal or court since Nuremberg. Due to the catastrophic impacts and clearly indiscriminate nature of such attacks, the potential to find evidence of genocidal intent on perpetrators could be greater.<sup>141</sup> As studies of victim populations and results of investigations emerge,<sup>142</sup> experiences of the resulting disabilities can be included in the accountability narrative regarding potential serious bodily or mental harm,<sup>143</sup> including reproductive challenges such as infertility, miscarriages and birth defects, which could potentially be linked to measures intended to prevent births if such intention can be shown.<sup>144</sup>

*Mutilation.* The war crime of mutilation can be a non-controversial means to pursue accountability for acts that have resulted in physical disability. As a crime under customary international law,<sup>145</sup> it covers permanently disfiguring the person or persons, including removal or permanent disabling of an organ or appendage that is not justified by the medical, dental or hospital treatment of the person concerned nor carried out in the person's interests.<sup>146</sup> Factual findings in previous international jurisprudence have included the severing of limbs.<sup>147</sup>

*Indiscriminate weapons and weapons used indiscriminately.* In addition to the specific considerations regarding the use of chemical or biological weapons, any use of indiscriminate weapons or indiscriminate use of conventional weapons that results in a disability – for example, through cluster munitions, barrel bombs or landmines<sup>148</sup> – should also be prioritized to recognize the high number of resulting physical disabilities.<sup>149</sup> In terms of assessing whether an attack was

141 ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment (Trial Chamber), 12 December 2012, paras 1170–1171; Iraqi High Tribunal, *Al Anfal Special Verdict*, Second Criminal Court, Case 1/2nd Criminal/2006, 2007, pp. 496, 853, translation available at: [www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal\\_verdict.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal_verdict.pdf).

142 UNICEF, above note 12, p. 10; Motjaba Satkin *et al.*, “The Quality of Life of Mustard Gas Victims: A Systematic Review”, *Tanaffos*, Vol. 16, No. 2, 2017, pp. 116, 121–123.

143 ICTR, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgment (Appeals Chamber), 12 March 2008, para. 46.

144 ICTR, *Akayesu*, above note 134, paras 507, 508; District Court of Jerusalem, *Attorney-General of Israel v. Adolf Eichmann*, Judgment, 36 ILR 5, 1968, para. 159.

145 Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 179; ICTY, *Tadić*, above note 114, para. 285 (as part of common Article 3 violations).

146 SCSL, *The Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, 20 June 2007, para. 724; SCSL, *Sesay*, above note 145, para.180(i); ICC, above note 113, Arts 8(2)(b)(x)-1(1), 8(2)(c)(i)-2(1), 8(2)(e)(xi)-1(1).

147 SCSL, *Brima*, above note 146, para. 1213; SCSL, *Sesay*, above note 145, para. 1208.

148 The author notes the lack of an established universal regime regarding the ban of anti-personnel landmines: see Peter Malanczuk, “The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, pp. 84–87.

149 International Committee of the Red Cross, “Anti-Personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines, Commissioned by the ICRC, March 1996”, in Louis Maresca and Stuart Maslen (eds), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999*, Cambridge University Press, Cambridge, 2000, p. 457; UNICEF, above note 12, p. 11; Naomi Hart *et al.*, “Making Every Life Count:

launched in an indiscriminate manner, the analysis should focus on the manner and context in which the attack was launched and whether it was likely directed at a specific military target, whether the weapon was capable of being sufficiently guided by the launch method (e.g., an unguided bomb from a fast and/or high-flying aircraft), and whether the weapon’s effects would be sufficiently limited to disabling the military objective.<sup>150</sup>

*Attempted crimes resulting in disability.* Attempted crimes that could likely result in both physical and mental disabilities should also be noted, in particular murder/killing, torture and extermination.

### *Additional note on sentencing*

Personal characteristics have been used as an aggravating factor in sentencing,<sup>151</sup> and this is now codified in Rule 145 of the ICC *Rules of Procedure and Evidence*.<sup>152</sup> It has been confirmed that vulnerabilities cannot be used in both establishing the material elements of a crime and sentencing; however, if none of the above crimes are pursued, introducing disability as an aggravating factor in sentencing could have positive implications for the development of the law, as it has with SGBV crimes.<sup>153</sup>

## **Case study: ISIL and persons with disabilities in Iraq**

The following case study can illustrate the application of the CRPD principles within the intelligence analysis cycle, with the following information to be thought of as initial leads identified. The example was selected due to its potentially unique nature and relevance to current accountability processes. To preserve the confidentiality requirements of ongoing investigations, the example utilizes only open-source allegations and does not reflect any past or current investigative work done.

Official statistics indicate that there are more than 1.3 million disabled people in Iraq (3% of the population); however, campaigners believe the real number is three times that.<sup>154</sup> While the overall coverage of the impact of the Islamic State in Iraq and the Levant (ISIL) within Iraq on populations with pre-

Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts”, *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 168.

150 ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgment (Trial Chamber), 12 June 2007, paras 462–463; Office of the UN High Commissioner for Human Rights, “Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law”, 30 March 2016, p. 6.

151 ICTY, *Kunarac*, above note 129, para. 874; ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 355.

152 ICC, *Rules of Procedure and Evidence*, 2013, Rule 145.

153 W. I. Pons *et al.*, above note 19, pp. 83–84.

154 Raya Al-Jadir, “I Was Lucky I Escaped Iraq When I Did – to Be Disabled There Is to Live a Nightmare”, *The Independent*, 4 December 2018, available at: [www.independent.co.uk/voices/iraq-disability-war-corruption-public-transport-un-convention-middle-east-a8666281.html](http://www.independent.co.uk/voices/iraq-disability-war-corruption-public-transport-un-convention-middle-east-a8666281.html).

existing disabilities and those who are disabled due to conflict-related events is sparse, there are several notable open-source allegations regarding ISIL's conduct in Iraq and persons with disabilities.

Open-source reporting included allegations that the Shar'ia Board of ISIL issued an oral fatwa to its members authorizing them to kill newborn babies with Down's syndrome and congenital deformities.<sup>155</sup> In 2016, allegedly more than thirty-eight children born with Down's syndrome and congenital deformities, aged between one week and three months, were killed by lethal injection or suffocation, including victims in Mosul.<sup>156</sup> In October 2016, ISIL members reportedly killed a physically disabled girl and those accompanying her for failing to keep up with a group forcibly displaced from Rufeila.<sup>157</sup> Regarding civilian infrastructure, a school for people with autism and Down's syndrome in Mosul was destroyed after ISIL entered the city, leaving many children stuck at home with no formal education.<sup>158</sup> There are additionally several open-source allegations of ISIL's use of chemical weapons against Iraqis, most notably mustard gas.<sup>159</sup> While the short- and long-term effects of these attacks on victims are not widely reported, longer-term effects may mirror past chemical weapons' reported impacts, which include children having a higher risk of a range of congenital disorders, acute neurological and mental health effects, and a range of respiratory and initial immunological dysfunctions and cardiovascular complications for further study.<sup>160</sup>

The operationalization of investigation measures within the CRPD framework in order to best promote autonomy, non-discrimination and

155 Emma Glanfield, "How Much More Depraved can ISIS Get? Group's Sharia Judges Order Children with Down Syndrome and Other Disabilities to Be Killed in Chilling Echo of the Nazis", *Mail Online*, 14 December 2015, available at: [www.dailymail.co.uk/news/article-3358840/How-depraved-ISIS-Group-s-Sharia-judges-order-children-s-syndrome-disabilities-killed-chilling-echo-nazis.html](http://www.dailymail.co.uk/news/article-3358840/How-depraved-ISIS-Group-s-Sharia-judges-order-children-s-syndrome-disabilities-killed-chilling-echo-nazis.html); Debra Killalea, "ISIS Wants to Kill Kids with Down Syndrome, Mosul Eye Says", *News.com.au*, 15 December 2015, available at: <https://tinyurl.com/2p9swhybr>; David K. Li, "ISIS Is Slaughtering Babies Born with Disabilities", *New York Post*, 14 December 2015, available at: <https://nypost.com/2015/12/14/isis-is-slaughtering-babies-born-with-disabilities/>. All of these articles reference Mosul Eye, "ISIL Issues 'Fatwa' to Exterminate Children with Down's Syndrome", *Facebook*, 13 December 2015, available at: [www.facebook.com/MosulEye/videos/829441013844069/](http://www.facebook.com/MosulEye/videos/829441013844069/).

156 E. Glanfield, above note 155; D. Killalea, above note 155; D. K. Li, above note 155; Mosul Eye, above note 155.

157 Stephen Jones, "ISIS Terrorists Kill Disabled Girl 'for Failing to Keep Up' as She's Marched Out of Village Near Mosul", *The Mirror*, 26 October 2016, available at: [www.mirror.co.uk/news/world-news/isis-terrorists-kill-disabled-girl-9128988](http://www.mirror.co.uk/news/world-news/isis-terrorists-kill-disabled-girl-9128988).

158 R. Al-Jadir, above note 154.

159 Qassim Abdul-Zahra, "ISIS Is Accused of Chemical Attack in Iraq that Wounds Hundreds, Kills Child", *Washington Post*, 12 March 2016, available at: <https://tinyurl.com/4evtcnv6>; Nafiseh Kohnavard, "Iraqi Town Taza 'Hit in IS Chemical Attack' Appeals for Help", *BBC News*, 25 March 2016, available at: [www.bbc.co.uk/news/world-middle-east-35898990](http://www.bbc.co.uk/news/world-middle-east-35898990).

160 Hassan Abolghasmi *et al.*, "Childhood Physical Abnormalities Following Paternal Exposure to Sulfur Mustard Gas in Iran: A Case-Control Study," *Conflict and Health*, Vol. 4, No. 13, 2010, p. 5; Samira Alaani *et al.*, "Uranium and Other Contaminants in Hair from the Parents of Children with Congenital Anomalies in Fallujah, Iraq", *Conflict and Health*, Vol. 5, No. 1, 2011, p. 13; Mahdi Balali-Moodin, "Early and Delayed Effects of Mustard in Iranian Veterans after the Iraq-Iran Conflict", in Ramesh C. Gupta *et al.* (eds), *Handbook of Toxicology of Chemical Warfare Agents*, Elsevier Science & Technology, Saint Louis, MI, 2015, p. 45.

accessibility would facilitate greater inclusion of persons with disabilities and recognition of these incidents within accountability efforts. Regarding the planning and direction phase of the investigation, a mechanism-wide strategy or micro-level investigation plan could assist in ensuring accessibility and non-discrimination for persons with disabilities, in particular, and emphasize the need to promote autonomy. Regarding collection, conscious searching for open-source leads involving persons with disabilities could uncover these reports, and if treated as initial leads, they could further inform the investigation plan for validation, prioritization of the affected area, and the types of acts to include in screening or interview plans for potential witnesses. Staff with expertise in disability, ideally alongside staff from the affected locations, could then assist in developing appropriate questions to ask and translation considerations. Searches of any already collated evidence databases can be run to see if any similar incidents have been reported, along with information from any collaborating humanitarian, human rights or disability-focused agencies. This can be in addition to trying to achieve a general increase in outreach and searches for persons with disabilities, across investigative activities. Donors can further assist by noting such efforts with specific measurable indicators and dedicated budget lines for reasonable accommodation measures, should they be needed further on in the investigation, and specific institutional reporting could occur, much like with SGBV crimes and crimes against children. For collation, tags that would allow patterns of disabled victims to emerge in analytical work could be implemented to facilitate analysis products such as thematic intelligence briefings, including geospatial intelligence or network analysis products that can feed back into the intelligence analysis cycle for future case-building. The crime base discussed above can serve as an example of crimes widely applicable in many jurisdictions due to their customary international law status, for consideration as a legal foothold. As a start, this could begin progress towards the full inclusion and participation of persons with disabilities, promoting their autonomy, ensuring non-discrimination and providing accessibility to the investigation process.

## Conclusion

Consistent implementation of and building upon the recommendations laid out in this paper can increase the realization of the CRPD principles of autonomy, non-discrimination and accessibility within accountability mechanisms as a critical start towards closing the gap in impunity for crimes against persons with disabilities, along with increased recognition for crimes resulting in disability. Most importantly, persons with disabilities should have a prioritized space within accountability mechanisms as survivors, victims and other witnesses, and as staff, in order to realize an inclusive and participatory accountability process, working to ensure that persons with disabilities are not the “forgotten victims of armed conflict”.