

Inaccessible justice: The violation of Article 13 of the CRPD and the ICC’s role in filling the accountability gap

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Abstract

This article examines how women and girls with disabilities who are survivors of sexual and gender-based violence crimes have a right to access justice under Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). It explains how the right to access justice requires States to actively address gender and disability stigmas and discriminations that create barriers within justice systems, and how the failure to do so violates the CRPD. Further, the author argues that when a State fails to eliminate such barriers post-armed conflict, the International Criminal Court may then exercise jurisdiction over these crimes in order to raise awareness of crimes against women and girls with disabilities, strengthen domestic justice systems by pressuring States to investigate and prosecute these crimes, and act as a court of last resort for crimes against women and girls with disabilities.

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Introduction

As a result of intersectional discrimination between gender and disability, women and girls with disabilities experience higher rates of sexual and gender-based violence (SGBV)¹ than their non-disabled peers, and these disparities only increase during times of armed conflict and humanitarian crises.² Under Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD), States have a duty to ensure effective access to justice for rights violations and crimes that occur during peacetime and armed conflicts.³ Yet, States consistently fail to remove barriers that limit and deny access to justice for women and girls with disabilities. Thus, when a State fails to remove these institutional barriers from all stages of the criminal justice system, it violates Article 13 of the CRPD. However, for women and girls with disabilities, these domestic denials in access to justice do not necessarily mean that their perpetrators may carry on with impunity, as the International Criminal Court (ICC) can take action when a State fails to.⁴ Despite the ability of the ICC to exercise jurisdiction in many of these cases, it has failed to do so for crimes against women and girls with disabilities, thereby perpetuating a global legal system that denies justice to these individuals. The lack of inclusion of SGBV crimes against women and girls with disabilities at the

- 1 SGBV crimes include both (1) sexual crimes and (2) gender-based crimes. This paper uses sexual and gender-based crimes as defined in International Criminal Court (ICC), *Policy Paper on Sexual and Gender-Based Crimes*, 20 June 2014.
- 2 United Nations Population Fund (UNFPA), “Five Things You Didn’t Know about Disability and Sexual Violence”, 30 October 2018, available at: <https://tinyurl.com/33t8jef7> (all internet references were accessed in September 2022). See also UNFPA, *Young Persons with Disabilities: Global Study on Ending Gender-Based Violence, and Realising Sexual and Reproductive Health and Rights*, July 2018. While SGBV can also impact boys and men with disabilities, this article focuses solely on SGBV against women and girls with disabilities due to the distinguishing intent behind SGBV crimes and the societal contexts within which these crimes are committed. Crimes against women are often committed to enforce a societal structure in which women are inferior and subordinate to men, whereas SGBV against men is often used to punish, oppress, intimidate and degrade an individual’s masculinity. While these crimes are committed in order to disempower all targeted individuals, they occur within different societal structures and gender roles, which can impact how accountability for these crimes is ensured. See ADD International, *Disability and Gender-Based Violence: ADD International’s Approach: A Learning Paper*, available at: https://add.org.uk/sites/default/files/Gender_Based_Violence_Learning_Paper.pdf (discussing SGBV violence against men and boys with disabilities and the need for additional data and research within this area); Plan International, “Fact Sheet: Violence against Women and Girls with Disabilities”, February 2013.
- 3 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), Art. 13.
- 4 While violations of Article 13 of the CRPD can also be addressed through other mechanisms such as national, regional and international human rights bodies, this paper focuses solely on how individual criminal accountability at the ICC can ensure justice when domestic courts are unable to do so for SGBV crimes against women and girls with disabilities.

ICC is partially attributable to the historical development of international criminal law (ICL) as a body of law that has excluded accountability for crimes against persons with disabilities more broadly.

This article argues that the failure of States to prosecute SGBV crimes against women and girls with disabilities violates the right to access justice under the CRPD, and that the ICC should prosecute where the State fails to ensure accountability for crimes against women and girls with disabilities. Thus, the second part of the article argues that the failure to prosecute SGBV crimes against women and girls with disabilities is a violation of Article 13 of the CRPD. The third part reviews the history of the prosecution of international crimes against persons with disabilities and of SGBV crimes from the Nuremberg Tribunals to the ICC. The fourth part reviews SGBV crimes against women and girls with disabilities in States where the ICC is currently active and elaborates on how the failure of these State courts to prosecute creates grounds for the ICC's jurisdiction over these crimes; it further argues that the ICC should exercise its jurisdiction in these cases. Lastly, the fifth part provides recommendations for the ICC on improving inclusion of persons with disabilities within the Court, ultimately to improve accountability for SGBV crimes against women and girls with disabilities.

How the failure to prosecute crimes against women and girls with disabilities violates Article 13 of the CRPD

Access to justice is essential to protecting the rights of women and girls with disabilities, ensuring that perpetrators of crimes against women and girls with disabilities are held accountable, and deterring future crimes against women and girls with disabilities. However, due to barriers within justice systems, women and girls with disabilities often do not have the full benefit of this right. Thus, the below section explains the prevalence of SGBV crimes against women and girls with disabilities, and how the failure to prosecute these crimes due to institutional barriers violates Article 13 of the CRPD.

The global prevalence of crimes against women and girls with disabilities

Women and girls with disabilities are more likely to experience violence⁵ and increased rates of SGBV, due to a variety of factors such as early discrimination against girls with disabilities,⁶ lack of reproductive health and sexual education, and dual disability- and gender-based discriminations.⁷ During armed conflicts,

5 See, generally, World Bank, *Brief on Violence against Women and Girls with Disabilities*, December 2019, p. 6 (finding that girls and young women with disabilities are nearly ten times more likely to experience violence in their lifetime compared to their non-disabled peers).

6 Early discrimination against girls with disabilities includes being shunned from society due to social stigma surrounding disability, and subsequent exclusions from education and social services. *Ibid.*

7 *Ibid.*, p. 6; United Nations Department of Economic and Social Affairs, "Women and Girls with Disabilities: Using Both the Gender and Disability Lens", available at: www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html.

these discriminatory attitudes and barriers can often be exacerbated within humanitarian responses, resulting in women and girls with disabilities experiencing heightened risks for victimization.⁸ Armed conflicts can also result in the loss of community, familial support, education, and health-care services, which can contribute to increased risks for SGBV against women and girls with disabilities.⁹ For example, due to the fast-moving nature of conflicts, many women may be forced to leave their wheelchairs, assistive aids, medications and/or prosthetics behind while fleeing from their homes.¹⁰ As a result of loss of access to mobility tools and familial support, these individuals are “more vulnerable to physical, psychological, sexual or financial violence, neglect, entrapment, and coercion”.¹¹ The loss of these accessibility tools can also increase mobility barriers for women and girls with disabilities, resulting in them having less access to reporting and justice mechanisms.¹²

In addition to the complications brought about by armed conflicts, regional stigmas and discriminations can also place women and girls with disabilities at the centre of harmful folklore, thereby increasing their risk of SGBV. For example, one common folk myth alleges that if a person with HIV has sex with a virgin, their HIV will be cured.¹³ Women and girls with disabilities are often seen by societies as asexual, and as this presumption assumes that they are sexually inactive and therefore virgins, it places them at higher risk of being targets for sexual violence under the HIV cure folklore.¹⁴ Other forms of discrimination and stigma surrounding gender and disability can originate as early as birth, making young girls targets for gender-based violence.¹⁵ For instance, the United Nations (UN) Economic and Social Commission for Asia and the Pacific has reported that it is not uncommon for children born with congenital disabilities to be killed or left to die after birth, and this practice is more common for girls with disabilities.¹⁶

8 Stephanie Ortoleva, “Accounting for Women and Girls with Disabilities in Conflict and Crisis Situations: Recommendations for Action and Implementation”, *Human Rights Magazine*, Vol. 42, No. 4, 2017, available at: www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/disability-rights-under-siege/accounting-for-women-and-girls-with-disabilities-in-conflict-and/.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.* (noting that even when displaced women and girls with disabilities can reach refugee camps, these camps are often inaccessible and may require some women and girls with disabilities to rely on others, increasing their risk of experiencing gender-based violence). See World Bank, above note 5, p. 12.

13 UN, *Toolkit on Disability for Africa: Culture, Beliefs, and Disability*, Division for Social Policy Development and Department of Economic and Social Affairs, 18 September 2016, pp. 13–15 (identifying additional misconceptions surrounding disability such as cultural beliefs that a child’s disability was caused by a mother’s sin or promiscuity, ancestral curse, or demonic possession). See also Charlotte Baker and Elvis Imafidon, “Traditional Beliefs Inform Attitudes on Disability in Africa. Why It Matters”, *The Conversation*, 15 June 2020, available at: <https://theconversation.com/traditional-beliefs-inform-attitudes-to-disability-in-africa-why-it-matters-138558> (discussing beliefs about disability and traditional animisms, such as that bad deeds caused a child to have a disability).

14 Nora Ellen Groce and Reshma Trasi, “Rape of Individuals with Disability: AIDS and the Folk Belief of Virgin Cleansing”, *The Lancet*, Vol. 363, No. 9422, 2004; World Bank, above note 5, p. 8.

15 *Hidden Sisters: Women and Girls with Disabilities in Asia and Pacific Region*, UN Doc. ST/ESCAP/1548, 1995.

16 *Ibid.*, p. 1.

Laws can also formalize societal stigmas and discrimination against women and girls with disabilities, increasing their risk of experiencing legally permissible sexual violence.¹⁷ For example, in several European countries such as Sweden, Norway, Denmark, Finland, Switzerland and Iceland, the crime of forced sterilization was still a legal practice used against women and girls with disabilities until the 1970s.¹⁸ Under these programmes, forced sterilization was promoted under the false stereotype that women with disabilities could not be mothers; therefore, it was best for these women to be sterilized, considering their high rates of abuse and potential for future pregnancies as a result of that abuse.¹⁹ While these programmes justified their operation under paternalistic concerns for women and girls with disabilities, in actuality, they punished women and girls with disabilities for being survivors of sexual assault, rather than focusing on holding perpetrators accountable and addressing why these women and girls were at a higher risk of experiencing this type of violence.²⁰

Overall, across the globe women and girls with disabilities experience SGBV crimes from childhood through adulthood – thus, under international human rights law, a State is obligated to ensure access to justice and accountability for these crimes and rights violations. Moreover, as the perpetration of these crimes increases with armed conflicts, the responsibility of prosecuting these crimes can extend beyond the State and to international criminal courts under ICL.

Article 13: The right to access justice under the CRPD

In December 2006, the CRPD was adopted and codified as the first human rights treaty on the rights of persons with disabilities. The CRPD is historic as a human rights treaty for its recognition that persons with disabilities are individuals with rights who have autonomy in decision-making and as members of society. Notably, Article 13 of the CRPD recognizes the right to access justice. The inclusion of the right to access justice under the CRPD is important, as this right

17 European Parliament Directorate-General for Internal Policies, *Discrimination Generated by the Intersection of Gender and Disability*, May 2013, p. 56. See, generally, European Economic and Social Committee, “Europe Must Do More to Protect Women with Disabilities”, 7 July 2018, available at: www.esc.europa.eu/en/news-media/news/europe-must-do-more-protect-women-disabilities.

18 European Disability Forum and Fundación Cermi Mujeres, *Ending Forced Sterilization of Women and Girls with Disabilities*, May 2016, p. 13.

19 *Ibid.*, pp. 20–27. Post-Second World War, both the United States and Canada also had forced sterilization laws: see *ibid.*, p. 26. See also Linda A. Thompson, “A New Report Highlights the Scandal of the Forced Sterilization of Women in Europe”, *Equal Times*, 8 May 2018, available at: www.equaltimes.org/a-new-report-highlights-the-#YEUX211Kg6F (reporting that Spain, the United Kingdom and Croatia all still allow the use of forced sterilization with court orders in certain circumstances).

20 Despacho de la Tercera Fiscalía Superior Penal De Lima Señor Fiscal Luis Landa Burgos, *Amicus Curiae Brief on the War Crimes Research Office at American University Washington College of Law*, 2 November 2017; see also William Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022, p. 58 (discussing crimes against persons with disabilities as crimes against humanity).

is a fundamental pillar of international law and is the means by which all other human rights can be protected and upheld.²¹

As such, Article 13 requires State Parties to the CRPD to “ensure effective access to justice for persons with disabilities on an equal basis with others”. Under Article 13, to ensure access to justice, States must provide procedural and age-appropriate accommodations to ensure that persons with disabilities can act as participants in investigations and legal proceedings. This obligation also requires States to make procedural accommodations and ensure that staff in the justice system are effectively trained on ensuring access to justice for persons with disabilities. The UN Office of the High Commissioner for Human Rights (UN Human Rights) has elaborated that access to justice under Article 13 is broader than the notions of fair trial and requires States to ensure that persons with disabilities can participate at all stages of the legal system; this in turn requires States to *actively remove* legal and institutional barriers to justice.²²

UN Human Rights has divided the right to access justice into three categories: (1) equality before the courts and the right to a fair trial; (2) the right to an effective remedy; and (3) participation in the administration of justice.²³ Under the first category of equality before the courts and fair trial rights, States must ensure that proceedings are physically accessible; information is presented in a manner which allows persons with disabilities to understand and defend their rights; procedural and age-appropriate accommodations are provided; the right to decision-making and legal capacity are protected; the presumption of innocence is maintained; and legal aid is provided for those who are unable to afford counsel.²⁴ Under the second category, the right to an effective remedy includes the duty to investigate and prosecute if sufficient evidence of a crime is found; the right to redress, reparations and remedies for human rights violations; and restoration of the individuals dignity.²⁵ Lastly, the right to participate in the administration of justice includes the ability to participate as victim-survivors, defendants, witnesses, experts, jurors, judges and lawyers, as well as the obligation for States to actively train administration of justice officials on attitudes and institutional barriers that impair access to justice for persons with disabilities.²⁶ The requirement to train individuals who help administer justice is critical to ensuring that once legal barriers have been removed by the State through the operation of law or procedural amendments, the individuals in the justice system applying the law do not create new barriers based on old discriminatory attitudes.²⁷

While UN Human Rights' guidance frames the right to access justice in terms of institutional reforms such as ensuring access to the courts,

21 *Right to Access Justice under Article 13 of the Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/37/25, 27 December 2017, para. 3.

22 *Ibid.*, p. 5.

23 *Ibid.*, pp. 10–14.

24 *Ibid.*, pp. 10–11.

25 *Ibid.*

26 *Ibid.*, pp. 14–15.

27 *Ibid.*

accommodations, and participation for persons with disabilities, application of this right must not omit the requirement that States demonstrate that they are ensuring individual criminal responsibility for crimes against persons with disabilities, and particularly women and girls with disabilities. Interpreting Article 13 to require individual accountability is consistent with the Committee on the Rights of Persons with Disabilities' (the Committee) reporting on States' compliance, UN Human Rights' illustrative list for ensuring access to justice, and the *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (International Principles and Guidelines). For instance, in its review of Venezuela's compliance with Article 13, the Committee requested that Venezuela explain

how the State party ensures that all violations of the rights of persons with disabilities, particularly those of women and children, committed in the context of the emergency situation by State and non-State actors, most notably acts of sexual violence and violations of social and cultural rights, are duly investigated, *prosecuted and punished* by means of legal proceedings against the perpetrators.²⁸

This request demonstrates that in the Committee's considerations of access to justice, actual perpetrator accountability for victim-survivors with disabilities is within the mandate of Article 13.

This interpretation is also supported by UN Human Rights' illustrative list, which recognizes that ensuring access to justice requires States not only to reform justice systems but also to ensure that this reform creates improved prosecutorial outcomes.²⁹ Specifically, under this list, when States are assessing their compliance with the access to justice requirement, they are urged to consider the "number of complaints submitted to the justice system by person with disabilities, that have been investigated and adjudicated; [and the] proportion of those found in favour of the complainant".³⁰ Again, this recognition identifies that States must ensure that persons with disabilities can feasibly submit complaints to the justice system (i.e., recognizing an outcome indicator for ensuring an accessible justice systems), *and* it recognizes that the State must consider how those claims are adjudicated in favour of or against the complainant (i.e., ensuring actual perpetrator accountability in a certain number of cases).

Lastly, Principle 8 of the International Principles and Guidelines states that persons with disabilities have the right to "have their complaints investigated and be afforded effective remedies".³¹ This principle specifically recognizes that in criminal cases, individuals who abuse or otherwise mistreat persons with disabilities should

28 *List of Issues in Relation to the Initial Report of the Bolivarian Republic of Venezuela*, UN Doc. CRPD/C/ VEN/Q/1, 29 October 2019, para. 13(a) (emphasis added).

29 EU, "Article 13: List of Illustrative Indicators on Access to Justice", 2020.

30 *Ibid.*, para. 13.18.

31 *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, August 2020 (International Principles and Guidelines), Principle 8.

be *prosecuted, convicted, and subject to appropriate punishments*. This principle reaffirms that ensuring individual perpetrator accountability is part of the right to access justice under international law. Therefore, the right to access justice must be understood to require States to ensure that it is possible to file complaints with the justice system and that individual perpetrators can be held accountable for crimes committed against persons with disabilities, particularly women and girls with disabilities.

How the right to access justice for women and girls with disabilities is violated

In its Communication No. 12/2013, the Committee on the Rights of Persons with Disabilities recognized that for there to be a violation of a protected right under the CRPD, there must be an omission by the State Party concerning the individual's enjoyment of that right.³² Thus, under Article 13 of the CRPD, all signatory States must ensure that victim-survivors with disabilities of all crimes, including SGBV crimes, have access to courts and accountability for the crimes committed against them, and therefore, when a State fails to *actively remove* barriers that limit access to courts and fails to hold individual perpetrators accountable, the State violates the individual's right to access justice.³³ For women and girls with disabilities, States consistently violate their right to access justice through institutional legal barriers which formalize and perpetuate disability and gender discrimination against persons with disabilities, and through physical and procedural access barriers; these combined barriers result in courts failing to ensure that individual perpetrators of SGBV crimes against women and girls with disabilities are held accountable.³⁴

Legal systems that perpetuate inappropriate stigmas and discriminatory attitudes about women and girls with disabilities create institutional barriers that deny them access to justice. For example, stereotypes that infantilize women with disabilities often perpetuate SGBV because laws can improperly permit the deprivation of the rights of women with disabilities, such as the right to bodily autonomy.³⁵ By permitting violations of the rights of women with disabilities to occur under a State's law, States are essentially removing the ability of these individuals to receive any justice for these violations, as any actor will have the complete defence that their conduct was legal. Moreover, as the Council of Europe reported in 2018, the deprivation of legal capacity of persons with disabilities is also a substantial barrier to justice, as without equality before the

32 Committee on the Rights of Persons with Disabilities, Communication No. 12/2013, 17 April 2015.

33 *Right to Access Justice under Article 13*, above note 21; Stephanie Ortoleva, "Women with Disabilities and the Justice System: Rights without Remedies", World Justice Project, 20 February 2013, available at: <https://worldjusticeproject.org/news/women-disabilities-and-justice-system-rights-without-remedies>.

34 S. Ortoleva, above note 33.

35 Women Enabled International, *Comments for Report on Access to Justice for Persons with Disabilities*, Washington, DC, 1 May 2017. See also *Right to Access Justice under Article 13*, above note 21.

law, persons with disabilities are essentially barred from having their rights recognized, upheld and protected.³⁶

Even when a State's laws prohibit the conduct that violates women's rights, legal systems may operate with formalized stigmas that make it difficult or impossible for women with disabilities to access justice through a criminal justice system. For instance, in cases of sexual and domestic violence, a prosecution's case often relies on the witness testimony of the victim-survivor.³⁷ In sexual and domestic violence cases involving women with disabilities, this can be made difficult as women with disabilities can often be deemed to lack legal capacity or be considered unreliable solely due to their disability.³⁸ Furthermore, laws that are intended to protect women against sexual and other forms of violence can also often fail to address the unique forms of violence experienced by women with disabilities, and can even provide excuses for such crimes. For example, in the United Kingdom, the law prohibits domestic violence that is controlling or coercive, but creates an exception to the crime under the "caregiver defence".³⁹ Under this defence, a person is not considered to be acting coercively or in a controlling manner if they are acting in the best interest of a person with a disability.⁴⁰ For women and girls with disabilities who may rely on a partner for caregiving support, this exception creates an additional hurdle for them as they must affirmatively demonstrate that they have autonomy over themselves.⁴¹

In addition to laws that interfere with women with disabilities being able to access justice, some women may also lack awareness of their legal rights and how to engage with justice systems.⁴² For example, a 2014 study by Leeds University found that many deaf women surveyed were unfamiliar with their formal rights under criminal law.⁴³ Even when women with disabilities are aware of their rights and are able to advocate for accountability, reporting mechanisms and court systems may not be adequately prepared to meet their needs.⁴⁴ In particular, women with disabilities may experience physical accessibility barriers such as inaccessible courtrooms or lack of transportation from rural communities to courthouses.⁴⁵

36 Council of Europe, *Implementation of the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006-2015*, 2015, p. 56.

37 Women Enabled International, above note 35, p. 2.

38 *Ibid.* (reporting on practices in Ghana and India).

39 *Ibid.*, p. 3; Crown Prosecution Service, "The Code for Crown Prosecutors: Controlling or Coercive Behaviour in an Intimate or Family Relationship", 30 June 2017, available at: www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship.

40 Crown Prosecution Service, above note 39.

41 Women Enabled International, above note 35.

42 Women Enabled International, above note 35, p.4.

43 University of Leeds *et al.*, *Access to Specialised Victim Support Services for Women with Disabilities Who Have Experienced Violence: National Report, United Kingdom of Great Britain and Northern Ireland*, June 2014, p. 24.

44 See also Center for American Progress, *Transforming the Culture of Power*, 31 October 2019, pp. 21–24 (discussing how resources in the United States for college campus sexual assault are not in accessible formats).

45 *Ibid.*; see also World Federation of the Deaf and World Association of Sign Language Interpreters, "Contribution of OHCHR study on article 13 of the Convention on the Rights of Persons with Disabilities", available at: www.ohchr.org/sites/default/files/Documents/Issues/Disability/RightAccessJusticeArticle13/CSO/WFD-WASLI.pdf.

These compounding layers of obstruction result in women and girls with disabilities receiving limited justice for the crimes committed against them, with one study in the United States finding that broadly, only 22% of perpetrators of crimes against persons with disabilities were charged, and only 9% of perpetrators were convicted.⁴⁶ Ultimately, this results in women and girls with disabilities experiencing multilayered institutional barriers based on societal stigmas and discrimination that impair their ability to report crimes, participate in proceedings and ultimately have their perpetrators held accountable under their national criminal justice systems.⁴⁷

The existence of these systematic and institutional barriers fails to meet the requirements of Article 13, according to which CRPD States Parties are obligated to ensure access to justice by *actively removing* barriers that impair access justice. As such, the failure by States to remove and revise such institutional and legal barriers for women and girls with disabilities is a violation of Article 13 of the CRPD.

Crimes against people with disabilities: From Nuremberg to the ICC

Before turning to the current role that the ICC could play in ensuring justice for women and girls with disabilities under ICL, it is essential to understand how the creation and evolution of ICL as a field has omitted prosecuting crimes against persons with disabilities, and how this may impact the ability of the Court to ensure accountability for these victim-survivors in the future.

The Nuremberg Tribunals

The post-Second World War International Military Tribunal (Nuremberg Tribunal) prosecutions are praised for establishing the first international court to recognize international norms during armed conflict and the violations of such norms through crimes against peace, war crimes and crimes against humanity.⁴⁸ While the Nuremberg Tribunal was intended to ensure individual accountability for the most egregious actors, it was also intended to educate the German people on the full extent of the Nazi atrocities.⁴⁹ For persons with disabilities who were victims

46 Nancy Smith, Sandra Harrell and Amy Judy, *How Safe are Americans with Disabilities?*, Vera Institute for Justice, April 2017, p. 20.

47 See also UN, above note 13, p. 15 (noting regional barriers in Africa such as attitudinal barriers in police, lawyers, and judges resulting in persons with disabilities seeming less credible as victims and witnesses; lack of knowledge on the right to report crimes; physical barriers at police stations and courtrooms; and lack of victim advocates at health-care facilities where evidence may be collected); European Parliament Directorate-General for Internal Policies, above note 17, p. 56 (the European Economic and Social Committee acknowledged that it and its member States lacked strong institutions to protect the human rights of women and girls with disabilities).

48 Department of State, "The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)", Office of the Historian, available at: <https://history.state.gov/milestones/1945-1952/nuremberg>.

49 National WWII Museum, "The Nuremberg Trial and Its Legacy", 17 November 2020, available at: www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy.

of the Nazis' crimes, the Tribunal failed to provide both justice and acknowledgment of the crimes committed against them. For instance, during the war, the Nazis forcibly sterilized persons with disabilities and implemented a programme known as T4. The T4 programme authorized "mercy death" killings for persons with disabilities, resulting in the murder of nearly 70,000 Austrian and German persons with disabilities by poisonous gas, as well as killing thousands of children with disabilities through morphine injections.⁵⁰ This programme also broadly mandated physicians to kill anyone who had a "life unworthy of living", which resulted in the murder of an estimated 275,000 persons with disabilities.⁵¹

During the Nuremberg Tribunal, the doctors who perpetrated the killings of adults and children with disabilities were prosecuted in the case of *United States v. Karl Brandt et al.*⁵² A total of twelve doctors were charged with crimes against humanity and war crimes for their conduct during the Second World War.⁵³ Notably, the third charge, which was classified as a crime against humanity, related to the doctors' participation in the "euthanasia" programme, though it did not specifically recognize that this programme was used to target children and adults with disabilities.⁵⁴ This case resulted in both death sentences and decades-long imprisonments for the doctors involved.⁵⁵ While there were many more doctors and nurses who perpetrated crimes against humanity and war crimes against persons with disabilities, these actors were not prosecuted at the Tribunal or by domestic courts.⁵⁶ The fact that a very small number of doctors were prosecuted for the intentional killing of hundreds of thousands of persons with disabilities is both a reflection of the historical discrimination faced by persons with disabilities and an example of the early experiences of persons with disabilities being denied recognition for the crimes committed against them under both international and national criminal law.

In addition to limited accountability for perpetrators of the T4 programme, many Second World War survivors of forced sterilization did not have a remedy

50 Suzanne E. Evans, *Forgotten Crimes: The Holocaust and People with Disabilities*, Ivan R. Dee, Chicago, IL, 2004, pp. 32, 41–94, 111; "T4 Program", *Britannica*, available at: www.britannica.com/event/T4-Program; United States Holocaust Memorial Museum (USHMM), "People with Disabilities", available at: www.ushmm.org/collections/bibliography/people-with-disabilities.

51 "T4 Program", above note 50; USHMM, above note 50. See, generally, Sylwia Afrodyta Karowicz-Bienias, "Nazi Crimes on People with Disabilities in the Light of International Law – a Brief Review", *Białostockie Studia Prawnicze*, Vol. 23, No. 4, 2016.

52 S. E. Evans, above note 50, p. 145; see also S. A. Karowicz-Bienias, above note 51.

53 S. E. Evans, above note 50, p. 145.

54 *Ibid.*, p. 146.

55 *Ibid.*; S. A. Karowicz-Bienias, above note 51. In addition to the prosecution of the Nazi doctors, fourteen nurses were also charged for their role in the mass murder of nearly 8,000 adults and children with disabilities at a State hospital. However, all fourteen nurses were acquitted as they stated that they were relying on orders from their superiors – a defence that would likely be held to be invalid under today's "superior orders" doctrine. S. E. Evans, above note 50, p. 147.

56 S. E. Evans, above note 50, p. 146. See also S. A. Karowicz-Bienias, above note 51 (noting the Polish efforts to ensure accountability for the murder of persons with disabilities in Poland, though with ultimately unsuccessful prosecutions).

post-Nuremberg.⁵⁷ While the Allies in the Nuremberg Tribunal recognized forced sterilization as a crime, in post-Nuremberg Germany forced sterilization was not found to be a crime as it was held to have followed appropriate procedures.⁵⁸ Moreover, because the forced sterilization law was implemented before the Nazi era, it was not recognized as a “Nazi-era law”⁵⁹ – therefore, survivors of forced sterilization were not entitled to restitution from the German government and were not recognized as a part of subsequent legal proceedings such as the Holocaust Victim Assets Litigation.⁶⁰

Ultimately, the historical context provided by the Nuremberg Tribunal is important as it sets the stage for how ICL developed as a body of law that did not fully recognize persons with disabilities as victim-survivors in ICL prosecutions.⁶¹

The prosecution of SGBV crimes under ICL

The next evolution of ICL did not occur until the early 1990s, in response to the internal armed conflicts in the former Yugoslavia and the Republic of Rwanda.⁶² The temporal proximity of these two conflicts and the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) resulted in ICL developing two substantial bodies of jurisprudence for international crimes, and specifically for SGBV crimes.⁶³ Both the ICTR and the ICTY produced notable decisions on accountability for SGBV crimes through the *Akayesu*,⁶⁴ *Celibici*⁶⁵ and *Kunarac et al.*⁶⁶ cases. However, these courts only recognized the vulnerability of certain groups, such as women, and did not include broader intersectional concerns such as disability.⁶⁷

It wasn't until the Special Court for Sierra Leone (SCSL) prosecuted members of the Revolutionary United Front (RUF) for sexual violence crimes

57 *Ibid.*, p. 159.

58 *Ibid.*, p. 158.

59 *Ibid.*

60 *Ibid.*, pp. 158–160.

61 See, generally, William Pons, “An Argument for the Prosecution of Crimes against Persons with Disabilities”, *Intercross*, 11 May 2017, available at: <https://intercrossblog.icrc.org/blog/an-argument-for-the-prosecution-of-crimes-against-persons-with-disabilities>; W. Pons, J. E. Lord and M. A. Stein, above note 20, p. 58.

62 International Criminal Tribunal for the former Yugoslavia (ICTY), “The Tribunal – Establishment”, available at: www.icty.org/en/about/tribunal/establishment.

63 *Ibid.*; UNSC Res. 827, 25 May 1993; UNSC Res. 955, 8 November 1994.

64 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; Phillip Weiner, “The Evolving Jurisprudence of the Crime of Rape in International Criminal Law”, *Boston College Law Review*, Vol. 54, No. 3, 2013, p. 1210. See also Mukwege Foundation, “Jurisprudence of Sexual Violence in Conflict: Important Cases at International Tribunals”, available at: www.mukwegefoundation.org/jurisprudence-sexual-violence/.

65 ICTY, “Celibici Case: The Judgement of the Trial Chamber. Zejnil Delalic Acquitted, Zdravko Mucic Sentenced to 7 Years in Prison, Hazim Delic Sentenced to 20 Years in Prison, Esad Landzo Sentenced to 15 Years in Prison”, press release, 16 November 1998.

66 ICTY, “Landmark Cases”, available at: www.icty.org/en/features/crimes-sexual-violence/landmark-cases; ICTY, *Prosecutor v. Kunarac, Kovač, and Vuković*, Case Nos IT-96-23, IT-96-23/1, Judgment (Trial Chamber), 22 February 2001.

67 See W. Pons, above note 61.

that an international court considered the impact a disability could have during an armed conflict.⁶⁸ In the prosecution of the RUF, the SCSL recognized that in the context of rape, the very nature of war was “universally coercive”, thereby creating an environment in which consent is virtually non-existent.⁶⁹ Further, in discussing the issue of consent, the SCSL recognized that there can be circumstances in which consent is impossible based on “age, *disability*, or being under the influence of some substance”.⁷⁰ This recognition of how a disability may play a role in providing consent was important, as it was an early attempt by an international court to consider multi-sectional aspects of victim-survivors during armed conflicts.⁷¹

Like the early *ad hoc* tribunals, the ICC has also struggled to include disability considerations in its prosecutions, and its jurisprudence on SGBV crimes poses unique challenges for accountability for women and girls with disabilities. In 2016, Jean-Pierre Bemba Gombo (known as Bemba) was the first defendant to be convicted under the command responsibility doctrine for rape as both a crime against humanity and a war crime.⁷² However, the Court’s victory was short-lived as the decision was overturned by the Appeals Chamber in 2018.⁷³ In reversing the Trial Chamber, the Appeal Chamber’s judgment reasoned that the Pre-Trial Chamber was required to demonstrate in the indictment that there were “substantial grounds to believe” the crimes alleged were committed, and to establish each underlying act.⁷⁴ This can be difficult for SGBV crimes (particularly those perpetrated in the chaos of war), as they may not be discoverable at the beginning of an investigation due to cultural and societal stigmas surrounding SGBV crimes and reporting.⁷⁵ Imposing strict timelines for reporting SGBV crimes is not only inconsistent with how ICL has previously prosecuted these crimes⁷⁶ but also creates unique challenges to reporting for women and girls with disabilities, who face additional stigmatization due to their disability and may be experiencing post-conflict accessibility barriers due to loss of assistive devices and lack of disability-inclusive humanitarian responses. This perspective is also consistent with the ICC Prosecutor’s *Policy*

68 Valerie Oosterveld, “The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments”, *Cornell International Law Journal*, Vol. 44, No. 1, 2011, pp. 50–56.

69 *Ibid.*, p. 56.

70 *Ibid.* (emphasis added).

71 Save the Children, *Weapons of War: Sexual Violence against Children in Conflict*, 18 February 2021, p. 18.

72 International Justice Monitor, “Background: Jean-Pierre Bemba Gombo”, available at: www.ijmonitor.org/jean-pierre-bemba-gombo-background/; Susana SáCouto, “The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?”, International Justice Monitor, 22 June 2018, available at: www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/.

73 International Justice Monitor, “Background”, above note 72. See, generally, Susana SáCouto and Patricia Viseur Sellers, “The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?”, *William & Mary Bill of Rights Journal*, Vol. 27, No. 3, 2019.

74 Alex Whiting, “Appeals Judges Turn the ICC on Head with Bemba Decision”, *Just Security*, 14 June 2018, available at: www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/.

75 *Ibid.*

76 S. SáCouto, above note 72 (referencing how in *Akayesu*, evidence of rape was discovered during a witness’s testimony and added to the indictment six months after the trial had already begun).

*Paper on Sexual and Gender-Based Crimes.*⁷⁷ In her policy paper, the then Prosecutor recognized how power relationships and dynamics can shape gender roles in a given context, and how stigma and societal, cultural and religious factors can all play a role in the reporting and prosecuting of SGBV crimes.⁷⁸ The former Prosecutor's paper also recognizes that specific gender roles, societal standards, behaviours and activities assigned to men and women can impact the reporting of these crimes.⁷⁹ The recognition of gender roles and societal expectation is important for accountability for crimes against women and girls with disabilities, who can experience discrimination and stereotypes at the intersection of gender and disability, such as being seen as asexual or less valued by society.⁸⁰ As a result of such discriminations, women and girls with disabilities who are survivors of SGBV can be unable to report crimes due to a lack of community support and access to courts.⁸¹ Thus, the time-based requirement will likely make it more difficult to identify and prosecute SGBV crimes against women and girls with disabilities, who have longer delays in reporting due to the aforementioned accessibility barriers.⁸²

Like the history of the Nuremberg Tribunal prosecutions of the T4 cases, the jurisprudence of SGBV crimes is important if we are to properly understand the lack of global accountability for these crimes. While the above-mentioned prosecutions are notable for the development of accountability for SGBV generally, this body of law does not recognize the impact on women and girls with disabilities other than in a one-off reference.⁸³ Thus, because the foundation of ICL has not properly included the needs of, and accountability for crimes against, persons with disabilities, and particularly women and girls with disabilities, these crimes continue to be perpetuated with impunity, even at the ICC.

The case for prosecuting SGBV crimes against women and girls with disabilities at the ICC

During armed conflicts, the legal systems that operate to protect people from harm and human rights violations can often fail to remain in effect due to the anarchical

77 ICC, above note 1; Valerie Oosterveld, "The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law", *William & Mary Journal of Women and the Law*, Vol. 24, No. 3, 2018.

78 ICC, above note 1, p. 5.

79 *Ibid.*, p. 12.

80 Human Rights Watch, *Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India*, 3 April 2018.

81 *Ibid.*; ICC, above note 1, pp. 12–14.

82 Human Rights Watch, above note 80.

83 For a discussion on the broad lack of accountability for crimes against people with disabilities in armed conflict, see, generally, Inclusion Europe, "People with Intellectual Disabilities in Armed Conflict", 30 October 2012, available at: www.inclusion-europe.eu/people-with-intellectual-disabilities-in-armed-conflict/ (discussing crimes against persons with intellectual disabilities in Sierra Leone and Sudan); see also Michael Howard, "Bombs Strapped to Down's Syndrome Women Kill Scores in Baghdad Markets", *The Guardian*, 1 February 2008, available at: www.theguardian.com/world/2008/feb/02/iraq.international1.

nature of such conflicts.⁸⁴ As a result, pre-existing patterns of discrimination are exacerbated, and vulnerable groups such as women, children and persons with disabilities are at a heightened risk of victimization and rights violations.⁸⁵ Furthermore, post-conflict, as situations begin to stabilize and justice mechanisms are implemented at the national level, the same pre-conflict barriers and discrimination will continue to exist, which can limit the ability of women and girls with disabilities to engage with post-conflict justice mechanisms.⁸⁶ ICL can play a unique role in ensuring accountability for SGBV crimes against women and girls with disabilities by acting as a mechanism for raising awareness of how women and girls with disabilities are targeted during armed conflicts, identifying the frequency of SGBV crimes against them, identifying how States are failing to prosecute these crimes, and acting as a court of last resort to ensure justice and accountability.

The inclusion of women and girls with disabilities in States under ICC investigations

Currently, the ICC has thirteen active investigations and fifteen preliminary examinations in States across South America, Africa, Asia and Europe.⁸⁷ Across these twenty-eight States, the ICC has produced numerous reports on the type of crimes committed, the types of victim-survivors, and whether a State is pursuing prosecutions for these cases. In addition, the Court has produced over 300 decisions on applications by victim-survivors to participate in the proceedings.⁸⁸

84 ICRC, “Disintegration of State Structures”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/case-study/icrc-disintegration-state-structures>.

85 Christine Beerli, “Keynote Address: Vulnerabilities in Armed Conflicts”, 14th Bruges Colloquium on International Humanitarian Law, 17–18 October 2013; ICRC, “Women in War: A Particularly Vulnerable Group”, 3 January 2007, available at: www.icrc.org/en/doc/resources/documents/feature/2007/women-vulnerability-010307.htm; Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, 2 February 2022, available at: www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities; UN Human Rights, “Women’s Human Rights and Gender-Related Concerns in Situations of Conflict and Instability”, available at: www.ohchr.org/en/women/womens-human-rights-and-gender-related-concerns-situations-conflict-and-instability.

86 See World Institute of Disability, *The Involvement of Persons with Disabilities in Conflict Resolution and Peacebuilding Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post-Conflict Arena*, August 2014 (discussing the inclusion of persons with disabilities in peacebuilding efforts); Amnesty International, *Burundi: No Protection from Rape in War and Peace*, 9 October 2007, p. 8.

87 The ICC has investigations in the Democratic Republic of the Congo, Uganda, Sudan, the Central African Republic, Kenya, Libya, Côte d’Ivoire, Mali, Georgia, Burundi, the State of Palestine, Bangladesh/ Myanmar and Afghanistan. See ICC, “Situations under Investigation”, available at: www.icc-cpi.int/pages/situation.aspx. The ICC currently has preliminary examinations in Colombia, Guinea, Nigeria, Honduras, the Republic of Korea, the Registered Vessels of Comoros, Greece and Cambodia, Iraq and the United Kingdom, Gabon, the Republic of the Philippines, Venezuela, the Plurinational State of Bolivia, and Ukraine. See ICC, “Preliminary Examinations”, available at: www.icc-cpi.int/pages/pe.aspx.

88 See, generally, ICC, *Report on the Activities Performed during the First Three Years (June 2003–June 2006)*, 12 September 2006; ICC, *Report on Preliminary Examination Activities (2014)*, 2 December 2014; ICC, *Report on Preliminary Examination Activities (2015)*, 12 November 2015; ICC, *Report on Preliminary Examination Activities (2016)*, 14 November 2016; ICC, *Report on Preliminary Examination Activities (2017)*, 4 December 2017; ICC, *Report on Preliminary Examination Activities (2018)*, 5 December 2018; ICC, *Report on Preliminary Examination Activities (2019)*, 5 December 2019. This author reviewed all

However, these reports and decisions contain limited references to how persons with disabilities, and specifically women and girls with disabilities, are targeted and victimized during armed conflicts. For instance, in reviewing the ICC Prosecutor's *Report on the Activities Performed during the First Three Years*, there is no mention of crimes perpetrated against women and girls with disabilities or, more broadly, persons with disabilities.⁸⁹ Similarly, in the ICC's *Prosecutorial Strategy 2009–2012*, while there was a recognition for the need for subject matter experts in intersectional areas such as gender, there was no recognition as to how disability should be an intersectional consideration.⁹⁰

Beginning in 2011, the ICC's preliminary investigation reports began to specifically include reports of SGBV crimes. Throughout the last decade, these reports have identified multiple incidents of SGBV crimes, such as in Guinea, where over 100 women and girls reported being raped or subject to sexual violence mutilations;⁹¹ gender-based violence in Afghanistan, where girls' schools were subjected to persistent attacks by arson, armed attacks, bombings, and the poisonings of female students and teachers;⁹² Boko Haram's kidnapping of 200 girls from a primary school and subjecting them to forced marriage, rape and other forms of sexual violence;⁹³ and in Burundi, where women associated with men who opposed the president's re-election were subject to sexual violence by security forces.⁹⁴ In 2016, the ICC even explicitly recognized that SGBV crimes in Afghanistan were having a severe impact on the lives of women and girls, but it did not discuss how marginalized women, such as women and girls with disabilities, could specifically be impacted by this increased violence.⁹⁵

decisions by Trial Chamber III on the applications by victims to participate in proceedings. Publicly available documents address claims by 4,869 victims, none of which included claims by women and girls with disabilities as victims.

89 ICC, *Report on the First Three Years*, above note 88.

90 ICC, *Prosecutorial Strategy 2009–2012*, 1 February 2010.

91 ICC, *Report on Preliminary Examination Activities (2011)*, 13 December 2011, para. 110; ICC, *Report on Preliminary Examination Activities (2012)*, 22 November 2012, para. 147; ICC, *Report on Preliminary Examination Activities (2013)*, 25 November 2013, para. 186.

92 ICC, *Report on Preliminary Examination Activities (2011)*, above note 91, para. 28; ICC, *Report on Preliminary Examination Activities (2012)*, above note 91, para. 31; ICC, *Report on Preliminary Examination Activities (2013)*, above note 91, para. 31; ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 87; ICC, *Report on Preliminary Examination Activities (2015)*, above note 88, para. 125.

93 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 177; ICC, *Report on Preliminary Examination Activities (2015)*, above note 88, para. 199; ICC, *Report on Preliminary Examination Activities (2016)*, above note 88, paras 50, 292; ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 211; ICC, *Report on Preliminary Examination Activities (2018)*, above note 88, para. 225; ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, para. 186.

94 Edward B. Rackley, "Armed Violence against Women in Burundi", *Humanitarian Exchange*, No. 31, September 2005; Julia Steers, "Women Say They Are Being Raped as Part of President of Burundi's Fight to Keep Power", *Time*, 14 January 2016, available at: <https://time.com/4179101/rape-burundi/>.

95 ICC, *Report on Preliminary Examination Activities (2016)*, above note 88, para. 227; ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 248 (reporting that women and girls who were studying, teaching, working, and participating in public affairs experienced repeated attacks, death threats and killings from the Taliban). See also Padmini Murthy, Ushma Upadhyay and Eleanor Nwadinobi, "Violence against Women and Girls: A Silent Global Pandemic", in Padmini Murthy,

The above examples demonstrate how SGBV crimes are of importance to the ICC, yet this concern rarely extends to investigating SGBV crimes against women and girls with disabilities in States where the Court is conducting investigations or preliminary examinations. The only reference to women and girls with disabilities being impacted during armed conflict is in the 2014 *Report on Preliminary Examination Activities*' section on Colombia. Here, the ICC recalled that there was a "close link between existing disability and vulnerability to sexual violence, in particular in the context of forced displacement".⁹⁶ However, while future reports would address crimes of sexual slavery and forced abortions, the 2014 report was the only one that included women and girls with disabilities in relation to SGBV crimes.⁹⁷

Ultimately, in the ICC's decade-long reporting of SGBV in preliminary examinations, women and girls with disabilities and their increased vulnerability to SGBV in armed conflicts are included only once.⁹⁸ It is important to recognize that this lack of inclusion of crimes against women and girls with disabilities is a result not of a scarcity of these crimes being perpetrated, but rather of a lack of ICC investigations inquiring into these types of crimes against this group of victim-survivors. For example, the United Nations Population Fund (UNFPA) has reported that girls with intellectual and mental disabilities report increased experiences of sexual violence, with one UN Women report finding that women and girls with disabilities in Afghanistan are ten times more likely to experience sexual violence than their non-disabled peers.⁹⁹ Similarly, in Nigeria, a 2013 study found that girls with intellectual disabilities reported higher rates of sexual

Clyde Lanford Smith (eds), *Women's Global Health and Human Rights*, Jones and Bartlett, Sudbury, MA, 2010, p. 12, available at: http://samples.jpub.com/9780763756314/56314_CH02_MURTHY.pdf.

- 96 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 122 (quoting the Colombian Constitutional Court's Working Group on Forced Displacement).
- 97 ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, para. 117; ICC, *Report on Preliminary Examination Activities 2020*, 14 December 2020, para. 134 (the sections on Colombia in the 2019 and 2020 reports addressed accountability for sexual slavery and forced abortions against boys and girls but did not mention the impact of these crimes on girls with disabilities, despite the earlier recognition of a close link in forced displacements). Forced abortions also raise concerns for women and girls with disabilities: see Universidad de Los Andes, "Submission to the Committee on the Rights of Persons with Disabilities for Considering in Drafting General Comment No. 3 on Article 6: Women and Girls with Disabilities", Program de Accion por la Igualdad y la Inclusion Social, 2015, p. 2, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/GC/Women/PAIIS.doc; Center for Reproductive Rights, "Submission to the Special Rapporteur on the Rights of Persons with Disabilities—Questionnaire on the Rights of Persons with Disabilities and Bioethics", 17 October 2019, p. 10 (stating that "[i]n Colombia, the Constitutional Court validated the practice of surgical sterilization of minors with intellectual and psychosocial disabilities. In its decision, the Court explained, 'The decision to undergo surgical sterilization ensures more dignified living conditions for those who cannot make decisions related to the exercise of their reproductive freedom and that may be exposed to forced pregnancies in detriment of their dignity and personal integrity'").
- 98 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 122.
- 99 UNFPA, "Five Things You Didn't Know", above note 2; UN Women, *Gender Alert on COVID-19 Afghanistan*, No. 10: *Women with Disabilities during COVID-19*, 25 June 2020. See also Human Rights Watch, "Disability Is Not Weakness": *Discrimination and Barriers Facing Women and Girls with Disabilities in Afghanistan*, 28 April 2020; Human Rights Watch, "Afghanistan: Women with Disabilities Face Systemic Abuse", 27 April 2020, available at: www.hrw.org/news/2020/04/27/afghanistan-women-disabilities-face-systemic-abuse.

violence because perpetrators intentionally targeted these girls due to their difficulty in recognizing offenders later on.¹⁰⁰ Most recently, the UN Human Rights Council's reporting on the situation in Ukraine expressed concern for the "impact of the conflict on women, children and persons in vulnerable situations, including persons with disabilities and older persons, who are at risk also of SGBV".¹⁰¹

In essence, SGBV crimes against women and girls with disabilities are occurring in the places where the ICC is conducting investigations, and if anything, these crimes are likely occurring at higher rates where the ICC is investigating, due to the loss of governmental stability. Yet, the ICC has not included these victim-survivors in its investigations or prosecutions, resulting in a lack of accountability for perpetrators and continuations of legal systems that deny justice to women and girls with disabilities.

The ICC's jurisdiction over SGBV crimes against women and girls with disabilities

While the ICC seeks to ensure accountability for global criminal acts, its scope of authority is limited to both who it can prosecute and under what circumstances it may prosecute.¹⁰² Specifically, under the Rome Statute, the ICC's jurisdiction is limited to crimes of sufficient gravity¹⁰³ and its prosecutions must be complementary to national criminal prosecutions.¹⁰⁴ The complementarity principle is at the core of the ICC, as it is intended to be a court of last resort and may therefore only prosecute a case when there is a lack of genuine national prosecutions.¹⁰⁵

In ensuring accountability for crimes against women and girls with disabilities, the ICC could have a basis to exercise jurisdiction over these crimes because (1) there is subject matter jurisdiction over the crimes, and (2) the complementarity principle could likely be satisfied. First, as explained above, SGBV crimes against women and girls with disabilities occur at disproportionate rates even outside of armed conflicts, and they only increase during times of armed conflict – thus, the widespread nature of these crimes should satisfy the ICC's gravity requirement.¹⁰⁶ SGBV crimes also fall within the ICC's subject

100 Women Enabled International, above note 35, pp. 2–5.

101 HRC Res. S-34/1, 12 May 2022.

102 ICC, *Policy Paper on Case Selection and Prioritization*, 15 September 2016, p. 14.

103 Marco Longobardo, "Factors Relevant for the Assessment of Sufficient Gravity in the ICC Proceedings and the Elements of International Crimes", *Questions of International Law*, 30 November 2016, available at: www.qil-qdi.org/factors-relevant-assessment-sufficient-gravity-icc-proceedings-elements-international-crimes/.

104 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 7(g).

105 See, generally, Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, International Center for Transitional Justice, New York, 2016. See also Amnesty International, "This Is What We Demand": *Impunity for Sexual Violence against Women in Colombia's Armed Conflict*, 2011.

106 See, generally, Megumi Ochi, *Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice*, ICD Brief No. 19, International Crimes Database, January 2016.

matter jurisdiction because they constitute crimes against humanity under Article 7 (g) of the Rome Statute.¹⁰⁷ Second, while the complementarity assessment is conducted on a case-by-case basis in each situation, the complementarity principle could likely be satisfied in many of these cases. Considering that State courts often fail to actively remove barriers that limit access to justice, in violation of Article 13 of the CRPD, the ICC would likely be able to establish that because of the existence of these institutional barriers, there is sufficient evidence to believe that there are no genuine State prosecutions which would prohibit the ICC from exercising jurisdiction over these cases.¹⁰⁸

This approach would also be consistent with the ICC Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes*, in which the then Prosecutor recognized that she does not have the authority to prosecute crimes when such crimes are being prosecuted by *genuine and relevant national proceedings*; however, she recalled that discriminatory attitudes, gender stereotypes in substantive law, and limited access to justice may all create a basis for the Office of the Prosecutor to find that there are no relevant national proceedings occurring.¹⁰⁹ This acknowledgement supports the ICC's ability to exercise jurisdiction over crimes against women and girls with disabilities when State courts fail to remove physical and societal barriers to justice, such as discriminations in witness credibility, failure to provide accommodations, and permissive laws that legalize international crimes like forced sterilization.¹¹⁰ Thus, under these circumstances the ICC could recognize that because of these institutional barriers the State is unable to facilitate genuine and relevant national proceedings, and therefore, the Court could exercise its jurisdiction.

The ICC's prosecution of these crimes would not only hold those most responsible accountable, but would also help pressure State institutions to strengthen their criminal justice systems in order to remove these cases from the ICC's jurisdiction. For example, during the ICC's investigation into the situation in Colombia, the Prosecutor's 2017 report recognized that the Colombian government was failing to prosecute State actors who had executed civilians and reported the deaths as guerrillas killed in combat to boost the State success rate

107 Rome Statute, above note 104.

108 See, generally, Linda E. Carter, "The Principle of Complementarity at the International Criminal Court: The Role of *Ne Bis in Idem*", *Santa Clara Journal of International Law*, Vol. 8, No. 1, 2010; Katharine A. Marshall, "Prevention and Complementarity in the International Criminal Court: A Positive Approach", *Human Rights Brief*, Vol. 17, No. 2, 2010.

109 ICC, above note 1, pp. 22–23; see also Amnesty International, above note 105.

110 A report by the National Women's Law Center in the United States found that thirty-one out of fifty US states have laws legalizing forced sterilization of persons with disabilities: National Women's Law Center, *Forced Sterilization of Disabled People in the United States*, 2022. See also Center for Reproductive Rights, "Organizations in Several Countries Reject Decision of the Colombian Constitutional Court Allowing for Sterilization of Minors with Disabilities without Their Consent", 18 March 2014, available at: <https://reproductiverights.org/organizations-in-several-countries-reject-decision-of-the-colombian-constitutional-court-allowing-for-sterilization-of-minors-with-disabilities-without-their-consent/>; Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, 2011.

in the internal armed conflict.¹¹¹ These were known as false-positive cases.¹¹² The 2017 report clearly stated that its investigations had identified twenty-nine commanders who were potentially responsible for false-positive killings, yet the Colombian government was only prosecuting seventeen of these individuals.¹¹³ Therefore, the report recognized that if the Colombian courts did not prosecute the remaining individuals, the ICC could potentially have jurisdiction over those cases.¹¹⁴ Subsequently, in the ICC's 2018 report, the Court recognized that there was improved accountability and prosecution in Colombia for these false-positive crimes.¹¹⁵ Thus, the pressure placed by the ICC on these cases in the 2017 report helped facilitate, or rather motivate, accountability for these crimes. With similar pressure from the ICC for accountability for SGBV crimes against women and girls with disabilities, the Court could help develop justice at the State level and ensure prosecution at the international level if the pressure failed to encourage State accountability.¹¹⁶ Lastly, even if the ICC only included the impact of SGBV crimes on women and girls with disabilities in its investigation report, this could nonetheless be beneficial in raising awareness as to the prevalence of these crimes during armed conflicts. Addressing the needs of diverse intersectional victim-survivors could also help bolster the Court's credibility by demonstrating a new inclusive perspective.¹¹⁷

Recommendations on increasing accountability for crimes against women and girls with disabilities

While State courts work to improve access to justice for women and girls with disabilities, the ICC must do the same to improve how it provides justice for victim-survivors with disabilities under ICL. Like the State justice systems that must remove and actively address historical stigmas, institutional barriers and exclusion, the ICC must do the same before it can even begin providing accountability for SGBV crimes against women and girls with disabilities. For States this reform often takes decades to achieve, but for the ICC it can occur much more quickly, as the ICC is only required to improve one court's positions, policies and procedures, rather than an entire State's legal system. Therefore, the following recommendations are intended to be used as a starting point for the Court to begin addressing accountability for crimes against persons with disabilities, and particularly women and girls with disabilities. However, it is

111 ICC, *Report on Preliminary Examination Activities (2012)*, above note 91, para. 8.

112 ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 135.

113 *Ibid.*

114 *Ibid.*, paras 149–153.

115 ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, paras 110–128.

116 Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, 3 May 2018.

117 Natasha Godsiff, "The Failure of the International Criminal Court to Prosecute Sexual and Gender-Based Violence", Cambridge University Law Society, available at: www.culs.org.uk/per-incuriam/the-failure-of-the-international-criminal-court-to-prosecute-sexual-and-gender-based-violence.

important to note that if adopted, these recommendations alone would not address the accountability gap currently experienced by women and girls with disabilities, and the ICC would need to continue to evolve in order to ensure that once the changes were adopted, the Court was actually including women and girls with disabilities in investigations and prosecutions.

The ICC Prosecutor should appoint a Special Adviser on disability

In 2021, the ICC Prosecutor appointed seventeen new Special Advisers, with fourteen acting as Special Advisers on specific portfolios, such as gender persecution and crimes against and affecting children.¹¹⁸ Special Advisers are appointed with specific mandates based on their specialty and may support the Prosecutor's training initiatives for the Office of the Prosecutor (OTP).¹¹⁹ As of August 2022, the Prosecutor has not appointed a Special Adviser on disability. Thus, to improve the Court's perspective, accessibility, and inclusion of disability, the Prosecutor should appoint a Special Adviser on disability.

Appointing a Special Adviser on disability could provide subject matter expertise on international crimes against persons with disabilities, and educate the Court on the historical exclusion of persons with disabilities in ICL.¹²⁰ The scope of the mandate for the Special Adviser on disability could include working with currently appointed Special Advisers to ensure that the ICC's work is inclusive of a disability perspective within intersectional fields such as gender crimes, crimes against children, and ICL more broadly. A Special Adviser on disability could also provide guidance to ICC investigations on engaging local, regional and national organizations of persons with disabilities, which could help the Court to identify crimes committed against persons, and specifically women and girls with disabilities, during armed conflicts.¹²¹ Using a Special Adviser on disability to more actively engage national organizations and coalitions led by persons with disabilities would also further the aims put forward in the Prosecutor's policy paper on ensuring accountability for SGBV crimes, which stated that the OTP would work with local stakeholders to "stop, prevent, and punish sexual and gender-based crimes".¹²²

A Special Adviser on disability could also review how the ICC's mechanisms are currently impairing access for victim-survivors with disabilities. For example, under the Court's Rules of Procedure and Evidence, when a victim-survivor is applying to be recognized as a victim before the Court, Rule 89 provides:

118 ICC, "ICC Prosecutor Mr Karim A.A. Khan QC Appoints Seventeen Special Advisers", Press Release No. ICC-CPI-20210917-PR1611, 17 September 2021.

119 *Ibid.*

120 ICC, above note 1, p. 16 (stating that the OTP would work to "[u]nderstand the intersection of factors such as gender, age, race, *disability* ... and other status or identities which may give rise to multiple forms of discrimination and social inequalities" (emphasis added) – a promise the Court has yet to fulfil).

121 S. Ortoleva, above note 8.

122 ICC, above note 1, pp. 14–15.

An application referred to in this rule may also be made in person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or when necessary, a victim who is disabled.

The inclusion of disability within this rule perpetuates a generalization that persons with disabilities lack the capacity to advocate for themselves because they are disabled, essentially conflating lack of legal capacity with disability more broadly. This rule has also been interpreted by the Court to require applicants to establish a relationship between the victim-survivor and the individual completing the application on behalf of the applicant with a disability.¹²³ This requirement by the Court largely focuses on the role of legal guardianship for individuals who lack capacity, but as stated above, not all persons with disabilities will need legal guardianship, and some may be able to participate independently. Thus, a Special Adviser on disability would be well poised to review whether and how this rule has limited individuals with disabilities from participating in the Court's proceedings. Furthermore, a Special Adviser on disability could also advise the Court on the type of relationship requirement, if any, that should be established between a victim-survivor with a disability and the individual completing the application. Ultimately, ensuring that the Court's rules do not impair victim-survivors with disabilities from participating on an equal basis with others would also be consistent with Principles 1 and 5 of the International Principles and Guidelines.¹²⁴

Lastly, a Special Adviser could also review how the ICC internally views disability within its jurisprudence.¹²⁵ While the Court has discussed disability in terms of victim-survivor applications for participation, it often views disability as a consequence of armed conflicts rather than a co-occurring condition of armed conflicts. Therefore, it would be important for a Special Adviser to address how the Court should internally understand disability, in order to ensure that it does not apply a narrow view of disability. This education could be conducted in support of the OTP's staff training, a responsibility already within the Special Advisers' mandate. Providing this type of training would also be consistent with Principle 10 of the International Principles and Guidelines, which recommends awareness-raising and training within justice systems.

123 See ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Ground for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009; ICC, *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, First Decision on Victims' Participation in the Case, 30 March 2011; ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on Contested Victims' Applications for Participation, Legal Representation of Victims and Their Procedural Rights, 27 November 2015; ICC, *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 8 August 2011.

124 International Principles and Guidelines, above note 31.

125 See, for example, SCSL, *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-T, transcript, 27 September 2006, pp. 99–102 (discussing the ability of a hearing-impaired man to give evidence via a sign language interpreter).

Ultimately, appointing a Special Adviser on disability would build upon the work that the Prosecutor has started by recognizing the need for subject matter experts at the ICC, and it would ensure that the Court continues to develop with an inclusive disability lens that provides accountability for persons with disabilities, and particularly women and girls with disabilities.

The ICC Prosecutor should issue a policy paper on crimes against persons with disabilities

Since the ICC's creation, the OTP has produced three policy papers on its position in relation to the interests of justice,¹²⁶ SGBV crimes¹²⁷ and children.¹²⁸ These policy papers play an important role in ensuring that the international community is aware of the Prosecutor's position on these thematic issues. A policy paper on crimes against persons with disabilities would be a substantial contribution from the OTP in recognizing the frequency of crimes against persons with disabilities, and establishing clear policies and procedures for engaging these communities during preliminary examinations, investigations, and prosecutions.¹²⁹

An OTP policy paper must recognize (1) the historical exclusion, and if any, inclusion,¹³⁰ of crimes against persons with disabilities under ICL; and (2) the intersectionality of persons with disabilities such as gender, sexual orientation, race and ethnicity. First, any policy paper must recognize the historical shortcomings of ICL for persons with disabilities,¹³¹ in order to ensure that as the ICC becomes more inclusive, it does not perpetuate the same barriers experienced by persons with disabilities in the decades prior.¹³² It would also be critical for the Prosecutor to address how the Court would handle cases in which crimes against humanity, such as the crime of forced sterilization,¹³³ are considered legal under a State's domestic laws while nonetheless still violating ICL.

Second, a policy paper must also address the national and international access to justice barriers faced by persons with disabilities, and women and girls with disabilities. With that in mind, a policy paper must address how the Prosecutor will review whether genuine domestic prosecutions are occurring, what weight it would give to human rights bodies' finding that a State is denying individuals with disabilities the right to access justice, and how the violation of

126 ICC, *Policy Paper on the Interests of Justice*, 1 September 2007

127 ICC, above note 1.

128 ICC, *Policy on Children*, 15 November 2016.

129 This recommendation was first proposed in W. Pons, J. E. Lord and M. A. Stein, above note 20.

130 See, for example, SCSL, *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-T, transcript, 15 May 2008, pp. 9936–9938 (witness discussing how individuals with disabilities who were begging were taken to a river and executed because they were “embarrassing the organization”).

131 For example, recognizing the contributions from the Nuremberg Tribunal and post-Nuremberg exclusion of persons with disabilities in the Holocaust Victim Assets Litigation.

132 See, generally, Phitalis Were Masakhwe, “The Disabled and the Rwanda Genocide: The Untold Story”, *Disability World*, Vol. 23, April–May 2004 (discussing crimes against persons with disabilities during the Rwandan armed conflict).

133 Rome Statute, above note 104.

the right to access justice could create grounds for the ICC's jurisdiction. Lastly, a policy paper should explain how the OTP will include a disability lens throughout its work, including how disability intersects with other factors such as gender, sexual orientation, race and ethnicity.

Conclusion

ICL is at a pivotal stage, with an ICC Prosecutor recently appointed to a new eight-year term, and armed conflicts now plaguing nearly all continents across the globe. While this body of law has continued to develop for the better and build off its past victories and losses, it can no longer operate as a mechanism for justice for only a select group of victim-survivors and a select group of States. The future of ICL must ensure accountability for crimes against women and girls with disabilities during armed conflict. As a court of last resort, it is well within the ICC's mandate and authority to prosecute SGBV crimes against women and girls with disabilities during armed conflicts when a State's national mechanism is unwilling or unable to do as a result of institutional failures in ensuring accessible justice systems. The ICC must step up and eliminate impunity for these crimes as this will not only provide justice to victims-survivors but also help strengthen national institutions to comply with the requirements of Article 13 of the CRPD.