

Opportunities and failures to prosecute violence against persons with disabilities at the international tribunals for the former Yugoslavia, Rwanda and Sierra Leone

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Abstract

This paper presents an inexhaustive but thorough review of the evidence of violence against persons with disabilities that came before, or ought to have been known to, the prosecutors of the international criminal tribunals for the former Yugoslavia, Rwanda and Sierra Leone. This research demonstrates that despite significant and

* It is noted that this article includes uncensored quotations from court documents and witness statements that include outdated and offensive language to describe persons with disabilities, including the terms “handicapped”, “infirm”, “retard”, “retarded” and “simple”. These terms are dehumanizing and stigmatizing. The replication of these quotes in this paper demonstrates how international justice mechanisms and witnesses spoke of and perceived persons with disabilities at the time. Neither the author nor the publisher in any way endorse the use of this language.

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compelling evidence from investigators, journalists and witnesses, gross violations against persons with disabilities were largely ignored by the prosecution or treated merely as aggravating factors at sentencing. These crimes could instead have been characterized as an “other inhumane act” prosecutable as a crime against humanity, which would have emphasized the gravity of the crimes, provided recognition of the victims’ suffering, imposed criminal sanctions on those responsible, and unequivocally condemned violence against persons with disabilities during armed conflict.

Keywords: Convention on the Rights of Persons with Disabilities, crimes against humanity, disability, Rwanda, Sierra Leone, Yugoslavia, United Nations.



Introduction

In April 2022, amid major escalations of the Russo-Ukrainian War, Disability Rights International (DRI) visited an institution in western Ukraine for children and young adults with disabilities. The facility – a relic of the Soviet-era policy that institutionalized thousands of persons with disabilities¹ – houses ninety-six children, twenty-two of whom arrived from the Donetsk region of eastern Ukraine following Russia’s invasion of the country on 24 February 2022. Vasyl Markulin, the institution’s director, described how the children’s previous caretakers had “unloaded them from the train like dead bodies” and fled Ukraine “like rats from a sinking ship” without giving the staff the children’s medical records or even disclosing their names and ages. Several children experienced violent, recurring seizures due to the trauma of the evacuation and the lack of consistent treatment; others were found tied down in their beds in dark, poorly ventilated rooms reeking of urine and faeces, without any opportunity for activity or stimulation. In the words of Marisa Brown, a registered nurse at the Georgetown University Center for Child and Human Development who visited the institution with DRI, the living conditions of these children “[amount] to a total denial of human dignity”.²

History repeats itself. More than twenty-five years earlier, in the thick of the various ethnic conflicts that emerged from the break-up of Yugoslavia, nine people with physical and mental disabilities were evacuated from a hospital in Petrinja, Croatia. They left with their caretakers, but, in the chaos of the war, they were abandoned at a school in Dvor while other refugees continued on to safer territory. On 8 August 1995, a group of combatants entered the building and

1 Michael Rasell and Elena Iarskaia-Smirnova, *Disability in Eastern Europe and the Former Soviet Union: History, Policy, and Everyday Life*, Routledge, Abingdon, 2014, p. 3.

2 DRI, *Left Behind in the War: Dangers Facing Children with Disabilities in Ukraine’s Orphanages*, 5 May 2022, available at: www.driadvocacy.org/wp-content/uploads/DRI-Ukraine-Left-Behind.pdf.

executed these nine people in plain view of a unit of Danish peacekeepers. Their bodies lay untouched for four days in sweltering heat before the peacekeepers ventured into the school. The belligerents responsible for this massacre, and four of the nine victims of the attack, were never identified.³

Persons with disabilities are the largely forgotten casualties of recent history's most appalling armed conflicts. They were the first victims of Nazi Germany's campaign of mass murder;⁴ they were specifically targeted for murder and torture during the recent hostilities in Colombia⁵ and Myanmar;⁶ and they have been disproportionately impacted by societal breakdown, institutional failure, and non-inclusive evacuation procedures and humanitarian aid in the Central African Republic,⁷ Gaza⁸ and Syria.⁹ Evidence from the wars in the former Yugoslavia, Rwanda and Sierra Leone provides additional support for the undeniable conclusion that persons with disabilities are at particular risk during armed conflicts. The testimony of investigators and witnesses and reports from journalists and non-governmental organizations attest that persons with disabilities during each of these conflicts were the targets of murder, assault, sexual violence, torture and cruelty, either incidentally or explicitly because of their disabilities.

In response to the gross human rights abuses that occurred during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, the United Nations (UN) established three international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the Special Court for Sierra Leone (SCSL) in 2002 (collectively known as the *ad hoc* tribunals). Though not without their flaws, each of these tribunals has been instrumental in developing an extensive and sophisticated body of law that defines the scope and application of war crimes, crimes against humanity and genocide. The *ad hoc* tribunals also pioneered the prosecution of violations of international criminal law from an intersectional, human rights-based perspective, particularly with regard to sexual and gender-based violence. Yet, despite universal recognition of the fact that persons with disabilities are exposed to particular risks and suffer

3 Georg Larsen and Kasper Vedsmand, "When the UN Watched a Massacre Unfold in Croatia", *Al Jazeera*, 29 May 2016, available at: www.aljazeera.com/features/2016/5/29/when-the-un-watched-a-massacre-unfold-in-croatia.

4 Atkion T4, the programme that systematically starved, lethally injected and gassed people with disabilities, is discussed below.

5 Daron Acemoglu *et al.*, "The Perils of High-Powered Incentives: Evidence from Colombia's False Positives", *American Economic Journal: Economic Policy*, Vol. 12, No. 3, 2020.

6 *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64, 12 September 2018, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

7 UNSC Res. 2217, UN Doc S/2015/290, 18 April 2015, available at: <https://digitallibrary.un.org/record/792341?ln=en>.

8 *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, available at: <https://daccess-ods.un.org/tmp/3599196.9704628.html>.

9 Office the UN High Commissioner for Human Rights (UN 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>.

disproportionately during armed conflict,¹⁰ each of the *ad hoc* tribunals, throughout the duration of their mandates, failed to investigate and prosecute the abuses faced by persons with disabilities. Violence against persons with disabilities was simply not accorded the same attention as violence against other groups, despite the jurisprudential and prosecutorial capacity to do so. This omission is glaring when one considers the extensive evidence that was put before the tribunals or was available to the prosecution evincing violence against persons with disabilities.

The principal contribution of this paper is an inexhaustive but thorough review of the evidence of violence against persons with disabilities that came before, or ought to have been known to, the Office of the Prosecutor for each of the *ad hoc* tribunals. This review demonstrates that, despite significant and compelling evidence from investigators, journalists and witnesses, gross human rights violations against persons with disabilities were largely ignored by the prosecution or treated merely as aggravating factors illustrating the moral turpitude of the accused, which further dehumanized and minimized the perception of violence against persons with disabilities. This article argues that these crimes could instead have been prosecuted as an “other inhumane act” under each tribunal’s framework for crimes against humanity, which would have endorsed a rights-based understanding of disability. Such an approach could have articulated the gravity of these crimes, provided recognition of the victims’ suffering, imposed criminal sanctions on those responsible, and unequivocally condemned violence against persons with disabilities during armed conflict. The author hopes that by highlighting the shortcomings of the *ad hoc* tribunals’ response to violence against persons with disabilities and by presenting an alternative course of action, international criminal tribunals in the future will be compelled to fully investigate atrocities committed against persons with disabilities during armed conflict.

Violence against persons with disabilities during the conflict in the former Yugoslavia, Rwanda and Sierra Leone

At least 15% of the world’s population – approximately one billion people – have a disability,¹¹ which is defined by Article 1 of the UN Convention on the Rights of Persons with Disabilities (CRPD) as “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder ... full and effective participation in society on an equal basis with others”. Persons with disabilities experience marginalization, stigmatization and violence to varying degrees, even if they live in countries with comparatively robust disability rights laws or countries that are signatories to major disability rights instruments like the CRPD. In Ghana and Nigeria, “prayer camps” attempt to “heal” the

10 See, for example, Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Law and Human Rights, Geneva, April 2019, p. 13, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf.

11 World Health Organization, *World Report on Disability*, 2011, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability.

“spiritually sick” (i.e., persons with intellectual or psychosocial disabilities) through torture and starvation.¹² In Kenya, mothers of persons with disabilities have reported pressure to kill their children at birth, as persons with disabilities are believed to be “cursed, bewitched and possessed”.¹³ In Mexico, evidence suggests that children with disabilities have been trafficked into forced labour or sexual slavery.¹⁴ In Paraguay and Uruguay, people with autism have been locked in isolated cells, where they have been forced to urinate and defecate in the same space where they sleep, eat and live.¹⁵ In former Soviet States, like Russia and Ukraine, persons with disabilities are institutionalized from infancy until death in deplorable conditions like those described in the introduction to this paper. Even in countries that laud themselves as “developed”, persons with disabilities experience unemployment, barriers to accessing health care and education, physical and sexual violence, homelessness and poverty at endemic rates. In Canada, for example, persons with disabilities are almost twice as likely to be victims of violent crime, and nearly four in ten reported incidents of violent crime involve a victim with a disability.¹⁶ This is to say nothing of stigmatization and abuse that goes unreported.

Armed conflict has a particularly devastating and disproportionate impact on persons with disabilities. War exacerbates pre-existing inequities and results in a “vicious cycle of violence, social polarization, deteriorating services, and deepening poverty” for such persons.¹⁷ Persons with disabilities have been the subject of targeted killings; are at an increased risk of sexual and gender-based violence; are more likely to be killed or sustain serious injury; are often excluded from evacuation procedures and humanitarian assistance; are at risk of secondary and preventable conditions owing to the interruption or deterioration of medical care; and may be prevented from accessing their places of education or employment through the destruction of infrastructure and assistive devices.¹⁸ The segregation of persons with disabilities into institutions, as is the typical practice in many countries, creates heightened risks of massacres and the use of persons with disabilities as human shields.¹⁹ In the aftermath of armed conflict, persons with disabilities are routinely denied access to justice and excluded from peace processes.

12 Human Rights Watch, *Living in Chains: Shackling of People with Psychosocial Disabilities Worldwide*, 6 October 2020, available at: www.hrw.org/report/2020/10/06/living-chains/shackling-people-psychosocial-disabilities-worldwide.

13 DRI, *Infanticide and Abuse: Killing and Confinement of Children with Disabilities in Kenya*, 2018, available at: www.driadvocacy.org/wp-content/uploads/Infanticide-and-Abuse.pdf.

14 DRI, “No Justice: Torture, Trafficking and Segregation in Mexico”, 22 July 2015, available at: www.driadvocacy.org/press-release-no-justice/.

15 DRI, “Jorge’s Story”, June 1995, available at: www.driadvocacy.org/about/jorges-story/.

16 “Canadians with a Disability almost Twice as Likely to Be Victims of Violent Crime”, *CBC News*, 15 March 2018, available at: www.cbc.ca/news/politics/canadians-with-a-disability-almost-twice-as-likely-to-be-victims-of-violent-crime-1.4577458.

17 Edward Thomas, *Children with Disabilities in Situations of Armed Conflict*, UNICEF, November 2018, p. 4, available at: www.unicef.org/media/126116/file/Children-with-Disabilities-in-Situations-of-Armed-Conflict-Discussion-Paper.pdf.

18 A. Priddy, above note 10, p. 12.

19 Catalina Devandas *et al.*, “Protecting Civilians with Disabilities in Conflicts”, *NATO Review*, 1 December 2017, available at: www.nato.int/docu/review/articles/2017/12/01/protecting-civilians-with-disabilities-in-conflicts/index.html.

There is extensive, compelling evidence that persons with disabilities suffered enormously during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone. However, violence in each of these conflicts against persons with pre-existing disabilities – as opposed to persons with disabilities that were incurred during the course of armed conflict, such as amputations or post-traumatic stress disorder – has rarely been the subject of academic research. Instead, the evidence of violence against persons with disabilities is buried in witness testimony, reported sparingly by human rights organizations and journalists, or mentioned in passing in the indictments and judgments of the *ad hoc* tribunals. Pieced together, this evidence plainly shows devastation that has been hidden, minimized or considered unworthy of redress.

The following sections provide an inexhaustive review of the publicly available evidence in the English language that was presented before the *ad hoc* tribunals, as well as the reports and statements from independent investigators that were available to the prosecution, that recount the violence experienced by persons with disabilities in each of these conflicts. It must be emphasized that this evidence came before the courts incidentally, in the absence of any investigatory focus on violence against persons with disabilities; thus, these incidents undoubtedly represent a fraction of the violence that occurred against persons with disabilities during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone.

Violence against persons with disabilities during the conflict in the former Yugoslavia

In addition to the massacre of persons with disabilities at the school in Dvor that was detailed in the introduction to this paper, persons with disabilities were frequently the victims of murders committed by various belligerents operating in the former Yugoslavia during the ethnic conflicts of the 1990s. Mr Zivko Dreznjak, who had a mental disability,²⁰ was killed with his wife in front of his house in Grabovica on 9 September 1993 by the Army of the Republic of Bosnia and Herzegovina.²¹ A witness in the *Milosevic* trial testified that Mr Agim Bytyci, a Kosovo Albanian who had a mental disability, was murdered in the village of Nishor by Serbian police officers.²² Mr Hysen Gashi, who had a mental disability,²³ was murdered along with at least nineteen women and children in the basement of a house in Djakovica, Kosovo, by the forces of the Federal Republic of Yugoslavia and Serbia.²⁴ A man named Hambarine, who had a mental disability, was among

20 ICTY, *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Testimony of Witness C, 10 February 2005, p. 36, available at: www.icty.org/x/cases/halilovic/trans/en/050210ED.htm.

21 ICTY, *Halilovic*, above note 20, Judgment (Trial Chamber), 16 November 2005, para. 458.

22 ICTY, *Prosecutor v. Milosevic*, Case No. IT-99-37-T, Testimony of Shefqet Zogaj, 24 April 2002, p. 3675, available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020424IT.htm.

23 ICTY, *Milosevic*, above note 22, Testimony of Behar Haxhiavdija, 2 September 2002, p. 9317, available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020902ED.htm.

24 ICTY, *Milosevic*, above note 22, Second Amended Indictment for Kosovo, 16 October 2001, para. 66(h), available at: www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-2ai011029e.htm.

fifteen men interned at the Keraterm camp in Prijedor, Bosnia and Herzegovina, who were randomly selected for execution by Bosnian Serb authorities; he was murdered while pleading, “Not me, not me.”²⁵ A man with a mental disability who was held at a school in Bratunac in the summer of 1995 was killed by a military police officer for mistakenly brushing against the officer’s bulletproof vest.²⁶ During the Izbica massacre, people with physical and mental disabilities were executed indiscriminately.²⁷

There are many instances of persons with disabilities being physically assaulted, some to the point of death.²⁸ In the trial against Radoslav Brdanin, Witness BT64 discussed one such incident that happened to a detainee sometime between May and October 1992, at a camp established by Bosnian Serbs in Pribinic, Bosnia and Herzegovina:

As far as Pero is concerned, who was mentally retarded, I went out with him to clean the compound, to clean the cigarette butts in front of the offices where the military police were. And then Milivoje [a guard], whose last name I don’t know, approached us. He was holding a metal bar and he approached Pero, hit him on the side of his back and head, hit him once. And Pero fell. And then I lifted him up. I poured some water over him. That’s what Milivoje ordered me to do. And again, when Pero got up, he didn’t collect cigarette butts. Again, he was hit again. And then Pero fainted. ... The next day, Pero died.²⁹

Persons with intellectual disabilities were beaten or killed for not understanding orders.³⁰ One witness described such a situation at the Manjaca concentration camp, established by the Yugoslav National Army and the Republika Srpska, in the summer of 1992:

25 ICTY, *Prosecutor v. Sikirica*, Case No. IT-95-8, Testimony of Witness Q, 21 May 2001, p. 3348, available at: www.icty.org/x/cases/sikirica/trans/en/010521ed.htm.

26 ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5/18, Testimony of Jean Rene Ruez, 3 July 1996, pp. 559–560, available at: www.icty.org/x/cases/karadzic/trans/en/960703it.htm.

27 ICTY, *Milosevic*, above note 22, Testimony of Sadik Xhemajli, 26 August 2002, pp. 8866 (available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020826IT.htm), 8904 (available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020826IT.htm); ICTY, *Milosevic*, above note 22, Testimony of Liri Loshi, 3 September 2002, p. 9483, available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020903IT.htm; ICTY, *Prosecutor v. Dordevic*, Case No. IT-05-87/1, Testimony of Milazim Thaqi, 25 May 2009, p. 4977, available at: www.icty.org/x/cases/djordjevic/trans/en/090525IT.htm.

28 See, for example, ICTY, *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-PT, Amended Indictment, 2 November 2005, para. 406.

29 ICTY, *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Testimony of Witness BT64, 21 May 2001, p. 16977 (available at: www.icty.org/x/cases/brdanin/trans/en/030604ED.htm), and Judgment (Trial Chamber), 1 September 2004, para. 406.

30 See ICTY, *Brdanin*, above note 29, Testimony of Sakib Muhic, 8 July 2002, p. 8109, available at: www.icty.org/x/cases/brdanin/trans/en/020708IT.htm (describing two people with disabilities who misunderstood orders and were killed on Muhici Street); ICTY, *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-T, Judgment (Trial Chamber), 15 March 2006, para. 1182 (discussing Franjo and Marko Rajic); ICTY, *Milosevic*, above note 22, Testimony of Witness B-1738, 17 March 2003, p. 18036, available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/030317ED.htm (describing the shooting of a mentally disabled man).

Sometimes in the kitchen, there would be a lot of us there and they were all – some people were retarded, some people were simply with poor nerves. And if we were more loud than acceptable to them, then Sarenac [a guard] would call the person who was louder out and that person would have to put his arms on his back and bend his head and then Sarenac would beat him.³¹

Another incident was described by a witness in the *Kvočka* trial regarding a young man named Crnalic, who was detained at the Omarska camp in 1992:

People who had been with him told us that he had left the white house through the window and come to the bench to sit down. Some people said that he was a retarded young man. I don't know whether that was true or not. But it was probably very hot and that was the reason why he went out. ... The guard yelled at him, he told him to stop or something to that effect, but the poor guy, he stood up, and he went to the guard and fire was opened. ... He was killed on the spot. It was terrible to see, because he fell down.³²

Persons with disabilities were often held as prisoners of war, despite being civilians and in some instances having obvious physical disabilities, such that they could not have been mistaken for belligerents. Between April 1992 and October 1994, Foca Kazneno-popravni Dom (known as KP Dom) was the primary detention facility for Bosnian Muslims in Bosnia and Herzegovina. Many of the 760 men interned at the facility had physical or mental disabilities.³³ One detainee at KP Dom recounted an incident in which a man with an intellectual disability was beaten and sent to solitary confinement after he came out of line while walking up some stairs.³⁴ An underage Bosnian Muslim boy with a mental disability was beaten constantly while interned at the Mitrovo Polje prison camp in Serbia in late 1995 or early 1996 because he had difficulty talking.³⁵ In the *Karadzic* trial, the prosecution discussed the content of a witness statement from a detainee at the prison camp at Bratunac in 1995, which remains under seal:

According to the witness's estimate, there were 400 men held there. They were in similar condition to him, mainly elderly men or men with disabilities. They were kept in suffocating heat, it was overcrowded, and they weren't given any food or water. When they complained, they were threatened or their complaints

31 ICTY, *Brdanin*, above note 29, Testimony of Faik Biscevic, 19 June 2002, p. 7091, available at: www.icty.org/x/cases/brdanin/trans/en/020619IT.htm.

32 ICTY, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Testimony of Kerim Mesanovic, 11 September 2000, p. 5192, available at: www.icty.org/x/cases/kvočka/trans/en/000911ed.htm.

33 ICTY, *Prosecutor v. Mladic*, Case No. IT-09-92, Testimony of Witness RM046, 18 January 2013, p. 7012 (available at: www.icty.org/x/cases/mladic/trans/en/130118ED.htm), and Testimony of the Prosecution, 30 October 2014, p. 27571, discussing Exhibit P738 (under seal) (available at: www.icty.org/x/cases/mladic/trans/en/141030ED.htm); ICTY, *Prosecutor v. Nikolic*, Case No. IT-94-2, Testimony of the Prosecution, 3 November 2003, pp. 216–217, available at: www.icty.org/x/cases/dragan_nikolic/trans/en/031103ED.htm.

34 ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Testimony of the Prosecution, 14 May 2003, p. 130, available at: www.icty.org/x/cases/krnojelac/trans/en/030514ED.htm (discussing evidence of Witness RJ).

35 ICTY, *Prosecution v. Tolimir*, Case No. IT-05-88/2, Testimony of Witness PW-013, 15 February 2011, p. 9880, available at: www.icty.org/x/cases/tolimir/trans/en/110215ED.htm.

were actually met with violence. Throughout that night of 12 July, Serb soldiers took about 40 prisoners in total from the warehouse, calling people out. He could hear blows being struck, moaning, screaming after the men were taken outside. Some of these men were returned to the room with blood on them, and the witness remembers that five men who had been brought out and returned died during the night.³⁶

Women with disabilities were targets of sexual violence. In Visegrad, soldiers broke into a home for persons with disabilities and raped them; girls and young women hid, cried, and screamed out of fear of the armed men.³⁷ One witness described another incident in which a woman with a mental disability was the target of repeated rapes while detained at the Tulek camp in the summer of 1992:

In early July, a Muslim woman was brought there. She was from Kozarac, near Prijedor originally. During that period, Zdravko Marinic and Zoran Cavraja were the persons in charge. They were playing cards. They were on duty. And they were placing bets that whoever lost the game would go there and rape this particular Muslim woman. ... At one point they came up to me and they told me, "Look, now you'll go there and abuse that Muslim woman sexually. All right?" I told them I couldn't. "Kill me if you want to, but I'm not going to do that." They gave up on me, and they made Slobodan Jandric from Sipovo [do it]. ... The Muslim woman was around 30 at the time. She was a bit – she was simple. She was a bit retarded And they would rape her on a regular basis. It was the army troops who did that and the military police who did that.³⁸

Hospitals and specialized facilities for persons with disabilities were frequently attacked. On 20 November 1991, 250 patients and staff from Vukovar Hospital, including persons with mental disabilities,³⁹ were removed from the hospital, transported to a farm, beaten and tortured for hours, separated into groups of ten to twenty people, executed by Serbian paramilitaries, and buried in a mass grave.⁴⁰ The prosecution in *Galic* presented evidence that a school for the blind in Nedarici was used by snipers,⁴¹ while the Trial Chamber accepted the defence's argument that this had not been proven beyond a reasonable doubt,⁴² the court did note that the school was subsequently destroyed and levelled.⁴³ The

36 ICTY, *Karadzic*, above note 26, Testimony of the Prosecution, 24 November 2011, p. 21917, available at: www.icty.org/x/cases/karadzic/trans/en/111124ED.htm.

37 Alexandra Adams, "The Legacy of the International Criminal Tribunals of the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape" *European Journal of International Law*, Vol. 29, No. 3, 2018, p. 767 fn. 81.

38 ICTY, *Prosecutor v. Stakic*, Case No. IT-97-24, Testimony of Nikola Cikojevic, 20 November 2002, pp. 9236–9238, available at: www.icty.org/x/cases/stakic/trans/en/021120ED.htm.

39 ICTY, *Prosecutor v. Hadzic*, Case No. IT-04-75, Testimony of Witness GH-103, 24 January 2013, p. 2785, available at: www.icty.org/x/cases/hadzic/trans/en/130124ED.htm (discussing a staff member with mental disabilities nicknamed "Specijalac").

40 ICTY, *Hadzic*, above note 39, Indictment, 21 May 2004, para. 24.

41 ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras 291–297, 299, 307, 319.

42 *Ibid.*, para. 340.

43 *Ibid.*, para. 301.

Trial Chambers in *Prlic* recalled a specific incident that occurred after 10 May 1993, when the Croatian Defence Council (Hrvatsko Vijeće Obrane, HVO) converted the Kostana Hospital in Stolac into a military facility, loaded the hospital patients into the back of a truck, and told the truck's Bosnian Muslim driver to drive to an isolated area of HVO-controlled territory and abandon the vehicle:⁴⁴

Near Blagaj, Salko Bojic [the truck's driver] opened the rear of the truck and discovered eleven women of all ages lying on the floor of the truck, as well as two men about forty years of age, one of whom was mentally handicapped. The women told Salko Bojic that they were invalid patients from Kostana Hospital in Stolac. Among them, only one could stand up – with difficulty – whereas all of the others were completely invalid. Salko Bojic drove the truck to the centre of Blagaj, where the invalid persons were sheltered in the home of the imam.⁴⁵

Many witnesses described the hardship associated with evacuating persons with disabilities and the violence that befell those who were unable to be evacuated. Many of the persons with disabilities who were killed in the Izbica massacre “couldn't go up into the mountains [with other civilians], so they thought that they would gather together because it would be safer with all the old people”.⁴⁶ While fleeing from violence against Bosnian Muslims in Bosanski Novi on 9 June 1992, Mr Midho Alic was forced to carry his aunt, who had a physical disability, in his arms.⁴⁷ There were several accounts of persons with disabilities who had been left behind being burned alive,⁴⁸ including the following recollection from Mr Nesib Buric, a witness in the *Oric* trial:

All villages along the River Drina, all Muslim villages, starting with Mala Daljegosta, that is furthest to the east, all along the river to Kragljivoda, were torched. I'm referring to more than 2,000 houses that were torched on that day. And dozens of people who were infirm or disabled or had not managed to escape for whatever reason were killed. They were set alight alive, and they were thrown on to haystacks ... and they were set on fire and entire families were thrown on to those fires.⁴⁹

Persons with disabilities were exposed to cruel treatment and prolonged torture. Mr Milan Rajcevic, a Bosnian Muslim with a mental disability, was tied to a car,

44 ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-T, Initial Indictment, 2 March 2004, para. 184.

45 ICTY, *Prlic*, above note 44, Judgment (Trial Chamber), 29 May 2013, Vol. 2, para. 2011.

46 ICTY, *Milosevic*, above note 22, Testimony of Sadik Xhemajli, 26 August 2002, p. 8904, available at: www.icty.org/x/cases/slobodan_milosevic/trans/en/020826IT.htm.

47 ICTY, *Brdanin*, above note 29, Testimony of Midho Alic, 30 January 2003, pp. 13885, 13896, available at: www.icty.org/x/cases/brdanin/trans/en/030130ED.htm.

48 ICTY, *Milosevic*, above note 22, Second Amended Indictment for Kosovo, 16 October 2001, para. 66(g) (describing two elderly disabled women who were unable to walk and were placed on a tractor-trailer that was set on fire). See also ICTY, *Prosecutor v. Oric*, Case No. IT-03-68, Testimony of Kada Hotic, 24 August 2005, p. 9671, available at: www.icty.org/x/cases/oric/trans/en/050824IT.htm (describing a house set on fire in Srebrenica).

49 ICTY, *Oric*, above note 48, Testimony of Nesib Buric, 5 September 2005, p. 10597, available at: www.icty.org/x/cases/oric/trans/en/050908IT.htm.

dragged around a courtyard, hung in between two trees, stabbed with knives, and finally died by immolation during a military operation in the village of Pocitelj on 9 September 1993.⁵⁰ A detainee with a mental disability at the Omarska camp was forced to drink motor oil.⁵¹ A person with a disability was beheaded by a sheet of glass by Vlado Rajic, an HVO soldier, in Gornji Vakuf in January 1993; his head was thrown “into a Muslim bar like a bowling ball”.⁵² Mr Hristo Zuzra, who had a mental disability, was forced to publicly recite the names of domestic animals and towns while he was forced to dress up as a woman.⁵³ One witness in the *Krajisnik* trial described the treatment of a detainee with a mental disability at the Manjaca camp in Banja Luka, Bosnia and Herzegovina, between April and May of 1992:

They used to take out those two people every day and beat them up. One of them, Jovo, his name is Muhamed but we called him Jovo, that man is still alive today. That man is retarded. That man couldn't even walk properly. He couldn't orient himself around town. And I don't understand why they called them, they nicknamed them “Muslim snipers”. They used to beat him up every day. His left arm was broken. It was broken right here. He had injuries on his nose. The bone was sticking out there. And at that moment, he had fly spit on that wound. Maggots were coming out of that wound. [He was] beaten up every day. No one could go up to him [or] to that other man Blek in the prison just because they had this nickname attached to them: “Muslim snipers”.⁵⁴

As a final indignity, the bodies of persons with disabilities were sometimes desecrated. A man named Srdjan Milosevic, who was blind and had a mental disability, was killed and “had his trousers torn in the genital area”.⁵⁵ The trial

50 ICTY, *Prosecutor v. Ademi*, Case No. IT-01-46-I, Indictment, 21 May 2001, Second Schedule. This file was transferred to the domestic courts in Croatia; Ademi was eventually found not guilty. See also Robert Adric, Mladen Stojanovic and Katarina Kruhonja, *Monitoring of War Crime Trials: A Report for 2008*, Centre for Peace, Non-Violence and Human Rights, 2009, pp. 45, 46, 91, available at: www.legal-tools.org/doc/c06917/pdf; Humanitarian Law Centre, “We Should Know the Facts: September 9, 1993 – Medak Pocket, Croatia”, 8 September 2010, available at: www.hlc-rdc.org/?p=13075&lang=de.

51 ICTY, *Karadzic*, above note 26, Judgment (Trial Chamber), 24 March 2016, para. 1762.

52 ICTY, *Prlic*, above note 44, Testimony of Andrew Williams, 16 October 2006, p. 8442, available at: www.icty.org/x/cases/prlic/trans/en/061016ED.htm; ICTY, *Prosecutor v. Kordic*, Case No. IT-95-14/2, Testimony of Andrew Williams, 2 August 1999, p. 6007 (available at: www.icty.org/x/cases/kordic_cerkez/trans/en/990802ed.html), and Testimony of Alistair Rule, 27 July 1999, pp. 5453–5354, 5384, 5386 (available at: www.icty.org/x/cases/kordic_cerkez/trans/en/990727it.html). Rajic was arrested by the HVO military police but was subsequently released.

53 ICTY, *Prosecutor v. Mucic*, Case No. IT-96-21, Testimony of the Prosecution, 5 November 1997, pp. 9095–9098, available at: www.icty.org/x/cases/mucic/trans/en/971105it.htm.

54 ICTY, *Prosecutor v. Krajisnik*, Case No. IT-00-39, Testimony of Isak Gasi, 5 February 2004, p. 552, available at: www.icty.org/x/cases/krajisnik/trans/en/040205ED.htm; also noted in ICTY, *Karadzic*, above note 26, Judgment (Trial Chamber), 24 March 2016, para. 806. As noted later in this article, the false insinuation that the two men were “Muslim snipers” was used by the guards as a pretext to commit violence against them.

55 ICTY, *Krajisnik*, above note 54, Testimony of Vidomir Banduka, 21 November 2005, p. 18827, available at: www.icty.org/x/cases/krajisnik/trans/en/051121IT.htm.

judgment in *Delic* describes another such instance that occurred on 10 September 1995, during a forced march of Bosnian Serb civilians:

One of the captives, a mentally retarded person named Milenko Stanic, protested against one of the women being beaten. When Stanic grabbed the throat of one Mujahedin, this Mujahedin fired several shots from an automatic rifle at him. After he had fallen to the ground, the same Mujahedin stabbed the chest of Stanic a number of times with a knife and fired more bullets from the automatic rifle into his head. Stanic's corpse was then thrown into a ditch on the side of the road.⁵⁶

Violence against persons with disabilities during the conflict in Rwanda

In comparison to the evidence before the ICTY, less information about violence against persons with disabilities was revealed in investigations by and witness testimony before the ICTR. There were some accounts of sexual violence against persons with disabilities, including one incident discussed by a witness in the *Nyiramasuhuko* trial in which a boy with a mental disability was groped,⁵⁷ and another incident recounted by a witness in the *Renzaho* trial in which a woman with a mental disability was raped by the Interahamwe, the Hutu paramilitary organization primarily responsible for the Rwandan genocide.⁵⁸ There were also incidents of persons with disabilities being left behind during evacuations and being burned alive in houses; a witness in *Simba*, for example, noted:

It is obvious that when their houses were burned down, some of them hid in the bushes and elsewhere. There were old women, old people, disabled people, young people, children. They were killed on the hills. Those who were able to flee sought refuge in Cyanika. Others were killed inside their houses and their bodies were dumped in pit latrines and in bushes.⁵⁹

The paucity of evidence before the ICTR, however, does not mean that violence against persons with disabilities did not occur. On the contrary, journalists, anthropologists and those who witnessed these atrocities attest that persons with disabilities suffered disproportionately during the Rwandan genocide. In the words of Theodore Simburudali, a commissioner for the Rwandan National Commission on Human Rights, "disabled people suffered intolerable horrors. They went through hell on earth. There are very few disabled who survived during the genocide."⁶⁰

56 ICTY, *Prosecutor v. Delic*, Case No. IT-04-83-T, Judgment (Trial Chamber), 15 September 2008, para. 288.

57 ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Testimony of Althea Alexis-Windsor, 28 September 2006, p. 31, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-42/TRS18806R0000626017.DOC>.

58 ICTR, *Prosecutor v. Renzaho*, Case No. ICTR-97-31-T, Testimony of H.A.D., 1 February 2007, available at: <https://tinyurl.com/475baast>.

59 ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment (Trial Chamber), 6 September 2004, para. 14.

60 Phitalis Masakhwe, "The Disabled and the Rwanda Genocide: The Untold Story", *Disability World*, Vol. 1, No. 1, 2004, p. 23.

In addition to the murder of individual persons with disabilities, the conflict in Rwanda resulted in at least two mass casualty events where many or the majority of the victims were persons with disabilities. The first massacre was at the Home de la Vierge des Pauvres (HVP) in Gatagara, a village which was formerly part of the Butare prefecture. HVP Gatagara, operated by the Roman Catholic Brothers of Charity, provided orthopaedic and rehabilitation services to children with disabilities, including those with congenital deformities and impairments caused by polio infections.⁶¹ Mr Simburudali recalled this attack on what was “once a thriving centre for rehabilitation and skills training”:

All the disabled people in the centre were senselessly murdered in cold blood. The workshop and all the equipment at the centre were looted and others destroyed. ... Watching video cassettes of the disabled persons from this centre, helplessly looking for help during the slaughter, would leave you breathless. This happened as the troops, both foreign and local, that could have helped, just watched as if they were watching a football game. As if they were on a picnic!⁶²

A second massacre occurred at the Ndera Neuropsychiatric Hospital (also known as Caraes) in Kigali, which remains the only psychiatric hospital in Rwanda. Mr Eric Eugene Murangwa, a former international football player and founder of the Ishami Foundation, had an uncle, Mr John Kayonga, who worked at the hospital as a nurse. Mr Murangwa’s 7-year-old brother, Irankunda Jean-Paul, had gone to Ndera to visit their uncle for the Easter holidays. Neither of them survived the massacre that occurred there:

On the sixteenth of April, the first evacuation for non-Rwandan people took place inside the hospital. They evacuated pretty much all non-Rwandans and Westerners who were staying there and they left. They apparently realized that one of the people, who was probably a resident of the hospital, had forgotten his dog. They came back, a day after, on April 17 ... and rescued the dog. Once again, they left Rwandans behind. As soon as they left, the whole militia, who had surrounded the area for days, just entered the hospital and pretty much killed everyone who was there.⁶³

When members of African Rights, a non-governmental organization, visited the hospital on 17 June 1994, they found that only two patients had survived the massacre. African Rights determined that it was “indisputable ... that Tutsi psychiatric patients were murdered” by armed combatants.⁶⁴ Rwanda’s National

61 International Committee of the Red Cross (ICRC), “ICRC Activities in Rwanda”, 1997, available at: <https://tinyurl.com/yzyb9pj>.

62 P. Masakhwe, above note 60, p. 23.

63 Ishami Foundation, “Ndera Hospital in 1994”, *YouTube*, 17 August 2021, available at: www.youtube.com/watch?v=PKoDITJ-54w.

64 African Rights, *Rwanda: Death, Despair and Defiance*, London, 1995, p. 973; see also Donatella Lorch, “Ndera Journal: Minds in Retreat from the Madness of Rwanda”, *New York Times*, 7 November 1994, available at: www.nytimes.com/1994/11/07/world/ndera-journal-minds-in-retreat-from-the-madness-of-rwanda.html.

Commission for the Fight against Genocide determined that approximately 3,500 Tutsis were killed at the hospital;⁶⁵ at least 750 of those victims were persons with disabilities.⁶⁶

Violence against persons with disabilities during the conflict in Sierra Leone

When the Sierra Leone Civil War ended in 2002, a survey found that more than 12% of Sierra Leoneans were living with mental health disorders, most notably schizophrenia. One doctor posits that the real number is probably much higher, as those living with mental illnesses are often hidden by their families or sent to traditional healers.⁶⁷ Persons with disabilities in Sierra Leone continue to suffer from some of the most deplorable conditions in the world: people with conditions like epilepsy, for example, are cut and burned, forced to drink kerosene, or sexually abused “to drive out demons”.⁶⁸ Today, the country’s only psychiatric facility has a small wooden sign at the front desk declaring that it has been “chain-free since 2018”.⁶⁹ During the war, most of the hospital’s buildings were destroyed;⁷⁰ according to the hospital staff, armed rebel fighters got as far as the staff quarters before turning back, “too afraid of what they might find inside”.⁷¹

Only thirteen indictments were ever issued by the prosecutor for the SCSL. None of the evidence before the SCSL addressed or even mentioned violence against persons with disabilities that predated the war. This aligns with the general trend of discussion on disability in Sierra Leone, which focuses on persons who developed disabilities during the conflict. The Truth and Reconciliation Commission of Sierra Leone, for example, did not reference persons with pre-existing disabilities at all in its report; instead, it focused heavily on persons disabled directly by the conflict, as the indiscriminate use of physical mutilation against civilians resulted in a massive population of persons with amputations. This is in line with the jurisprudence of the SCSL, where “disability” is used as a synonym for

65 National Commission for the Fight against Genocide, “April 17, 1994: The Implementation of Genocide Perpetrated against Tutsi Throughout the Country”, 17 April 2020, available at: <https://tinyurl.com/2mx6ah2n>.

66 “Aid Workers in Rwanda Report 750 Slain at a Mental Hospital”, *New York Times*, 10 October 1994, available at: www.nytimes.com/1994/10/10/world/aid-workers-in-rwanda-report-750-slain-at-a-mental-hospital.html.

67 Melanie Mayhew, “As Liberia and Sierra Leone Recover from Civil Wars and Ebola, Demand for Mental Health Services Surges”, World Bank, 11 April 2016, available at: www.worldbank.org/en/news/feature/2016/04/11/as-liberia-sierra-leone-recover-from-civil-wars-and-ebola-demand-for-mental-health-services-surges.

68 Aliyah Baruchin, “Stigma is the Toughest Foe in an Epilepsy Fight”, *New York Times*, 29 August 2011, available at: www.nytimes.com/2011/08/30/health/30epilepsy.html?smid=url-share.

69 Stephanie Nolen, “This Psychiatric Hospital Used to Chain Patients. Now It Treats Them”, *New York Times*, 11 April 2022, available at: www.nytimes.com/2022/04/11/health/this-psychiatric-hospital-used-to-chain-patients-now-it-treats-them.html?searchResultPosition=1.

70 M. Mayhew, above note 67.

71 Ryan Lenora Brown, “Africa’s Oldest Psychiatric Hospital a Stark Reminder of War and a Forgotten People”, Bhekisisa Centre for Health Journalism, 22 November 2016, available at: <https://bhekisisa.org/article/2016-11-22-africas-oldest-psychiatric-hospital-a-stark-reminder-of-war-and-a-forgotten-people/>.

amputations and mutilations.⁷² While it is important to understand the barriers facing previously non-disabled people who became physically disabled (for example, through mutilations or amputations) or mentally disabled (for example, through post-traumatic stress disorder)⁷³ during the war, the failure of both the SCSL and the Truth and Reconciliation Commission to solicit testimony from people with pre-existing disabilities means that there is no data available on how this conflict affected persons with disabilities.

The anecdotal evidence that does exist demonstrates that, as with the conflicts in the former Yugoslavia and Rwanda, persons with disabilities suffered immensely during the Sierra Leone Civil War. Persons with disabilities were deliberately shot and killed,⁷⁴ and children with disabilities were abandoned by their families while fleeing from the conflict.⁷⁵ Memorably, Sorious Samura's 1999 documentary "Cry Freetown", which was credited with exposing international audiences to the atrocities committed during the siege of Freetown, told the story of Moses, a 9-year-old boy with a mental disability, who was stripped naked, beaten, and tortured by Nigerian soldiers who suspected him of being a sniper for the Revolutionary United Front:

To [Moses' foster mother, Martha], the idea of Moses being a child soldier is ridiculous. That's because Moses, who is now 13, has been living in this community since he was 5, when this place was not a rehabilitation center for child soldiers but an orphanage. As long as [she has] known Moses, he has been mentally handicapped. He cannot speak. He can barely put on his own shoes, let alone fire a gun, but he, like many boys of his age, simply needs love and attention.⁷⁶

Evidentiary trends and prosecutorial failures

Although more information would obviously be needed to build viable cases against the individuals who committed the murders, assaults and torture of persons with disabilities discussed in the preceding sections of this paper, it is clear that sufficient evidence of violence against persons with disabilities was known to the prosecutors of the *ad hoc* tribunals. This evidence ought to have warranted further investigation, but when violence against persons with disabilities was

72 See, for example, SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement (Sentencing), 8 April 2009, paras 155, 156.

73 See, for example, Maria Berghs, *War and Embodied Memory: Becoming Disabled in Sierra Leone*, Routledge, Abingdon, 2016.

74 Alison Harris and Sue Enfield, *Disability, Equality and Human Rights: A Training Manual for Development and Humanitarian Organisations*, Oxfam, Oxford, 2014, p. 21; Brigitte Rohwerder, "Intellectual Disabilities, Violent Conflict and Humanitarian Assistance: Advocacy of the Forgotten", *Disability and Society*, Vol. 28, No. 6, 2012, p. 772.

75 International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2007: Focus on Discrimination*, 2007, p. 97, available at: https://www.preventionweb.net/files/1720_WDR2007English.pdf.

76 Sorious Samura (dir.), "Cry Freetown", *CNN.com*, 17 February 2000, available at: www.cnn.com/TRANSCRIPTS/0002/17/nsst.00.html.

mentioned at all in indictments or judgments of the tribunals, it was treated merely as an aggravating factor in determining the accused's sentence, rather than as a crime that deserved attention and action in and of itself.⁷⁷ For example, in assessing the extent of the violence inflicted on the Muslim detainees of the Kaonik prison established by the HVO, the Trial Chamber in *Aleksovski* considered that the "commission of violent offences against vulnerable, helpless persons or those placed in a situation of inferiority constitutes an aggravating circumstance";⁷⁸ and referred, by example, to national laws that relate to violence against "a handicapped person".⁷⁹ In *Gotovina*, violence against persons with disabilities was addressed only once, at the sentencing stage:

The Trial Chamber considers further the vulnerability of the murder victims, who to a great extent consisted of those too frail to flee the advance of the [Croatian Army], including the elderly and some disabled The Trial Chamber considers that this circumstance renders the murders particularly cowardly and blameworthy acts, for which the Accused are held responsible as a natural and foreseeable consequence of implementing the [joint criminal enterprise]'s objective. In this regard, the Trial Chamber considers in particular that Gotovina commented at the Brioni meeting that a large number of civilians were already evacuating Knin, which meant that if Croatian forces continued to exert pressure, the only civilians left would be those who had no possibility of leaving. The Trial Chamber finds that the vulnerability of the victims must therefore weigh in aggravation of the Accused's sentence.⁸⁰

The failure of the *ad hoc* tribunals to investigate and prosecute violence against persons with disabilities has had significant and long-lasting effects. Most obviously, those who murdered, assaulted and tortured persons with disabilities during each of these conflicts have not had to answer for their crimes, which perpetuates impunity and sets a dangerous precedent for the future. Although this research has uncovered some accounts of violence against persons with disabilities that occurred in the former Yugoslavia, Rwanda and Sierra Leone, the failure to adequately investigate these crimes means that the international community still has virtually no data on how these conflicts affected persons with disabilities, which could have informed humanitarian responses to similar armed conflicts in the future. The failure to prosecute these offences has also resulted in the delegitimization of international criminal law fora. Finally, by remaining silent on the violence against persons with disabilities that occurred during these conflicts,

77 See, for example, ICTY, *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Judgment (Trial Chamber), 15 April 2011, para. 2603; ICTY, *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment (Trial Chamber), 27 September 2006, para. 1149; ICTY, *Brdanin*, above note 29, Judgment (Trial Chamber), 1 September 2004, para. 1106.

78 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 227; referred to in ICTY, *Prosecutor v. Jokic*, Case No. IT-01-42/1-S, Judgment (Trial Chamber), 18 March 2004, para. 64.

79 ICTY, *Aleksovski*, above note 78, fn. 468.

80 ICTY, *Gotovina*, above note 77, para. 2603.

the *ad hoc* tribunals have perpetuated a discriminatory trend that does not accord respect or importance to the human rights and lives of persons with disabilities.

The following sections of this paper will argue that, had the countless instances of violence against persons with disabilities been given adequate prosecutorial attention and investigated thoroughly, they could have been characterized as an “other inhumane act” prosecutable as a crime against humanity. Prosecution of these crimes on this ground was conceptually feasible given the flexibility of the *ad hoc* tribunals’ crimes against humanity framework, as demonstrated through the courts’ innovative articulations of sexual and gender-based violence as crimes against humanity. Analyzing the tribunals’ treatment of sexual and gender-based violence will also highlight the primary reason why violence against persons with disabilities was not prosecuted in the first place: namely, that the prosecution and judiciary unintentionally internalized a “charitable” understanding of disability, wherein persons with disabilities are not seen as possessing innate human rights but are instead bestowed rights through the benevolence of non-disabled people.

The *ad hoc* tribunals

To appreciate the flexibility of the crimes against humanity framework available to the *ad hoc* tribunals, it is important to highlight the tribunals’ unique origins and functions. They were, after all, “the first truly international criminal tribunal[s]”,⁸¹ and remained so until the International Criminal Court (ICC) was created in 2002. Although international criminal law’s ancestry is often traced back to the conclusion of World War II, the Nuremberg trials were not truly “international”: as the German Reich had unconditionally surrendered, the Allied forces that drafted the Nuremberg Charter and administrated the tribunals were exercising sovereign legislative and judicial power over an occupied territory.⁸² Nuremberg’s legacy was in developing the substance – rather than the form or procedure – of international criminal law as we understand it today. While the trials were essentially domestic, they grappled with crimes that not only impacted a single State, but shook the very foundations of humanity. Article 6(c) of the Nuremberg Charter provided, for the first time, for the prosecution of “crimes against humanity”, which included “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war ... whether or not in violation of the domestic law of the country where perpetrated”. The attorneys and judges in Bavaria grappled with this novel concept just as the drafters of the UN Charter in San Francisco finished articulating their lofty ambitions to “reaffirm faith in fundamental human rights” and “in the dignity and worth of the human person”,⁸³ to “achieve international

81 Theodor Meron, “Remarks by Theodor Meron”, *American Society of International Law: Proceedings of the Annual Meeting*, Vol. 106, 2012.

82 International Military Tribunal, *France et al. v. Goring et. al.*, (1945) 22 IMT 203, 13 ILR 203, 1945.

83 UN Charter, Preamble.

co-operation ... in promoting and encouraging respect for human rights”,⁸⁴ and to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.⁸⁵

The UN hesitated to use international criminal law to further its mandate of upholding and strengthening human rights for nearly fifty years after its creation in 1945. This changed when, in the words of former ICTY and ICTR prosecutor Louise Arbour, “the utter despair of the international community as to how to manage [the] unmanageable conflicts in the Balkans”⁸⁶ compelled the UN Security Council, pursuant to its statutory capacity to establish subsidiary organs,⁸⁷ to create the ICTY. The ICTY was formally established by Security Council Resolution 827 and adopted without a vote by general agreement of the fifteen members of the Council on 25 May 1993. A little over a year later, the genocide in Rwanda against the Tutsi population and politically moderate Hutus and Twas compelled the Security Council to act again. The ICTR was created by Resolution 955 on 8 November 1994, before the ICTY was even operational.

Since 1994, the Security Council has been asked to establish similar tribunals to prosecute human rights abuses committed during the reign of the Khmer Rouge in Cambodia from 1975 to 1979, the conflict in East Timor in 1999, the civil war in Burundi from 1993 to 2005, and the ongoing war in Darfur. Although the Security Council has established “hybrid courts” in Cambodia, Lebanon and East Timor, the only other mechanism that can accurately be described as an *ad hoc* tribunal, along with the ICTY and ICTR, is the SCSL. The SCSL, tasked with addressing the atrocities committed during the civil war from 1991 to 2002, was created on 16 January 2002 after the Security Council requested that Secretary-General Kofi Annan proceed with the negotiation of an agreement with the government of Sierra Leone to establish an “independent special court”.

The SCSL was an international tribunal because its judicial force did not stem from State sovereignty. It was a “treaty-based *sui generis* court of mixed jurisdiction and composition” which was “not anchored in any existing system” and which reflected the interests of the international community rather than those of the State itself.⁸⁸ Theoretically, the ICTY and ICTR could have also been formed in this way, just as the SCSL could have theoretically been formed as a subsidiary organ of the UN Security Council. Regardless of their inception, each *ad hoc* tribunal was an international court with a legal personality and an autonomous will distinct from the institutions that created it.

The *ad hoc* tribunals also fulfilled similar objectives to each other. They were created to restore and maintain international peace and security; to convict

84 *Ibid.*, Art. 1.

85 *Ibid.*, Preamble.

86 William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge, 2012, pp. 3–4.

87 See UN Charter, Art. 29; Provisional Rules of Procedure, Rule 28.

88 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, p. 9.

and punish the figures in each conflict that bore the greatest responsibility for breaches of international criminal law; to send the message that violations of international humanitarian law (IHL) and international human rights law (IHRL) would not be tolerated by the global community; to encourage reconciliation; and, perhaps most importantly for the purposes of this paper, to formally recognize the suffering and loss of the victims of each conflict. Former ICTY judge Patricia Wald wrote powerfully of the ICTY's role of "truth in fact finding for history's sake":

Many historians as well as the relatives of the victims maintain that only the adjudicated findings of an impartial international body of jurists following accepted rules of legal procedure will quell the doubts of future generations that the terrible things did in fact happen. To chronicle accurately for history some of the world's darkest deeds is the special responsibility of the Tribunal. Many would say it explains and even justifies the extraordinary length of the Tribunal's judgments and what sometimes appears to be the Tribunal's near-obsession with minute factual detail.⁸⁹

The *ad hoc* tribunals have now formally completed their functions. The ICTR and ICTY were dissolved on 31 December 2016 and 31 December 2017 respectively, and their residual functions are now carried out by the International Residual Mechanism for Criminal Tribunals. The SCSL was dissolved on 2 December 2013, and its residual functions are now carried out by the Residual Special Court for Sierra Leone. The current preference of the Security Council is to refer situations to the ICC, as it did with the situation in Darfur, rather than establish a new tribunal through its statutory powers or by treaty. The existence of the ICC means that further *ad hoc* tribunals are unlikely to be established in the future, although their creation remains a viable legal option.

The legal community's response to the *ad hoc* tribunals was and remains mixed. Some have cited the tribunals as actors of domestic change⁹⁰ and as rule-of-law tools for post-conflict States,⁹¹ while others label them as ineffective examples of victor's justice.⁹² An undeniable accomplishment of the tribunals, however, was their role in developing international criminal law. International law is inherently static, given that there is no world government authorized to enact substantive laws; it therefore relies significantly on judicial creativity. As the ICTY was the "first truly international criminal tribunal",⁹³ judges, prosecutors and legal counsel in the early years of the *ad hoc* tribunals surely felt like they were aimlessly wandering a jurisprudential desert, barren of precedents or useful

89 Patricia M. Wald, "Judging War Crimes", *Chicago Journal of International Law*, Vol. 1, No. 1, 2000, p. 195.

90 See, for example, Klaus Bachmann, Gerhard Kemp and Irena Ristic (eds), *International Criminal Tribunals as Actors of Domestic Change: The Impact of Institutional Reform*, Peter Lang, Berlin, 2018.

91 See, for example, UN Human Rights, *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems*, Geneva, 2008, pp. 47–48.

92 See, for example, Victor Peskin, "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *Journal of Human Rights*, Vol. 4, No. 2, 2005.

93 T. Meron, above note 81.

academic commentary. Indeed, in the words of former ICTY and ICTR judge David Hunt, “[t]here was no Moses to produce on slabs of stone a code of commandments which were intended to be all-encompassing for all time”.⁹⁴ Technically, the *ad hoc* tribunals had to rely on international conventions, international custom, general principles of law “recognized by civilized nations”, and “judicial decisions and the teachings of the most highly qualified publicists of the various nations” in interpreting their enabling statutes and rendering their judgments.⁹⁵ On this basis, some have argued that the *ad hoc* tribunals “manipulated the process of abstraction of legal rules from national legal systems, so as to create a legal principle apt for settling the legal issue at hand rather than to identify an existing legal principle”.⁹⁶ Others, including former ICTY and ICTR judge Georges Abi-Saab, have viewed the *ad hoc* tribunals’ unique position as an advantage. In his words, the tribunals were “afforded a unique opportunity to assume responsibility for the further rationalization of these categories [of international crimes] at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order”.⁹⁷ All can agree that the *ad hoc* tribunals were in a privileged position to develop flexible understandings of the crimes they were tasked with adjudicating.

Crimes against humanity in the jurisprudence of the *ad hoc* tribunals

Crimes against humanity are one of a handful of crimes that mass atrocities may be prosecuted as under international criminal law. Broadly defined as “particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings”,⁹⁸ crimes against humanity “fully capture the social harm suffered by the victims”⁹⁹ of armed conflict, and therefore play a crucial role in recognizing and adjudicating human rights abuses.

94 David Hunt, “The International Criminal Court: High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges”, *Journal of International Criminal Justice*, Vol. 2, No. 1, 2004.

95 These four sources of law are listed in Article 38 of the Statute of the International Court of Justice, which the ICTY Appeals Chamber affirmed to be a “complete statement of the sources of international law”: ICTY, *Aleksovski*, above note 78, Judgment (Appeals Chamber), 24 March 2000, fn. 364.

96 See, for example, Fabian O. Raimondo, “General Principles of Law, Judicial Creativity, and the Development of International Criminal Law”, in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010, p. 45.

97 ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

98 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005, p. 178, available at: <https://reliefweb.int/report/sudan/report-international-commission-inquiry-darfur-united-nations-secretary-general>.

99 Leila Nadya Sadat, “Crimes against Humanity in the Modern Age” *American Journal of International Law*, Vol. 107, No. 2, 2013, p. 344.

The *ad hoc* tribunals, more than any other institution, can be credited with developing the abstract notion of “crimes against humanity” into an organized and well-defined body of law.¹⁰⁰ The enabling statutes of each of the tribunals provided for the prosecution of crimes against humanity, although the language of each relevant section – and therefore the scope of prosecution – differed from tribunal to tribunal. Regardless of the definition under each statute, crimes against humanity in each tribunal’s jurisprudence contained what Bernhard Kuschnik has helpfully described as elements of macro- and micro-criminality.¹⁰¹ The successful prosecution of a crime against humanity in each of the *ad hoc* tribunals required three elements to be proved beyond a reasonable doubt: the act must have been committed as part of a widespread or systematic attack directed against a civilian population (the macro-criminal element); the act must have been one of several prohibited acts (the micro-criminal element); and the act must have been done with knowledge of the macro-criminal element and with the intent to commit the micro-criminal element (the *mens rea* nexus).

The macro-criminal element required that the individual criminal acts (i.e., the micro-criminal element) be committed against “any civilian population”¹⁰² as part of a widespread attack (i.e., a “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”)¹⁰³ or systematic attack (i.e., a non-random pattern of similar criminal conduct).¹⁰⁴ The macro-criminal element justified the adjudication of these crimes by international criminal tribunals because it contextualized the relevant act within a greater assault on human life and dignity, to the exclusion of single or isolated incidents. The “attack directed against any civilian population” was thus not to be understood as the particular attack or attacks by the perpetrator, but rather as the “broader attack” directed against civilians

100 Goran Sluiter, “Chapeau Elements of Crimes against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals”, in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, Cambridge, 2011, p. 109.

101 Bernhard Kuschnik, “Humaneness, Humankind and Crimes against Humanity”, *Goettingen Journal of International Law*, Vol. 2, No. 2, 2010.

102 The language of a “widespread and systematic attack” appeared directly in Article 3 of the ICTR Statute and Article 2 of the SCSL Statute. This requirement was imposed in the ICTY trials by judges; see, for example, ICTY, *Prosecutor v. Mrksic et al.*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61, 3 April 1996, para. 30; ICTY, *Tadic*, above note 97, Judgment (Appeals Chamber), 15 July 1999, para. 311; ICTY, *Kordic*, above note 52, Judgment (Appeals Chamber), 17 December 2004, para. 106; ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 98.

103 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 580; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000, para. 204; ICTR, *Prosecutor v. Ntakirutimana*, Case Nos ICTR-96-10, ICTR-96-17-T, Judgment (Trial Chamber), 21 February 2003, para. 804.

104 ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 94; ICTY, *Prosecutor v. Naletilic et al.*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 236; ICTR, *Akayesu*, above note 103, paras 578–579; ICTY, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber), 6 December 1999, para. 67.

generally.¹⁰⁵ Importantly, neither the attack nor the acts of the accused needed to be supported by any form of “policy” or “plan”, though there must have been some connection between the attack and the State or *de facto* power.¹⁰⁶

The micro-criminal elements were enumerated in the enabling statute of each of the *ad hoc* tribunals, and generally included murder, extermination, enslavement, deportation, imprisonment, torture and rape. Each statute also listed persecution as a crime against humanity, but because the ICTY, ICTR and SCSL were limited to the enumerated discriminatory grounds,¹⁰⁷ persecution on the basis of disability was not an option for the *ad hoc* tribunals. At the conclusion of each list of offences, the statutes for the *ad hoc* tribunals provided for a generic charge, termed “other inhumane acts”. The language of “other inhumane acts” was an import from the Nuremberg Charter and had been designed to encompass all crimes that amounted to “cruel treatment” under the Geneva Conventions.¹⁰⁸ The *ad hoc* tribunals repeatedly explained that the crime of inhumane acts “function[ed] as a residual category for serious offences which [were] not otherwise enumerated under” the relevant statute’s crimes against humanity framework.¹⁰⁹ According to the Appeals Chamber in *Kordic*, prosecutions for other inhumane acts had to meet the following conditions: the victim must have suffered serious bodily or mental harm; the suffering must be the result of an act or omission of the accused or of a subordinate; and, when the offence was committed, the accused or the subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.¹¹⁰ In order to satisfy the principle of legality, which holds that an individual may not be prosecuted for acts that were not characterized as crimes at the time when they were committed, external sources like international standards of human rights could be used to identify universally recognized standards. In *Tadic*, for example, the ICTY referred to the definition of crimes against humanity found in the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind, which allowed for the prosecution of “other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.¹¹¹ Over the course of their mandates, the *ad hoc* tribunals prosecuted various crimes as “other inhumane

105 ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment (Trial Chamber), 7 June 2001, para. 75; ICTR, *Prosecutor v. Nindabahizi*, Case No. ICTR-2001-71-I, Judgment (Trial Chamber), 15 July 2004, para. 477.

106 ICTY, *Kunarac*, above note 104, para. 98; ICTR, *Akayesu*, above note 103, para. 580; ICTY, *Blaskic*, above note 102, para. 126.

107 ICTR, *Nyiramasuhuko*, above note 57, Judgment (Trial Chamber), 24 June 2011, para. 2136.

108 ICTY, *Prosecutor v. Jelacic*, Case No. IT-95-10-T, Judgment (Trial Chamber), 14 December 1999, para. 52.

109 ICTY, *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment (Trial Chamber), 29 November 2002, para. 234; ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 563; ICTY, *Blaskic*, above note 102, para. 237; ICTY, *Kordic*, above note 52, Judgment (Trial Chamber), 26 February 2001, para. 269.

110 ICTY, *Kordic*, above note 52, Judgment (Appeals Chamber), 17 December 2004, para. 117; ICTY, *Vasiljevic*, above note 109, para. 234; W. A. Schabas, above note 86, p. 222.

111 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, 1996, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf.

acts”, including the undressing and public display of women,¹¹² forcing women to perform exercises naked in public,¹¹³ desecrating corpses,¹¹⁴ the forcible transfer of civilians¹¹⁵ and forced marriage.¹¹⁶

Finally, both the macro- and micro-criminal elements of a crime against humanity, as articulated by the *ad hoc* tribunals, required knowledge and intent. This *mens rea* was two-pronged: first, the accused must have carried out the individual act (i.e., the micro-criminal element) with knowledge and intent, as is required with offences under most domestic criminal codes; and second, the accused must have been aware of a widespread or systematic attack directed against any civilian population (i.e., the macro-criminal element).¹¹⁷ In other words, the prosecution had the onus of proving that the accused “must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known that there is an attack on the civilian population and that his acts comprise part of that attack”.¹¹⁸ The accused was generally assumed to have knowledge of the attack if he or she was aware of the risk that an attack existed and of the risk that certain elements of the attack elevated it to a dangerous level.¹¹⁹ Significantly, there was no requirement that the offence be committed with discriminatory intent, except in the specific case of persecution.¹²⁰

Thus, the articulation of the elements of crimes against humanity by the *ad hoc* tribunals created an important and necessary framework. This, however, has been selectively applied and requires creative interpretation to extend it to prosecutions of violence hitherto excluded, whether intentionally or by collective indifference.

Framing violence against persons with disabilities as a crime against humanity

Although persons with disabilities continue to experience unacceptable levels of violence during times of both war and peace, the international community has never been more conscious of, or concerned with, violence towards this group of people. Over the past fifty years, various treaties and conventions have been implemented with the aim of affirming the human rights of persons with disabilities and ensuring their protection during armed conflict, including the

112 ICTR, *Akayesu*, above note 103, para. 688.

113 *Ibid.*, para. 697.

114 ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment (Trial Chamber), 1 December 2003, paras 934–936; ICTR, *Prosecutor v. Bagosora*, Case No. ICTR-98-41-A, Judgment (Appeals Chamber), 14 December 2011, para. 729.

115 ICTY, *Stakic*, above note 38, Judgment (Appeals Chamber), 22 March 2006, para. 317.

116 SCSL, *Prosecutor v. Brima*, Case No. SCSL-2004-16-T, Judgment (Trial Chamber), 20 June 2006.

117 ICTY, *Kunarac*, above note 104, paras 102, 410; ICTY, *Krnjelac*, above note 34, Judgment (Trial Chamber), 15 March 2002, para. 59; ICTY, *Tadic*, above note 97, para. 271; ICTR, *Bagilishema*, above note 105, para. 94; ICTR, *Rutaganda*, above note 105, para. 71; ICTR, *Musema*, above note 103, para. 206.

118 ICTY, *Kunarac*, above note 104, Judgment (Appeals Chamber), 12 June 2002, para. 102.

119 ICTY, *Kunarac*, above note 104, para. 434.

120 ICTY, *Tadic*, above note 97, paras 283, 292, 305; ICTY, *Kordic*, above note 52, Judgment (Appeals Chamber), 17 December 2004, para. 111; ICTR, *Akayesu*, above note 103, paras 447–469.

Declaration on the Rights of Mentally Retarded Persons in 1971, the Declaration of the Rights of Disabled Persons in 1975, and the World Programme of Action Concerning Disabled Persons in 1982. Most recently, the CRPD came into effect in May 2008, and as of August 2022, it has 164 signatories and 185 States Parties. Article 11 of the CRPD, which addresses “Situations of Risk and Humanitarian Emergencies”, imposes a specific obligation on States to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”. The UN Security Council reiterated these obligations in 2019 with the adoption of Resolution 2475, which emphasized the “need for States to end impunity for criminal acts against civilians, including those with disabilities” and to ensure their “access to justice and effective remedies and, as appropriate, reparation”.¹²¹

IHL and IHRL have therefore been engaged with protecting and affirming the personhood of persons with disabilities for many years. The legal response to violence against persons with disabilities during armed conflict, however, has been virtually non-existent. In fact, it seems that little has changed since the “Doctors’ Trial” at the close of World War II, when the Aktion T4 eugenics programme – which resulted in the murder of approximately 300,000 persons with disabilities by deliberate starvation, lethal injection, and gassing – was grouped with the experiments and “medical crimes” committed against non-disabled Holocaust victims. Aktion T4 was characterized by the prosecution in these trials as a “first step” to the genocide of the Jews, rather than as a stand-alone crime against humanity.¹²² The torture and murder of these hundreds of thousands of persons with disabilities were not deemed important enough to be prosecuted as a crime against humanity; they were characterized not as egregious human rights violations in and of themselves, but as predictive of what was to come for non-disabled victims of the Nazi regime. Similarly, violence against persons with disabilities during conflicts today, when it is discussed at all in international criminal law, is often construed as a secondary, less serious crime.

Such responses in international criminal law to violence against persons with disabilities reflect antiquated and incorrect conceptions of disability. Two such conceptions are the “medical model” of disability and the “charitable model” of disability. The “medical model” regards disability as a limitation that must be healed or repaired. It is based on the premise that “disability is considered exclusively as a problem of the person, produced by an illness, accident or health condition that requires medical care provided by professionals in the form of an individual treatment”.¹²³ The medical model views persons

121 UNSC Res. 2475, 20 June 2019, available at: [https://undocs.org/Home/Mobile?FinalSymbol=s%2Fres%2F2475\(2019\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=s%2Fres%2F2475(2019)&Language=E&DeviceType=Desktop&LangRequested=False).

122 Tamara Zwick, “First Victims at Last: Disability and Memorial Culture in Holocaust Studies”, *Conatus*, Vol. 4, No. 2, 2019, p. 52.

123 Priscilla Denisse Coria Palomino, “A New Understanding of Disability in International Humanitarian Law: Reinterpretation of Article 30 of Geneva Convention III”, *International Review of the Red Cross*, Vol. 104, No. 919, 2022, p. 1434.

with disabilities as fundamentally defective; while persons with disabilities may lead valuable lives, this value is in spite of their disability. The “charitable model” of disability is an offshoot of the medical model and conceptualizes persons with disabilities as passive recipients of charity, whose well-being is dependent solely on the goodwill of non-disabled people. Under this model, persons with disabilities are seen not as multifaceted human beings who possess free will and agency, but as helpless and tragic one-dimensional objects of pity. The charity model “exacerbates discriminatory prejudices towards persons with disabilities and conceives them as being ‘lesser’ than persons without a disability”.¹²⁴ Both of these conceptual frameworks depict persons with disabilities as passive, weak, defective and vulnerable, and as such, in need of paternalistic care and attention. Major legal documents, such as the Geneva Conventions, continue to reflect this prejudicial and flawed understanding of disability.¹²⁵ These conceptions of disability facilitate and encourage the minimization and “othering” of persons with disabilities, and enable egregious human rights violations against them to go ignored.

These flawed understandings of disability can be contrasted with the human rights approach. This normative conception of disability rests on the fundamental premise that human rights are inherent to all human beings, regardless of their personal characteristics, as a birthright. The rights-based conception of disability is compatible with the social model, which understands disability as the result of “the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.¹²⁶ Under the human rights approach and the social approach, persons with disabilities require special legal attention and protection during periods of conflict because they are particularly at risk of violence and the adverse effects of conflict due to attitudinal and systemic prejudices and failures – not because they themselves have any inherent defect. The UN and other international organizations have adopted the human rights and social approaches to disability, most notably with the enactment of the CRPD.

Emerging conceptions of violence against persons with disabilities as a crime against humanity

It is important to note that the CRPD has not created anything new. Persons with disabilities have always been entitled to the same human rights as persons without disabilities. IHL has also long held that persons with disabilities are entitled to additional care and protection because they are particularly exposed to violence and mistreatment during armed conflict. Thus, while the ratification of the CRPD

124 A. Priddy, above note 10, p. 18.

125 P. D. C. Palomino, above note 123, p. 1435.

126 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), preambular para. (e); see also A. Priddy, above note 10, pp. 19–21.

and calls to action by the Security Council are useful insofar as they provide “a detailed legal framework and an agreed legal language for calling the violations what they are, and a basis to begin to hold states accountable”,¹²⁷ prosecutors have had the means and ability to address violence against persons with disabilities during armed conflict for many years.

William Pons, Janet Lord and Michael Ashley Stein point to one such framework – crimes against humanity – as a means by which violence against persons with disabilities can be prosecuted. Although their recent article “Disability, Human Rights Violations, and Crimes against Humanity” offers the first treatment of these issues in the legal literature, their call to end impunity for those who commit atrocities against persons with disabilities by prosecuting these crimes as crimes against humanity is not groundbreaking. The authors simply argue that international criminal courts should build on existing crimes against humanity jurisprudence to achieve this goal. In their words, “the current framework of [crimes against humanity] provides the flexibility, efficacy, and jurisprudence necessary to prosecute crimes against persons with disabilities”.¹²⁸ This has been amply demonstrated by the willingness of prosecutors and judges to use the crimes against humanity framework to prosecute gender-based violence and sexual crimes before the *ad hoc* tribunals.

One of the greatest achievements of the *ad hoc* tribunals was the inclusion of sexual and gender-based crimes in the list of micro-criminal elements with which an accused could be charged. It would be inaccurate, however, to assume that the mere inclusion within the legislation made sexual violence the internationally reviled crime that it is today. Although the ICTY and ICTR statutes included rape as a crime against humanity, sexual violence was not investigated or prosecuted in the first four years of these tribunals’ existence. Prosecuting sexual violence during the conflicts in the former Yugoslavia and Rwanda was a daunting task, given the lack of substantive provisions concerning sexual crimes falling outside rape, as well as the absence of appropriate definitions of such offences in international criminal law generally.¹²⁹ When the Office of the Prosecutor came under pressure from feminist legal scholars and human rights activists to address the reports of gender-based violence arising from these conflicts, the *ad hoc* tribunals responded by building upon national case law, existing treaties and conventions that prohibited rape, and academic work that sought to elevate rape from a domestic crime to a crime under international law.¹³⁰ In convicting Jean-Paul Akayesu of rape as a crime against humanity in

127 Catalina Devandas Aguilar and John H. Knox, “Introduction to the Symposium on William I. 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. 68.

128 William I. 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, 2021, p. 82.

129 Maike Isaac and Olga Jurasz, “Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY”, *International Criminal Law Review*, Vol. 18, No. 1, 2018, p. 861.

130 James R. McHenry II, “The Prosecution of Rape under International Law: Justice that Is Long Overdue”, *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 4, 2002, pp. 1303–1304. Also see, for example,

1998, for example, the ICTR's Trial Chamber relied upon the language of international conventions¹³¹ to adopt "a conceptual definition of rape that was broad enough to maintain the flexibility it needed to prosecute a variety of crimes and to support victims and witnesses".¹³²

The prosecutorial will to address gender-based violence during armed conflict also led to convictions for crimes other than rape, most notably Alex Tamba Brima's conviction by the SCSL for forced marriage as an "other inhumane act" prosecutable as a crime against humanity. As mentioned, an "other inhumane act" cannot be an act that is also prosecutable under another heading.¹³³ Although forced marriage had been prosecuted as a form of sexual violence by the ICTY in *Kvočka et al.*,¹³⁴ the prosecution in *Brima* argued that forced marriage could not be subsumed into any of the crimes enumerated in the SCSL Statute. This argument failed at trial but was accepted on appeal. In particular, the Appeals Chamber noted that the involuntary conjugality of forced marriage involved "specific elements of psychological and moral suffering, not 'only' of sexual exploitation and abuse".¹³⁵ By relying on the widely recognized right prohibiting non-consensual marriage, as codified in Article 16(2) of the Universal Declaration of Human Rights, Article 23(3) of the International Covenant on Civil and Political Rights, and Article 16(b) of the Convention on the Elimination of All Forms of Discrimination against Women, the SCSL was able to prosecute forced marriage as an "other inhumane act" without retroactively applying the law.

Therefore, crimes against humanity that are well-entrenched in jurisprudence today, like rape and forced marriage, became legal precedents through the creativity and dedication of prosecutors and judges from the *ad hoc* tribunals working within a legal and social milieu that forced attention on ending the impunity of these crimes. The flexibility of the framework for crimes against humanity has elevated what was once a "condoned by-product of conflict, if not an outright spoil of war, to a universally reviled international crime".¹³⁶ Thus, while the Draft Articles on Prevention and Punishment of Crimes against

Patricia Viseur Sellers and Kaoru Okuizumi, "International Prosecution of Sexual Assaults", *Transnational Legal and Contemporary Problems*, Vol. 45, No. 7, 1997, pp. 46-47; Theodor Meron, "Rape as a Crime under International Humanitarian Law", *American Journal of International Law*, Vol. 87, No. 1, 1993, pp. 424-425.

131 ICTR, *Akayesu*, above note 103, para. 597: "The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law."

132 Thekla Hansen-Young, "Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone", *Chicago Journal of International Law*, Vol. 6, No. 1, 2005, p. 486.

133 ICTR, *Brima*, above note 116, para. 703. For a reiteration of this principle in the ICTY case law, see ICTY, *Kordić*, above note 52, Judgment (Appeals Chamber), 17 December 2004, para. 117.

134 ICTY, *Kvočka*, above note 32, Judgment (Trial Chamber), 2 November 2001, para. 180.

135 Micaela Frulli, "Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity", *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, p. 1037. See also Neha Jain, "Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution", *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, p. 1013.

136 W. I. Pons, J. E. Lord and M. A. Stein, above note 128, p. 82.

Humanity's silence on disability is unfortunate and disappointing,¹³⁷ it is not fatal to the prosecution of violence against persons with disabilities as a crime against humanity. As Pons *et al.* argue, the existing jurisprudence on crimes against humanity provides a flexible framework that is able to respond to violence against persons with disabilities, and the work done by IHRL and IHL has established foundational principles on which prosecution of violence against persons with disabilities can be based. What is required is the will of prosecutors and judges to end impunity for violence against persons with disabilities.

Potentials for prosecuting violence against persons with disabilities as an “other inhumane act” before the *ad hoc* tribunals

This paper contends that, had the many instances of violence against persons with disabilities that occurred during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone been given adequate prosecutorial attention and investigated thoroughly, the *ad hoc* tribunals could have prosecuted this violence as a crime against humanity by characterizing the acts as an “other inhumane act”. As mentioned previously, each of the statutes of the *ad hoc* tribunals provided that “other inhumane acts” may fulfil the micro-criminal element of a crime against humanity, which must be proven beyond a reasonable doubt along with the macro-criminal element and the *mens rea*. Moreover, a prosecutable “other inhumane act” must have caused the victim to suffer serious bodily or mental harm, it must have been the act or omission of the accused or of a subordinate, and it must have been motivated by the intention to inflict serious bodily or mental harm upon the victim. To accord with the principle of legality, the criminality of the “other inhumane act” must also have an established basis in law.

Pons *et al.* have identified three forms of disability-based discrimination: acts that directly target persons with disabilities on the basis of their disability, acts that have a disparate impact on persons with disabilities, and acts that have an incidentally greater impact on persons with disabilities.¹³⁸ There was evidence that each of these forms of discrimination occurred during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone. Importantly, each of these forms of discrimination had a basis in IHRL and IHL during the relevant indictment periods. By the time the ICTY was created in 1993, the rights of persons with disabilities had been explicitly enshrined in numerous human rights instruments, including Article 25 of the Universal Declaration of Human Rights (1948), the Declaration on the Rights of Disabled Persons (1975), Article 18(4) of the African Charter of Human and People's Rights (1986), Article 23 of the Convention of the Rights of the Child (1990), and the Principles for the Protection of Persons with Mental Illness (1991). The Geneva Conventions of 1949 also accord specific protection to the “wounded” and “sick”, terms which are undefined in the Conventions but were interpreted in Additional Protocol I of 1977 to include

¹³⁷ Adopted by the International Law Commission, 71st Session, UN Doc. A/74/10, 2019.

¹³⁸ W. I. Pons, J. E. Lord and M. A. Stein, above note 128, p. 91.

persons with disabilities.¹³⁹ Of particular note are the articles of the Geneva Conventions which stipulate that the “wounded and sick” must be respected and protected at all times;¹⁴⁰ that violence against and attempts upon the life of those who are “wounded and sick” are strictly prohibited;¹⁴¹ and that persons with disabilities must be spared from attack and afforded particular protection, especially with regard to their evacuation, detention or internment.¹⁴² This is to say nothing of customary IHL, which has long held that persons with disabilities affected by armed conflict are entitled to special protection in light of the unique risks they face.¹⁴³ Clearly, the prohibition on violence against persons with disabilities already had a solid foundation in IHRL and IHL when the *ad hoc* tribunals commenced their mandates, which could have been used to satisfy the principle of legality.¹⁴⁴

The categories delineated by Pons *et al.* provide a useful framework for conceptualizing violence against persons with disabilities as an “other inhumane act” prosecutable as a crime against humanity. First, the violence against persons with disabilities that occurred in the former Yugoslavia, Rwanda and Sierra Leone could have been prosecuted as an “act that directly targeted persons with disabilities on the basis of their disability”. Recall, for example, the torture, abuse and ostracization of Muhamed, known as Jovo, who was interned at the Manjaca camp in Banja Luka in 1992. The repeated beatings and humiliation that Jovo endured, as recounted by prosecution witness Isak Gasi, occurred within the context of what the ICTY in *Krajisnik* called a “relentless and methodical” attack.¹⁴⁵ In that case, the Trial Chamber held that Bosnian Muslims and Bosnian Croats in Banja Luka were the subject of various discriminatory measures, and civilians who were unlawfully arrested and taken to the Manjaca camp experienced “intolerable” conditions, including “insufficient food, water, medical care, and hygiene facilities”, as well as routine beatings and executions.¹⁴⁶ The attack “required the involvement of the Bosnian-Serb authorities, on central, regional, and municipal levels”, and was “clearly directed against the Bosnian-Muslim and Bosnian-Croat civilian population”.¹⁴⁷ It can therefore be presumed that the perpetrators of Jovo’s mistreatment knew about the attack and that their acts constituted a part of it, as is required by the macro-criminal element. The micro-criminal element – i.e., the “other inhumane act” of directly targeting persons with disabilities – was alluded to by Mr Gasi and could have been established through further investigation, especially considering that Jovo survived the war and was living in Banja Luka at the time of the trial. Jovo clearly

139 Additional Protocol I, Art. 8(a).

140 Geneva Convention I (GC I), Art. 12; Geneva Convention II (GC II), Art. 12.

141 GC I, Art. 12; GC II, Art. 12.

142 Geneva Convention III, Arts 16, 30, 49, 110; Geneva Convention IV, Arts 17, 27, 85, 119, 127.

143 Customary International Humanitarian Law, Rules 110 and 138.

144 For an overview of the international legal framework on disability in the early 1990s, see Akiko Ito, “International Legal and Policy Framework on Disability” *American Society of International Law: Proceedings of the Annual Meeting*, Vol. 93, 1993, p. 334.

145 ICTY, *Krajisnik*, above note 54, Judgment (Trial Chamber), 27 September 2006, p. 709.

146 *Ibid.*, p. 708.

147 *Ibid.*, p. 710.

suffered serious abuses at the hands of the camp guards, including, but likely not limited to, physical injuries (e.g., a broken arm and serious injuries to his nose), psychological injuries (e.g., those incurred by the trauma of daily beatings) and social ostracization (in the words of Isak Gasi, “[n]o one could go up to him ... because [he] had this nickname attached to [him]”). Although many non-disabled persons also suffered egregious harms at Banja Luka, it seems clear from Mr Gasi’s testimony that Jovo’s mistreatment was directly linked to his disabilities: as Jovo was obviously disabled, to the point of being unable to “walk properly” or “orient himself around town”, the labelling of him as a “Muslim sniper” was a cruel farce used to justify violence against a person with physical and intellectual disabilities. The *mens rea* nexus element of the crime against humanity would have to be assessed by the trier of fact.

The violence against persons with disabilities that occurred in the former Yugoslavia, Rwanda and Sierra Leone could also have been prosecuted as acts that had “a disparate impact on persons with disabilities”. Consider the massacres at HVP Gatagara and the Ndera Neuropsychiatric Hospital. The ICTR found that there had been a “widespread and systematic attack against the civilian population in Butare”,¹⁴⁸ the prefecture in which Gatagara was located. Given their “methodical and organized approach”,¹⁴⁹ the Trial Chamber considered it “inconceivable” that the perpetrators of extermination and murder in Butare prefecture could not have known that their actions formed part of a greater attack on civilians.¹⁵⁰ Similarly, Ndera Hospital is in Kigali, which, as a whole, was determined to be the site of “widespread and systematic killings”¹⁵¹ that fulfilled the macro-criminal element required for a finding of crimes against humanity. The micro-criminal element – i.e., the “other inhumane act” – could have been the massacre of the persons with disabilities at these institutions, the victims of which may have been targeted partially because of their disability, but it could also have been the destruction of infrastructure that subsequently had a disproportionate impact on persons with disabilities. Both HVP Gatagara and Ndera Neuropsychiatric Hospital were subject to looting and destruction: equipment was pillaged, records disappeared, and specialized facilities were rendered inoperative. Professionally trained health-care providers fled the country or were murdered with their patients. In the words of Mr Simburudali, “[a]s a matter of fact, Rwanda now suffers a huge deficit in terms of well-trained men and women to support effective rehabilitation and specialized management of those with disabilities”.¹⁵² Although both of these institutions were redeveloped

148 ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Judgment (Trial Chamber), 19 June 2012, para. 1544; see also ICTR, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Judgment (Trial Chamber), 17 May 2011, para. 1457 (discussing the “systematic manner” in which violence was inflicted in Butare prefecture).

149 ICTR, *Nizeyimana*, above note 148, para. 1556.

150 *Ibid.*, para. 1544.

151 ICTR, *Bagosora*, above note 114, para. 2167.

152 P. Masakhwe, above note 60, p. 23.

with international support,¹⁵³ the lack of health-care and rehabilitation infrastructure for persons with disabilities in the wake of the Rwandan genocide, coupled with the sheer trauma of the conflict, almost certainly had serious physical and psychological impacts on persons with disabilities who managed to survive the attack. Once again, the *mens rea* nexus element of the crime against humanity would have to be assessed by the trier of fact.

Finally, violence against persons with disabilities that occurred in the former Yugoslavia, Rwanda and Sierra Leone could have been prosecuted as an “act that [had] an incidentally larger impact on persons with disabilities”. Consider the stories of forced deportations that were heard by both the ICTY and the ICTR, in which inaccessible evacuation procedures resulted in persons with disabilities being left behind and falling victim to torture and murder. The ICTY and the ICTR both found that forced deportations constituted an “other inhumane act”. It is conceivable, then, that the courts could have found that this form of violence against persons with disabilities was an “other inhumane act” constituting a crime against humanity simply by deepening and extending the same analysis. The courts could have recognized that disability created a stark reality during forced deportations; while those situations resulted in instability and deprivation in the greater population, they were often nothing short of a death sentence for persons with disabilities.

In short, the *ad hoc* tribunals tacitly accepted, or at least ignored, treatment of persons with disabilities that would not be tolerated for any other group. In doing so, they mirrored larger societal attitudes and prejudices that persons with disabilities and their allies have long battled. The tribunals failed to use a rights-based approach in relation to persons with disabilities and thereby perpetuated antiquated conceptions of persons with disabilities as dependent, lesser and inferior. It is unacceptable that the memory of countless individuals has been lost to history because they were not accorded proper investigatory and legal attention. It is unacceptable that those who committed these atrocities have escaped prosecution. Practitioners of international criminal law must learn from the failure of the ICTY, ICTR and SCSL, and they must set a new trend that validates the reality of violence against persons with disabilities and ends impunity for those who commit such acts during armed conflict.

Moving forward: Using the shortcomings of the *ad hoc* tribunals to inform the prosecution of violence against persons with disabilities as a crime against humanity

The foregoing sections have demonstrated that the *ad hoc* tribunals failed to respond to compelling evidence of violence against persons with disabilities, which could

153 See, for example, ICRC, “Rwanda: ICRC Assisting Psychiatric Hospital in Kigali”, 15 March 1995, available at: www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jlyy.htm; ICRC, “Update No. 96/1 on ICRC Activities in Rwanda”, 6 March 1995, available at: www.icrc.org/en/doc/resources/documents/update/57jmxh.htm.

have been prosecuted as an “other inhumane act” as a crime against humanity. In fairness to the tribunals, international criminal courts going forward will have greater latitude to address violence against persons with disabilities. Article 7(1) (h) of the Rome Statute of the ICC, for example, defines persecution as a crime against humanity as “persecution against any identifiable group or collectivity on ... other grounds that are universally recognized as impermissible under international law”, which would presumably include persons with disabilities. The Office of the Prosecutor at the ICC has explicitly committed itself to taking steps at the investigatory and prosecutorial stages “to understand the significance of attributes like age and birth, and the degree to which they may give rise to multiple forms of discrimination and social inequalities, either alone or as they intersect with other factors, like race, ability or disability.”¹⁵⁴ The preceding sections of this paper, however, have demonstrated that violence against persons with disabilities may be ignored by prosecutors and judges even when a tribunal’s enabling statute provides the opportunity to prosecute such violence, as the inclusion of the prosecution for “other inhumane acts” did in the *ad hoc* tribunals’ statutes. What is absolutely crucial to ending impunity for violence against persons with disabilities is prosecutorial will and commitment to investigating and prosecuting these offences to the fullest extent of the law.

The enabling statutes of all major international criminal tribunals¹⁵⁵ – including the *ad hoc* tribunals¹⁵⁶ – entitle the prosecutor to investigate and prepare the indictment. The prosecutor has broad discretion to decide what cases they will investigate. Usually, this decision is informed “on the basis of information obtained from any source, particularly from governments, United Nations organs, and intergovernmental and non-governmental organizations”.¹⁵⁷ To determine whether a *prima facie* case exists, the prosecutor questions suspects, identifies and interviews victims and witnesses, collects evidence, and conducts on-site investigations. At all stages of the investigation, prosecutors investigating armed conflicts in the future must be alive to violence against persons with disabilities and must prepare their policies and procedures in accordance with the standards articulated in the CRPD and in customary IHL. Specialized units, like the ones created to address gender-based issues, must be established, and these units must identify and work closely with persons with disabilities affected by the conflict and any representative organizations that operate in the relevant area. Prosecutors must be cognizant of societal biases that predate the conflict and must ensure that these barriers do not hinder the investigation. Furthermore, all legal actors – including prosecutors, judges, and defence counsel – must ensure that persons with disabilities have the support and accommodations needed “to facilitate their effective role as direct and indirect participants, including as

154 ICC Office of the Prosecutor, *Policy on Children*, November 2016, p. 19, available at: www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

155 See, for example, Part 5 (“Investigation and Prosecution”) of the Rome Statute of the ICC.

156 ICTY Statute, Art. 18; ICTR Statute, Art. 17; SCSL Statute, Art. 15.

157 W. A. Schabas, above note 86, p. 350.

witnesses, in all legal proceedings”.¹⁵⁸ This may include, but is not limited to, providing materials and signage in Braille and in easy-to-read and understandable forms;¹⁵⁹ providing professional and specialized guides, readers, note-takers, interpreters and other support personnel at all stages of the proceedings;¹⁶⁰ providing accessible transportation; ensuring that persons with disabilities have access to necessary health and social service providers;¹⁶¹ adjusting the pace of interviews and proceedings to accommodate for differences in communication; modifying the method of questioning in appropriate circumstances;¹⁶² providing technical supports as necessary, including assistive listening systems and devices, real-time captioning, or video description services;¹⁶³ and ensuring that effective complaint mechanisms are in place to continuously improve accessibility and accommodation for persons with disabilities.¹⁶⁴

The greatest barrier to ending impunity for violence against persons with disabilities in armed conflict are the attitudinal barriers of individual international criminal law practitioners. None of the actions recommended in this section can be effectively implemented unless international criminal law practitioners fully embrace a rights-based approach to disability that empowers and accommodates persons with disabilities. Training in the human rights-based approach to disability must be mandatory for all prosecutors, investigators and other justice personnel, as is required under Article 13 of the CRPD. No one’s suffering should be invisible or go unexamined, but this is precisely what has happened to persons with disabilities over the course of recent history because of the inertia of the very people charged with investigating rights abuses.

Conclusion

This paper has argued that violence against persons with disabilities, which was widespread during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, could have been prosecuted by the ICTY, ICTR and SCSL as an “other inhumane act” pursuant to each tribunal’s crime against humanity framework. Flawed conceptions of the worth of persons with disabilities have resulted in impunity for those who committed egregious acts during these conflicts, and the loss of valuable information about how persons with disabilities have been affected by armed conflict.

Evidence arising out of current armed conflicts, which may be the subject of legal action by the UN or independent international criminal tribunals in the near

158 CRPD, above note 126, Art. 13.

159 *Ibid.*, Art. 9(2)(d).

160 *Ibid.*, Art. 9(2)(e).

161 Special Rapporteur on the Rights of Persons with Disabilities, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, 15 August 2019, p. 19, available at: www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities.

162 *Ibid.*, p. 16.

163 *Ibid.*, p. 16.

164 *Ibid.*, p. 23.

future, demonstrates that this pattern of violence against persons with disabilities remains alive today. It is imperative that those working for international criminal tribunals in the future learn from past mistakes in order to successfully prosecute crimes against persons with disabilities and ensure that the personhood of persons with disabilities is fully upheld.