

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

# Seeking victim-centred accountability for violence against persons with disabilities at the United Nations Independent International Commission of Inquiry for Ukraine

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## Abstract

Persons with disabilities suffer disproportionately in every armed conflict, and Russia's war in Ukraine is no exception. The atrocities committed against persons with disabilities in this conflict, however, are in part a consequence of the state's longstanding policy of institutionalization, which heightens existing vulnerabilities and places persons with disabilities at an unacceptable risk of acute harm. The Independent International Commission of Inquiry for Ukraine must investigate the extensive and varied acts of violence that have been committed against persons with disabilities in Ukraine since the beginning of the Russian invasion, with a focus on persons with disabilities who are institutionalized. In recommending future action, the Commission must be driven by a victim-centred approach to accountability that contributes both to the criminal prosecutions of individual perpetrators, and to systemic reforms that contribute to the project of deinstitutionalization. This article can assist the Commission's analysis by: (i) canvassing the reports of violence against persons with disabilities during the war in Ukraine, particularly those persons in institutions; (ii) reviewing the Commission for Ukraine's mandate and explaining its primary purpose – that is, to ascertain the facts of the conflict, through an intersectional lens, with the aim of promoting accountability – with reference to the work done by United Nations commissions of inquiry in the past; and (iii) providing concrete examples on how the Commission's investigations and report can further both legal accountability and systemic accountability for violence against persons with disabilities in Ukraine.

**Keywords:** international criminal law; international humanitarian law; international human rights law; persons with disabilities; Ukraine

## 1. Introduction

On 24 February 2022, a military unit composed of approximately 60 Chechen soldiers crossed the Belarusian border into Ukraine as part of Russia's initial invasion of the country. This unit proceeded through northern Ukraine until it reached Borodyanka, a commuter town some

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60 kilometres from Kyiv.<sup>1</sup> After evaluating the town's strategic importance, the Chechen unit decided to establish a military encampment at the Borodyanka Psychoneurological Residential Hospital, a government-run centre for over 350 men with Down syndrome, cerebral palsy, high-needs autism, and other developmental disabilities.<sup>2</sup> On 5 March, the unit stormed the hospital, marking the beginning of a two-week siege that would lead to the death of over a dozen of these residents.

Upon entering the hospital, the Chechen unit kicked down doors, destroyed or pillaged residents' personal belongings, and confiscated their mobile phones. After ushering the residents into the institution's courtyard at gunpoint, the soldiers instructed them to undress in order to check for military tattoos. Until these soldiers left Borodyanka on 15 March, the hospital's residents had no access to electricity, heating, or medical care. The sewage system stopped working. When the institution's on-site well dried up, the residents resorted to drinking pond water, which made them sick. Their food had to be prepared on an open fire on the facility's grounds, where the residents watched as the Chechens dug trenches, installed Grad-style rocket launchers and self-propelled artillery systems,<sup>3</sup> and shot the residents' beloved farm animals for fun.<sup>4</sup> All of this – coupled with the sheer trauma these men experienced – resulted in 13 fatalities during the course of the siege. Maryna Hanitska, the director of the institution, recalled wrapping their emaciated bodies in trash bags and burying them in a mass grave under threat of Russian fire.<sup>5</sup>

In April 2022, Ukrainian officials deemed Borodyanka 'the most thoroughly destroyed place Ukraine has regained control of'.<sup>6</sup> The burned-out vehicles, blackened facades, and bullet-riddled statue of Ukrainian writer Taras Shevchenko will not be forgotten by Ukraine or the international community anytime soon, especially as demands for justice continue to mount. Among the 220 Russian soldiers accused of war crimes in Borodyanka is Daniil Martynov, a high-ranking commander from Chechnya, who has been charged by the Security Service of Ukraine (SBU) with cruel treatment of civilians under Article 438(1) of the Criminal Code of Ukraine.<sup>7</sup> Although Mr. Martynov has not been tried in a court of law for his role in the siege on the Borodyanka Hospital, the facts of these events, as conveyed by the SBU and independent media, indicate that the persons with disabilities who lived there were used as human shields by Mr. Martynov and his subordinates to minimize return fire from Ukrainian forces, which is a war crime and a violation of international humanitarian law.<sup>8</sup>

<sup>1</sup>A. Grom, "Like Madness Itself": The Ukrainian Psychiatric Hospital that Endured Russian Occupation', *Radio Free Europe*, 14 December 2022, available at [www.rferl.org/a/ukraine-russia-invasion-psychiatric-hospital-borodyanka/32176252.html](http://www.rferl.org/a/ukraine-russia-invasion-psychiatric-hospital-borodyanka/32176252.html).

<sup>2</sup>J. Gettleman and O. Chubko, 'Thank You for Not Killing Us', *New York Times*, 17 April 2022, available at [www.nytimes.com/2022/04/15/world/europe/ukraine-russia-occupation.html?searchResultPosition=1](https://www.nytimes.com/2022/04/15/world/europe/ukraine-russia-occupation.html?searchResultPosition=1).

<sup>3</sup>I. Domashchenko, 'Chechen Officer Held 500 Civilians "as Human Shields"', *Institute for War and Peace Reporting*, 14 March 2023, available at [iwpr.net/global-voices/chechen-officer-held-500-civilians-human-shields](http://iwpr.net/global-voices/chechen-officer-held-500-civilians-human-shields).

<sup>4</sup>A. Stewart, 'Propaganda or Providence: One Ukrainian's Wild Story of Survival', *Global News*, 20 June 2022, available at [globalnews.ca/news/8871382/borodyanka-ukraine-russian-occupation/](http://globalnews.ca/news/8871382/borodyanka-ukraine-russian-occupation/).

<sup>5</sup>M. Burger, K. Khudov and W. Leaming, 'A Care Center for Ukraine's Disabled Deals with the Trauma of Occupation', *Washington Post*, 30 July 2022, available at [www.washingtonpost.com/world/2022/07/30/ukraine-war-russia-occupation-trauma/](https://www.washingtonpost.com/world/2022/07/30/ukraine-war-russia-occupation-trauma/).

<sup>6</sup>M. MacKinnon, 'The Harrowing Scale of Destruction in Ukraine's Shattered Town of Borodyanka', *Globe and Mail*, 15 April 2022, available at <https://www.theglobeandmail.com/world/article-ukraine-borodyanka-kyiv-russia-invasion/>.

<sup>7</sup>B. Stewart, 'Among the Ruins of Borodyanka, Prosecutors Are Investigating 400 War Crime Accusations', *CBC*, 20 May 2022, available at [~www.cbc.ca/news/world/ukrainian-torture-war-crimes-1.6460060#:~:text=World-,Among%20the%20ruins%20of%20Borodyanka%2C%20prosecutors%20are%20investigating%20400%20war,from%20the%20International%20Criminal%20Court](https://www.cbc.ca/news/world/ukrainian-torture-war-crimes-1.6460060#:~:text=World-,Among%20the%20ruins%20of%20Borodyanka%2C%20prosecutors%20are%20investigating%20400%20war,from%20the%20International%20Criminal%20Court).

<sup>8</sup>1998 Rome Statute of the International Criminal Court, Art. 8(b)(xxiii); 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV), Arts. 28, 49; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 51.7.

Mr. Martynov may or may not be prosecuted for his alleged role in the siege on the Borodyanka Psychoneurological Residential Hospital. Even if he is, there is no guarantee that the residents of the hospital will be accorded any attention in the proceedings; in fact, only Ms. Hanitska, the director of the institution, is listed on the indictment as an injured party.<sup>9</sup> Despite all that has happened to them – including being taken hostage, being denied the necessities of life, incurring serious bodily and/or psychological injury, and having their possessions destroyed or appropriated – the hundreds of residents of the Borodyanka Hospital have once again disappeared from the public eye, into the hidden network of institutions for persons with disabilities that is woven into the fabric of Ukrainian society.

It is undeniable that persons with disabilities suffer disproportionately during armed conflict, particularly when they are subject to institutionalization, as is the practice in Ukraine and many parts of the world today. Humanitarian law practitioners have never been more aware of the risks that this demographic is exposed to during war, as evidenced by the wealth of scholarship and strategies that augment Article 11 (Situations of risk and humanitarian emergencies) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and harmonize this provision with the Geneva Conventions and their Additional Protocols. Yet there remains what one group of scholars has termed an ‘accountability void’ with respect to how justice mechanisms respond to egregious violations against persons with disabilities.<sup>10</sup> International, domestic, and hybrid tribunals have consistently failed to respond to credible reports of violence against this demographic when investigating and prosecuting atrocity crimes.<sup>11</sup> Further, the structural or systemic factors that expose persons with disabilities to such violence in the first place – including institutionalization – are only rarely mentioned in discussions on accountability. The result is a kind of dual impunity: individuals who commit atrocities against persons with disabilities go unpunished, and the systems that facilitate those atrocities remain unchanged.

Given their singular focus on criminal justice, most of the mechanisms that have been created in the wake of the Russian invasion of Ukraine are ill-equipped to promote the holistic approach to accountability that is necessary to counter this dual impunity and deliver real, comprehensive justice for victims with disabilities. The responsibility to fill this accountability void thus falls on the Independent International Commission of Inquiry for Ukraine (the Commission or the Commission for Ukraine), which was established by the United Nations Human Rights Council (HRC) on 4 March 2022.<sup>12</sup> The Commission for Ukraine is a fact-finding mission mandated to ‘investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation’, with a view to ‘ending impunity and ensuring accountability, including, as appropriate, individual criminal responsibility, and access to justice for victims’.<sup>13</sup> The Commission for Ukraine’s institutional pliancy as an *ad hoc* commission of inquiry; its focus on accountability, including but not limited to prosecutions; and its stated commitment to investigating violence against civilians who are ‘affected by intersectional inequalities’<sup>14</sup> naturally positions this body to identify atrocities committed against persons with disabilities during the course of this war and provide constructive recommendations that will deliver sustainable justice for these victims.

<sup>9</sup>See Domashchenko, *supra* note 3.

<sup>10</sup>W. I. Pons, J. E. Lord and M. A. Stein, ‘Addressing the Accountability Void: War Crimes against Persons with Disabilities’, (2023) 105(922) *International Review of the Red Cross*, 465.

<sup>11</sup>See K. McInnes, ‘Opportunities and Failures to Prosecute Violence against Persons with Disabilities at the International Tribunals for the former Yugoslavia, Rwanda and Sierra Leone’, (2023) 105(922) *International Review of the Red Cross* 484.

<sup>12</sup>Human Rights Council, Resolution adopted by the Human Rights Council on 4 March 2022, A/HRC/RES/49/1 (4 March 2022).

<sup>13</sup>*Ibid.*, paras. 11(a) and (e).

<sup>14</sup>Report of the Independent International Commission of Inquiry on Ukraine, UN Doc. A/77/533 (18 October 2022) (the First Report), para. 8, available at [www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary](https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary).

The author submits that the extensive and varied acts of violence that have been committed against persons with disabilities in Ukraine since the start of the Russian invasion require a meaningful response from the Commission for Ukraine. In investigating and reporting relevant facts and recommending future action, the Commission must be driven by a victim-oriented approach to accountability that contributes both to the criminal prosecutions of individual perpetrators, and to systemic reforms that further the ongoing project of deinstitutionalization.

This article can assist the Commission's analysis by: (i) canvassing the reports of violence against persons with disabilities during the war in Ukraine, with a particular focus on persons with disabilities in institutions; (ii) reviewing the Commission for Ukraine's mandate and competency, and explaining its primary purpose – that is, to ascertain the facts of the conflict, through an intersectional lens, with the aim of promoting accountability – with reference to the work done by United Nations commissions of inquiry in the past; and (iii) providing concrete examples on how the Commission's investigations and report can further both legal accountability and systemic accountability for violence against persons with disabilities in Ukraine.

## 2. The war in Ukraine and the ongoing crisis for persons with disabilities in institutions

The war in Ukraine began with Russia's illegal invasion of the country in the early morning hours of 24 February 2022. This 'special military operation' – premised in part on what Russian President Vladimir Putin has described as the 'demilitarization' and 'de-Nazification' of Ukraine<sup>15</sup> – has triggered the largest land war in Europe since the Second World War, in which thousands have been killed, millions have been displaced within Ukraine and abroad, entire towns have been shelled and leveled, and the core principles of state sovereignty in the modern era have been undermined. The war has caused a human catastrophe that has impacted every Ukrainian, regardless of their age, gender, religion, ethnic or linguistic background, socioeconomic status, or geographic identity.

Russia's assault on Ukraine has been particularly disastrous, however, for the country's 6.6 million persons with disabilities,<sup>16</sup> who are defined in this article as those who possess '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'.<sup>17</sup> Persons with disabilities – and, in particular, those with intellectual and psychosocial disabilities – are considered to be among the most disadvantaged people in Ukraine. Ukrainians with disabilities often face significant social stigmatization; experience the systemic deprivation of their political, economic, legal, and social agency; have limited access to specialized support services; are excluded from public life and community involvement; and, as will be discussed, are frequently subject to involuntary institutionalization.<sup>18</sup> The vulnerability that results from this discrimination is amplified when an individual possesses other social identities also subject to discrimination – for example, persons with disabilities in Ukraine who are Romani.<sup>19</sup> Furthermore, the brunt of ableism in Ukraine is disproportionately borne by women: a recent survey of 500 families with persons with disabilities found that 71.8 percent of respondent caregivers were single mothers

<sup>15</sup>*Ibid.*, para. 24.

<sup>16</sup>'Recommendations for a Strategy of Intervention in Institutional Settings in Ukraine', *Handicap International*, 2022, at 2, available at [www.hi.org/sn\\_uploads/20221222-INSTITUTIONS\\_Ukraine\\_Consultancy\\_TOR\\_1.pdf](http://www.hi.org/sn_uploads/20221222-INSTITUTIONS_Ukraine_Consultancy_TOR_1.pdf). Although national statistics indicate there are approximately 2.7 million persons with disabilities in Ukraine, this figure is widely considered to be a gross underestimate: see United Nations Ukraine, UN Policy Options: Disability (2021).

<sup>17</sup>2006 Convention on the Rights of Persons with Disabilities (CRPD), Art. 1.

<sup>18</sup>See United Nations Ukraine, *supra* note 16.

<sup>19</sup>See, for example, 'The Rights of Roma Women in Ukraine', *UN Women*, 2018, available at [eca.unwomen.org/sites/default/files/Field%20Office%20ECA/Attachments/Publications/Country/Ukraine/ROMA\\_eng\\_Final-compressed.pdf](http://eca.unwomen.org/sites/default/files/Field%20Office%20ECA/Attachments/Publications/Country/Ukraine/ROMA_eng_Final-compressed.pdf).

raising children with disabilities, and 96.5 percent of those caregivers were women who reported high degrees of economic and social marginalization.<sup>20</sup>

It is now universally recognized that persons with disabilities are at a heightened risk of experiencing gross violations of international human rights law and international humanitarian law during armed conflict. Reports arising from the war – including the preliminary investigations of the Commission for Ukraine<sup>21</sup> – provide further proof of this. Since the war began in February 2022, independent media sources and investigative teams have reported that persons with disabilities have been killed by Russian armed forces,<sup>22</sup> been denied access to bomb shelters,<sup>23</sup> and been unable to access humanitarian aid because of long lines, unclear signage, and a lack of interpreters.<sup>24</sup> Although persons with disabilities must be prioritized in evacuations under humanitarian law,<sup>25</sup> there have been many reports of persons with disabilities being denied access to evacuation transport,<sup>26</sup> sometimes because the vehicles used in the evacuation are not adaptive to specific care needs;<sup>27</sup> as a result, some persons with disabilities have been left behind by family members and caregivers who are themselves fleeing the conflict.<sup>28</sup> Contrary to the Geneva Conventions and the Rome Statute,<sup>29</sup> there have been over a thousand attacks on Ukrainian healthcare centres since the beginning of the war,<sup>30</sup> which have a disproportionate impact on persons with disabilities, who may rely on frequent access to healthcare services, rehabilitation programming, or regular medications.<sup>31</sup> Persons with disabilities have also been unduly impacted by Russia's illegal and repeated attacks on Ukraine's electrical grids and telecommunications,<sup>32</sup> and by soaring inflation that place medication, assistive devices, sanitary items like diapers, and other basic needs out of financial reach.<sup>33</sup>

<sup>20</sup>H. Kurylo et al., 'Families Find a Way: Children with Disabilities in War-Torn Ukraine', *Disability Rights International*, 8 June 2023, at 8, available at <https://www.driadvocacy.org/reports/families-find-way-children-disabilities-war-torn-ukraine>.

<sup>21</sup>Conference Room Paper of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/CRP.4 (2023). The Conference Room Paper's discussion on the war's impact on persons with disabilities is limited to the 8 April 2022 attack on Kramatorsk city (para. 225), the mass casualty event in Yahidne (para. 792), and the illegal transfers of children from institutions in Mariupol (paras. 753–755), Mykolaiv oblast (paras. 763–764); Kherson oblast (paras. 765–768); and Kharkiv oblast (para. 769). Other reports by the Commission for Ukraine provide significantly fewer findings on this topic.

<sup>22</sup>See, for example, 'The Situation of Persons with Disabilities in the Context of the War of Aggression by Russia against Ukraine', *International Disability Alliance*, 24 April 2023, at 14, describing a man with disabilities who was killed by Russian armed forces who attempted to requisition his vehicle. Available at [www.internationaldisabilityalliance.org/sites/default/files/ida\\_ukraine\\_report.pdf](http://www.internationaldisabilityalliance.org/sites/default/files/ida_ukraine_report.pdf).

<sup>23</sup>*Ibid.*, at 18–21.

<sup>24</sup>*Ibid.*, at 19.

<sup>25</sup>1949 Geneva Convention IV, *supra* note 8, Art. 17. See also 'How Law Protects Persons with Disabilities in Armed Conflict', *International Committee of the Red Cross*, 13 December 2017, at 5–6, available at [reliefweb.int/report/world/how-law-protects-persons-disabilities-armed-conflict](http://reliefweb.int/report/world/how-law-protects-persons-disabilities-armed-conflict).

<sup>26</sup>See 'Study Report: Rapid Assessment of the Experience of Evacuating People with Disabilities in Ukraine Due to the War in 2022', *United Nations Partnership on the Rights of Persons with Disabilities*, March 2023, at 72, available at [www.undp.org/sites/g/files/zskgke326/files/2023-03/ReportEvacuationEn%20%282%29.pdf](http://www.undp.org/sites/g/files/zskgke326/files/2023-03/ReportEvacuationEn%20%282%29.pdf).

<sup>27</sup>See, for example, *International Disability Alliance*, *supra* note 22, at 25, describing the evacuation of Denis, a teenager from Kharkiv with spina bifida and microcephaly.

<sup>28</sup>See, for example, *ibid.*, at 17, describing a woman with a physical disability who was found by activists lying on a urine-soaked mattress after her family fled to Germany.

<sup>29</sup>1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I), Arts. 19, 21, 22; 1949 Geneva Convention IV, *supra* note 8, Arts. 18, 19; 1977 Additional Protocol I, *supra* note 8, Arts. 12, 13; Rome Statute, *supra* note 8, Art. 8(2)(b)(ix).

<sup>30</sup>Regional Office for Europe, 'WHO Records More than 1000 Attacks on Health Care in Ukraine over the past 15 Months of Full-Scale War', *World Health Organization*, 30 May 2023, available at [www.who.int/europe/news/item/30-05-2023-who-records-1-000th-attack-on-health-care-in-ukraine-over-the-past-15-months-of-full-scale-war](http://www.who.int/europe/news/item/30-05-2023-who-records-1-000th-attack-on-health-care-in-ukraine-over-the-past-15-months-of-full-scale-war).

<sup>31</sup>See Kurylo et al., *supra* note 20, at 5, noting that, while 79.7% of respondents in a survey of 500 families from every oblast of Ukraine had access to rehabilitation services before the war, only 47.2% had access 10 months after the start of the war.

<sup>32</sup>See 'Ukraine: Devastating Power Cuts Undermining Civilian Life as Christmas Approaches', *Amnesty International*, 21 December 2022, noting that these attacks are 'a blatant violation of international humanitarian law', available at [www.amnesty.org/en/latest/news/2022/12/ukraine-devastating-power-cuts-undermining-civilian-life-as-christmas-approaches/](http://www.amnesty.org/en/latest/news/2022/12/ukraine-devastating-power-cuts-undermining-civilian-life-as-christmas-approaches/).

<sup>33</sup>See Kurylo et al., *supra* note 20, at 7.



Persons with disabilities suffer disproportionately in every war, and these examples demonstrate that Russia's siege on Ukraine is clearly no exception. What is unique to this conflict, however, is the fact that persons with disabilities are at an even greater risk of acute harm as a result of Ukraine's long-standing practice of segregating persons with disabilities in institutions. Indeed, Ukraine institutionalizes children and adults with disabilities at a higher rate than anywhere else in Europe,<sup>34</sup> and these institutions – defined as 'any residential care where residents are isolated from the broader community and/or compelled to live together; residents do not have sufficient control over their lives and over decisions which affect them; and the requirements of the organisation itself tend to take precedence over the residents' individual needs'<sup>35</sup> – remain 'almost the only option for accommodation and social care' for persons with disabilities in Ukraine today.<sup>36</sup>

The institutionalization of persons with disabilities in Ukraine is a remnant of 'defectology' models of disability that were imposed by Moscow during the Soviet era, but it is also a deliberate policy choice that has been rejected by other former Soviet states.<sup>37</sup> Institutionalization is perceived in Ukraine to be a legitimate policy choice that helps families mitigate poverty. Approximately 90 percent of children in institutions have at least one living parent who has not been deprived of their parental rights,<sup>38</sup> and the current system allows parents to place their children in institutional care simply by filing an application.<sup>39</sup> Ukraine's network of nearly 700 institutions receives more than £100 million a year from the state, which primarily goes to paying the salaries of its 68,000 staff; what funds remain are barely enough to provide institutionalized persons with their basic human needs, including proper nutrition, clothing, medical care, and education.<sup>40</sup> While the Ukrainian government provides support to children in institutions at a cost of approximately £390 a month, children with high support needs who live with their families receive a monthly stipend no greater than £235.<sup>41</sup> Ukraine's social policies therefore incentivize institutionalization and undermine the family- and community-based care that persons with disabilities are entitled to under international human rights law.

Ukraine's long-standing practice of institutionalization is at odds with the country's obligations under the Convention on the Rights of Persons with Disabilities. This is because institutionalization is, in itself, a form of violence<sup>42</sup> which *en principe* offends various provisions of the CRPD, including Article 5 (discriminatory practices), Article 12 (de facto denial of legal capacity), Article 14 (detention and deprivation of liberty based on impairment), Article 18 (liberty of movement), Article 19 (the right to live in the community),

<sup>34</sup>Commission Opinion on Ukraine's Application for Membership of the European Union', *European Commission*, 17 June 2022, at 13, available at [neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Ukraine%20Opinion%20and%20Annex.pdf](https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Ukraine%20Opinion%20and%20Annex.pdf).

<sup>35</sup>'Independent Living and De-Institutionalisation Policy', *European Disability Forum*, 2023, available at [www.edf-feph.org/independent-living-and-de-institutionalisation-policy/](https://www.edf-feph.org/independent-living-and-de-institutionalisation-policy/).

<sup>36</sup>United Nations Human Rights Monitoring Mission in Ukraine, 'Briefing Note: The Human Rights Situation of Persons with Intellectual and Psychosocial Disabilities in Ukraine', *OHCHR*, 1 February 2022, available at [tinyurl.com/3vy7ud9f](https://tinyurl.com/3vy7ud9f).

<sup>37</sup>Georgia, for example, reduced the number of children in institutional care by about 86% between 2003 and 2014: O. Ulybina, 'Transnational Agency and Domestic Policies: The Case of Childcare Deinstitutionalization in Georgia', (2020) 20(3) *Global Social Policy* 333, at 334.

<sup>38</sup>Recommended Response to Children from Institutions in Ukraine', *European Disability Forum*, April 2022, at 4, available to download at [www.edf-feph.org/content/uploads/2022/04/220330-ADVOCACY-DOC-Recommended-response-to-children-from-institutions-in-Ukraine-FINAL.docx](https://www.edf-feph.org/content/uploads/2022/04/220330-ADVOCACY-DOC-Recommended-response-to-children-from-institutions-in-Ukraine-FINAL.docx).

<sup>39</sup>I. Demchenko and N. Bulyha, 'Impact of the COVID-19 Pandemic on the Deinstitutionalization of Child Care Reform in Ukraine', *European Centre for Social Welfare Policy and Research*, 24 March 2021, available at [eespn.euro.centre.org/impact-of-the-covid-19-pandemic-on-the-deinstitutionalization-of-child-care-reform-in-ukraine/](https://eespn.euro.centre.org/impact-of-the-covid-19-pandemic-on-the-deinstitutionalization-of-child-care-reform-in-ukraine/).

<sup>40</sup>R. Clegg, 'Ukraine Orphanages: Children Tied Up and Men in Cots', *BBC*, 26 July 2022, available at [www.bbc.com/news/disability-62226636](https://www.bbc.com/news/disability-62226636).

<sup>41</sup>See Kurylo et al., *supra* note 20, at 7.

<sup>42</sup>See Committee on the Rights of Persons with Disabilities, Guidelines on Deinstitutionalization, including in Emergencies, UN Doc. CRPD/C/5 (10 October 2022), available at [digitallibrary.un.org/record/3990185](https://digitallibrary.un.org/record/3990185).

Article 22 (respect for privacy), and Article 23 (separation of children from their parents on the basis of disability). In practice, Ukraine's institutions have been shown to expose persons with disabilities to mistreatment and neglect, in contravention of Article 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and Article 16 (freedom from exploitation, violence and abuse). As a 2015 study by Disability Rights International (DRI) reported, life in Ukrainian institutions is almost uniformly marked by malnutrition; poor sanitation; the improper use of physical restraints, including shackles, and chemical restraints, including sedatives; forced labour; rampant sexual abuse by caregivers, other institutionalized persons, and the public; and a heightened risk of human trafficking.<sup>43</sup>

In 2017, the Government of Ukraine introduced the National Strategy of Reforming the System of Institutional Care and Upbringing of Children. The strategy envisioned the creation of a modernized welfare regime, in which children with disabilities who were formerly placed in institutions would be cared for in a family or a family-like environment, in line with international human rights standards.<sup>44</sup> In June 2021, however, the Ukrainian government adopted an order which excluded 'special boarding schools', 'sanatorium boarding schools', and 'education and rehabilitation centres' – in effect, all of the institutions that provide care to persons with disabilities – from de-institutionalization reform. The order further legitimized discrimination on the basis of disability and marked a 'worrisome U-turn' on ending institutionalization in Ukraine,<sup>45</sup> which remained a work in progress at the time of the Russian invasion.

Reports from armed conflicts in the past demonstrate that institutionalization places persons with disabilities at risk of significant harm.<sup>46</sup> Even in the present context, the harms that institutionalized persons with disabilities experience in the face of Russian aggression have been known for almost ten years. See, for example, DRI's description of the situation for institutionalized children in Russian-controlled regions of eastern Ukraine in 2015:

Children caught in the crossfire of the current armed conflict in Eastern Ukraine are especially at risk of disappearing from institutions or being abandoned by them. Some children from war-torn areas have been moved to institutions in other parts of Ukraine. Others have disappeared over porous borders into Russia or into temporary camps outside of Odessa, Kharkiv, Dnipopetrovsk, and other cities. After staff fled orphanages and other institutions, some children have been taken in by whoever will have them. The thousands of children remaining in institutions in the war-zone are especially at risk of being trafficked ... According to the Kharkiv Institute for Social Research, the local rebel authorities in Krasnyi Luch issued a statement in February 2015 calling on neighbours to take children from institutions. This statement has also served as notice to traffickers and pedophiles that children are available.<sup>47</sup>

These reports from almost a decade ago – as well as the United Nations Committee on the Rights of Persons with Disabilities' concluding observations on Ukraine's country report, which urged

<sup>43</sup>E. Mathews et al., 'No Way Home: The Exploitation and Abuse of Children in Ukraine's Orphanages', *Disability Rights International*, 2015, available at <https://www.driadvocacy.org/reports/no-way-home-exploitation-and-abuse-children-ukraines-orphanages>.

<sup>44</sup>See Y. Sereda et al., 'Behind the Mask of Care: A Report Based on the Results of a Situation Analysis of Baby Homes in Ukraine', *Hope and Homes for Children*, 2020, at 119, available at [repo.knmu.edu.ua/bitstream/123456789/27823/1/%D0%9F%D0%BE%D0%B4%20%D0%BC%D0%B0%D1%81%D0%BA%D0%BE%D0%B9%20%D0%BF%D0%BE%D0%BC%D0%BE%D1%89%D0%B8.pdf](https://repo.knmu.edu.ua/bitstream/123456789/27823/1/%D0%9F%D0%BE%D0%B4%20%D0%BC%D0%B0%D1%81%D0%BA%D0%BE%D0%B9%20%D0%BF%D0%BE%D0%BC%D0%BE%D1%89%D0%B8.pdf).

<sup>45</sup>'Joint Statement: A Worrisome U-turn on Ending the Institutionalisation of Children in Ukraine', *Hope and Homes for Children, Lumos, SOS Children's Villages, Save the Children, Eurochild, Disability Rights International, Validity Foundation and ENIL*, 12 October 2021, available at [www.hopeandhomes.org/content/uploads/2022/07/Joint-Statement\\_Care-Reform-in-Ukraine\\_October-2021-1.pdf](https://www.hopeandhomes.org/content/uploads/2022/07/Joint-Statement_Care-Reform-in-Ukraine_October-2021-1.pdf).

<sup>46</sup>See McInnes, *supra* note 11, at 496–7, describing a massacre at the Ndera Neuropsychiatric Hospital in Kigali during the Rwandan genocide.

<sup>47</sup>See Mathews et al., *supra* note 43, at 7, 10.

the development of inclusive emergency response plans<sup>48</sup> – did not apparently trigger any emergency preparedness from Ukrainian authorities or international agencies. As a result, during this current iteration of the war, persons with disabilities in Ukraine's institutions have been exposed to many of the same atrocities that were committed by Russia as early as 2014, albeit on a much larger scale.

Since the very beginning of Russia's war in Ukraine, a number of reports have described the conversion of institutions for persons with disabilities into military objectives and the use of the residents of those institutions as human shields, as occurred during the Borodyanka siege described in the introduction to this article. Another such incident occurred at an institution for persons with disabilities in Stara Krasnianka, Luhansk oblast. As active hostilities closed in on Stara Krasnianka on 7 March 2022, the Ukrainian military converted the institution into a military post without evacuating its residents. Three days later, Russian forces breached the institution using heavy artillery, causing a fire that resulted in the death of dozens of persons with mobility-related disabilities who were unable to flee. According to the OHCHR, just 22 of the institution's 71 residents reportedly survived the attack.<sup>49</sup>

There is also evidence that persons with disabilities in institutions have been unlawfully transferred out of Ukraine and into Russia, contrary to international humanitarian law.<sup>50</sup> In March 2022, for example, an institution in Mariupol for persons with disabilities and elderly persons began evacuating its 92 residents. The group reached Yur'ivka, a village on the western outskirts of the city, with the intention of organizing further evacuation to Ukrainian government-controlled Zaporizhzhia. Before they could do so, Russian officials detained the residents, confiscated their passports, and ordered them onto a bus that transferred them to Donetsk.<sup>51</sup> It can be assumed that there are many more instances of such transfers, given that at least 7,700 persons with disabilities reside in Ukrainian institutions in regions presently under Russian occupation.<sup>52</sup>

To minimize the risk of attacks causing mass casualties and unlawful transfers, the Ukrainian Ministries of Health and Education have ordered orphanages to send children who have parents or guardians back home. This approach has not been taken by the Ministry of Social Policy, which regulates institutions for persons with disabilities; in fact, an additional 4,000 persons with disabilities were placed in institutional care between February and July 2022.<sup>53</sup> For those who remain in institutions, the prospect of evacuation is slim; as of August 2022, just ten percent of all persons with disabilities in institutions had been evacuated abroad.<sup>54</sup> In the few instances where those living in institutions have been transferred to safer areas of Ukraine or abroad, the evacuations appear to have been planned and executed with little regard for the health and wellbeing of those being evacuated. Take, for example, DRI's report of the evacuation of 22 children with disabilities from an

<sup>48</sup>Concluding Observations on the Initial Report of Ukraine, CRPD/C/UKR/CO/1 (2015), paras. 22–25.

<sup>49</sup>Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation: 24 February–15 May 2022', OHCHR, 29 June 2022, paras. 35–36, available at [www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf](http://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf).

<sup>50</sup>1949 Geneva Convention IV, *supra* note 8, Art. 49; 1977 Additional Protocol I, *supra* note 8, Art. 85(4)(a); 1998 Rome Statute, *supra* note 8, Arts. 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii), 8(2)(e)(viii).

<sup>51</sup>"Like a Prison Convoy": Russia's Unlawful Transfer and Abuse of Civilians in Ukraine during "Filtration", *Amnesty International*, November 2022, available at [www.amnesty.org/en/wp-content/uploads/2022/11/EUR5061362022ENGLISH.pdf](http://www.amnesty.org/en/wp-content/uploads/2022/11/EUR5061362022ENGLISH.pdf).

<sup>52</sup>B. Van Esveld et al., "We Must Provide a Family, Not Rebuild Orphanages": The Consequences of Russia's Invasion of Ukraine for Children in Ukrainian Residential Institutions', *Human Rights Watch*, 13 March 2023, at 20, available at [www.hrw.org/report/2023/03/13/we-must-provide-family-not-rebuild-orphanages/consequences-russias-invasion](http://www.hrw.org/report/2023/03/13/we-must-provide-family-not-rebuild-orphanages/consequences-russias-invasion).

<sup>53</sup>Persons with Disabilities in Situations of Risk and Humanitarian Emergencies: Submission to the Committee on the Rights of Persons with Disabilities on Article 11', *Amnesty International*, 2023, at 6, available at [doc.es.amnesty.org/ms-opac/image-file/byte?f=/opt/baratz/mediasearch/image-cache/raw/1/00000023/000035337/47385.pdf](http://doc.es.amnesty.org/ms-opac/image-file/byte?f=/opt/baratz/mediasearch/image-cache/raw/1/00000023/000035337/47385.pdf).

<sup>54</sup>Committee on the Rights of Persons with Disabilities Holds Meeting with States Parties on the Situation of Persons with Disabilities in Ukraine and in Countries where They Fleed Following the Russian Aggression', OHCHR, 17 August 2022, available at [www.ohchr.org/en/press-releases/2022/08/committee-rights-persons-disabilities-holds-meeting-states-parties-situation](http://www.ohchr.org/en/press-releases/2022/08/committee-rights-persons-disabilities-holds-meeting-states-parties-situation).



institution in Donetsk to a facility in western Ukraine in April 2022. According to Vasyi Markulin, the facility's director, the institution's staff unloaded the children 'like dead bodies' and fled Ukraine 'like rats from a sinking ship' without disclosing the children's names, ages, or medical records. Several children experienced violent, recurring seizures due to the trauma of the evacuation and the lack of consistent treatment; DRI investigators found others tied down in their beds in dark, poorly ventilated rooms, without any opportunity for activity or stimulation.<sup>55</sup> Similarly, in October 2022, the Ministry of Social Affairs organized a transfer of 143 men with psychosocial disabilities, who were supported by just one caregiver, to a care centre in Latvia. Before they arrived, the Latvian staff did not know anything about those being transferred, such as their ages, what types of disabilities they had, or what their support and health needs were.<sup>56</sup>

Lastly, the human toll of Russia's war in Ukraine has overwhelmed institution staff and worsened the already-substandard care provided to persons with disabilities in these institutions on a day-to-day basis. The account of Viktor Krivoruchko, a 54-year-old man with physical and verbal disabilities following a stroke seven years ago, is emblematic. Mr. Krivoruchko had lived independently in Mykolaiv before the war, but when hostilities closed in on his neighbourhood in December 2022, he was taken to an institution for persons with disabilities near Uman. He described this institution as 'a living hell': he reported having his passport confiscated without his consent, and he described the facility as reeking of feces due to a shortage of staff able to clean and change diapers. After just four days, Mr. Krivoruchko convinced a sympathetic staffer to return his passport and drive him to a bus stop. Now back at his home in Mykolaiv, he says that 'it's better for me to be under shelling than to be there'.<sup>57</sup>

### 3. Commissions of Inquiry: Fact-finding, intersectionality, and accountability

The atrocities that have occurred following Russia's violent invasion of Ukraine have been the subject of widespread condemnation from states, international organizations, private corporations, and the public. There has rarely been such strong and sustained political will to secure justice for war victims and hold those responsible for violations of international law accountable. While Ukrainian authorities have the primary jurisdiction to investigate, prosecute, and adjudicate crimes committed within Ukrainian territory, the International Criminal Court (ICC)<sup>58</sup> and a number of individual countries<sup>59</sup> have opened investigations into alleged crimes of aggression, war crimes, and crimes against humanity committed in the course of this conflict.

While many of the responses to the war in Ukraine have been unprecedented, the HRC's decision to establish a commission of inquiry for Ukraine was to be expected. Although *ad hoc* commissions of inquiry – defined in this article as including all independent investigative commissions created by the UN<sup>60</sup> – have been denounced as fuelling 'critiques of double standards, selectivity and racism' and providing 'no sound and sustainable basis for international justice strategies in the long run',<sup>61</sup> they remain 'the biggest, best resourced, and most important

<sup>55</sup>E. Rosenthal et al., 'Left Behind in the War: Dangers Facing Children with Disabilities in Ukraine's Orphanages', 5 May 2022, at 1–3, available at <https://www.driadvocacy.org/news/new-report-left-behind-war-dangers-facing-children-disabilities-ukraines-orphanages>.

<sup>56</sup>See International Disability Alliance, *supra* note 22, at 45.

<sup>57</sup>S. Hendrix, A. Morris and S. O'Grady, 'War Forces Thousands of Disabled Ukrainians into Institutions', *Washington Post*, 18 March 2023, available at [www.washingtonpost.com/world/2023/03/18/ukraine-disabled-elderly-institutionalized-war/](https://www.washingtonpost.com/world/2023/03/18/ukraine-disabled-elderly-institutionalized-war/).

<sup>58</sup>A. Deutsch, 'ICC to Seek Warrants against Russians over Alleged Ukraine War Crimes', *Reuters*, 13 March 2023, available at [www.reuters.com/world/europe/icc-seek-warrants-against-russians-over-alleged-ukraine-war-crimes-source-2023-03-13/](https://www.reuters.com/world/europe/icc-seek-warrants-against-russians-over-alleged-ukraine-war-crimes-source-2023-03-13/).

<sup>59</sup>See, for example, 'Germany Has Evidence of War Crimes in Ukraine "in Three-Digit Range", Prosecutor Says', *Reuters*, 3 February 2023, available at [www.reuters.com/world/europe/germany-has-evidence-war-crimes-ukraine-in-three-digit-range-prosecutor-2023-02-04/](https://www.reuters.com/world/europe/germany-has-evidence-war-crimes-ukraine-in-three-digit-range-prosecutor-2023-02-04/).

<sup>60</sup>This includes commissions of inquiry, commissions of human rights experts, fact-finding missions, and groups of human rights experts.

<sup>61</sup>S. Vasiliev, 'Watershed Moment or Same Old?', (2022) 20(4) *Journal of International Criminal Justice* 893, at 894.

international fact-finding bodies in existence today'.<sup>62</sup> Commissions of inquiry have been devised to address some of recent history's most complex conflicts and most worrisome human rights situations, including those in Burundi, the Democratic Republic of the Congo, Ethiopia, Eritrea, Libya, Myanmar, North Korea, the Occupied Palestinian Territories and Israel, South Sudan, Sri Lanka, and Venezuela. Given the scale and seriousness of the conflicts to which they respond, the mandates for these commissions are broad and ambitious; in the words of Michael Nesbitt, they are designed both 'promote individual accountability for criminal wrongdoing, in particular war crimes, crimes against humanity and genocide', and 'lay the foundation for broad-based transitional justice reforms . . . and provide holistic recommendations meant to transition those troubled nations to peace and democracy'.<sup>63</sup>

The preceding sections of this article illustrated how Russian belligerence has exacerbated and exploited the pre-existing vulnerabilities of persons with disabilities in Ukraine, which were caused, in part, by the practice of institutionalization. The following sections will demonstrate how the Commission for Ukraine's competency, capabilities, and mission require that it investigate these atrocities and make recommendations that further both criminal accountability and systemic change.

### 3.1 Competency

The competency and capabilities of any commission of inquiry are derived solely from its mandate, which may specify up to four jurisdictional parameters: the actors relevant to the mandate (*ratione personae*), the temporal mandate (*ratione temporis*), the geographic mandate (*ratione loci*), and the subject matter mandate (*ratione materiae*).<sup>64</sup> Not unusually,<sup>65</sup> Resolution 49/1, the HRC resolution which created the Commission for Ukraine, only particularized two of these four elements. Resolution 49/1 does not, for instance, provide a geographic mandate, though the Commission has committed itself to 'focus[ing] on violations committed in all territories affected by the armed conflict'.<sup>66</sup> The resolution's silence on the *ratione temporis* is trickier. The Commission has recognized that 'the present armed conflict in Ukraine unfolds against a legacy of significant past events and reports of serious human rights violations and abuses, and violations of international humanitarian law', and, as such, the Commission has 'reviewed such events and patterns of grave violations documented by the United Nations and other entities since 2013, to garner a better understanding of the current developments'.<sup>67</sup> In contrast, with respect to the *ratione personae*, the Commission has been clearly tasked with identifying, 'where possible, those individuals and entities responsible for violations or abuses of human rights or violations of international humanitarian law, or other related crimes in Ukraine, with a view to ensuring that those responsible are held accountable'.<sup>68</sup> Finally, the subject matter mandate for the Commission of Ukraine is specified in Resolution 49/1 as comprising of international human rights law, international humanitarian law, and international criminal law. In this subsection, the focus will be on examining the competence *ratione materiae* as it pertains to these first two legal regimes;

<sup>62</sup>M. Nesbitt, 'Re-Purposing UN Commissions of Inquiry', (2017) 13(2) *Journal of International Law and International Relations* 83, at 83.

<sup>63</sup>*Ibid.*, at 85.

<sup>64</sup>See 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice', OHCHR, 2015, at 37, available at [www.ohchr.org/sites/default/files/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice.pdf).

<sup>65</sup>The mandate for the Libya Commission (A/HRC/RES/43/39), for example, was silent on temporal scope, while the Eritrea Commission (A/HRC/RES/26/24) did not provide for actors under scrutiny; see generally C. Harwood, 'The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order', (2020) *Leiden Studies on the Frontiers of International Law*, at 123–32.

<sup>66</sup>See Conference Room Paper, *supra* note 21, para. 10.

<sup>67</sup>*Ibid.*, para. 50.

<sup>68</sup>See A/HRC/RES/49/1, *supra* note 12, para. 11(d).

a discussion on the Commission's ability to make findings pursuant to international criminal law is reserved for Section 3.3.

Both Ukraine and Russia are parties to the seven core human rights instruments, including the CRPD.<sup>69</sup> All potential violations of the CRPD, including those relating to the unlawful practice of institutionalization, clearly fall within the scope of the Commission for Ukraine's mandate. Although the argument could be made that institutionalization in Ukraine predated the war, and thus falls outside the ambit of the Commission's competency, it is recalled that Resolution 49/1 does not provide a *ratione temporis* and the Commission has defined its own temporal scope as extending back to 2013. Policy choices made these past 11 years have prolonged and expanded the institutionalization of persons with disabilities in Ukraine, with one obvious example being the government's June 2021 order to exclude persons with disabilities from the country's general deinstitutionalization strategy. In light of all the dimensions of its mandate, there is no reason for the Commission to ignore the violations of the CRPD caused by Ukraine's practice of institutionalization.

In addition to the CRPD and other human rights instruments, both Ukraine and Russia are parties to the Geneva Conventions, which are the foundational texts of international humanitarian law.<sup>70</sup> Although international human rights law and international humanitarian law are distinct legal regimes, they play complementary roles in practice, and significant work has been done over the past decade to harmonize the CRPD with the Geneva Conventions. This has been especially necessary given the ideological gulf between the two bodies in their understanding of disability: while the CRPD approaches disability from a modern, social model of disability, the Geneva Conventions and the Additional Protocols codified a medical model of disability, which relies on 'pejorative and outdated notions about disability insofar as they do not square with a disability rights sensibility emphasizing agency, inclusion, participation and equal rights'.<sup>71</sup>

Much of this harmonization has been generated through the prism of Article 11 of the CRPD, which provides an explicit connection between that instrument and international humanitarian law by prescribing specific state obligations to account for persons with disabilities during armed conflict. As Janet E. Lord has powerfully written:

The inclusion of Article 11 in the CRPD supports the proposition that military decision-makers ought to assess the application of IHL norms through a CRPD reading. The logic of Article 11 is that persons with disabilities are entitled to be protected in situations of risk, irrespective of the international legal regime applicable or co-applicable in the risk situation to which they are subjected. Its implications are far reaching ... Article 11 embraces a reading of norms from discrete areas of international law as complementary, co-applicable and mutually supportive.<sup>72</sup>

The importance and significance of Article 11 has been stressed by UN bodies, non-governmental organizations, and individual scholars.<sup>73</sup> The International Committee on the Red Cross, for example, has underscored the bridging function that Article 11 plays in incorporating the human rights standards found in the CRPD into humanitarian law analyses.<sup>74</sup> The Office of the High Commission for Human Rights' 2015 thematic study on Article 11 further affirmed that

<sup>69</sup>See Conference Room Paper, *supra* note 21, para. 36.

<sup>70</sup>*Ibid.*, para. 37.

<sup>71</sup>J. E. Lord, 'Accounting for Disability in International Humanitarian Law', (2023) 105(922) *International Review of the Red Cross* 60, at 65.

<sup>72</sup>*Ibid.*, at 74.

<sup>73</sup>See, for example, the vital work of William I. Pons, Janet E. Lord, Rosemary Kayess, and Michael Ashley Stein, who have provided powerful legal analyses on Art. 11's broad applicability.

<sup>74</sup>IHL and Persons with Disabilities', 4 October 2017, available at [www.icrc.org/en/document/ihl-and-persons-disabilities](http://www.icrc.org/en/document/ihl-and-persons-disabilities); 'How Law Protects Persons with Disabilities in Armed Conflict', 13 December 2017, available at [www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict](http://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict).

‘international humanitarian law and international human rights law should be viewed as complementary and mutually reinforcing with regard to the protection of the rights of persons with disabilities in situations of risk and humanitarian emergency’.<sup>75</sup> While the Security Council has highlighted the particular impact that armed conflicts have on persons with disabilities since at least 2009,<sup>76</sup> it was only in Resolution 2475 that Article 11 was specifically invoked to support the Security Council’s call to parties to armed conflict to facilitate humanitarian access for persons with disabilities, end impunity for crimes against this group, and ‘shift power to persons with disabilities as agents of change, participating and leading in decision-making in humanitarian action, conflict prevention, resolution, reconciliation, reconstruction and peacebuilding’.<sup>77</sup> Finally, Article 11 has been the source of derivation for a series of important standards issued by the Committee on the Rights of Persons with Disabilities in its concluding observations from country reports, including state requirements for adopting and reforming national emergency response plans to be inclusive and accessible to persons with disabilities, and ensure participation of organizations of persons with disabilities in drafting and executing these measures. Of note, both of these points were made by the Committee in its concluding observations on the initial report of Ukraine, issued in October 2015.<sup>78</sup>

### 3.2 Fact-finding and intersectionality

Having established the Commission for Ukraine’s mandate, we now turn to its function. As mentioned, commissions of inquiry are *ad hoc* by nature: they are established for a variety of purposes and in response to a wide range of violations, they are not bound by precedent, and, as is the case with the Commission for Ukraine, the vagueness of their mandates may permit wide commissioner discretion. A common thread that connects all commissions of inquiry, however, is the expectation that they will make credible findings of fact in relation to human rights abuses. In the words of the late Professor M. Cherif Bassiouni, commissions of inquiry can be broadly defined as ‘fact-finding mechanisms intended to correct violations of human rights and humanitarian law by investigating and reporting on a particular situation and providing recommendations to the mandating body’.<sup>79</sup>

The Commission for Ukraine is no exception. Under the terms of its mandate, the Commission must ‘investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation’, and ‘collect, consolidate and analyse evidence of such violations and abuses, including their gender dimension’.<sup>80</sup> A subsequent resolution, adopted on 12 May 2022, requested that the Commission conduct particular inquiries into the events that occurred in the Kyiv, Chernihiv, Kharkiv, and Sumy oblasts in late February and March 2022.<sup>81</sup> The standard of proof for determining facts is that of an ‘objective and ordinary prudent observer’ who, ‘based on a body of verified information’, ‘would have reasonable grounds to conclude that the fact took place as described’.<sup>82</sup>

<sup>75</sup>Report on the Rights of Persons with Disabilities under Article 11 of the CRPD Relating to Situations of Risk and Humanitarian Emergencies, A/HRC/31/30 (30 November 2015), para. 55, available at [www.ohchr.org/en/calls-for-input/report-rights-persons-disabilities-under-article-11-crpdl-relating-situations-risk](http://www.ohchr.org/en/calls-for-input/report-rights-persons-disabilities-under-article-11-crpdl-relating-situations-risk).

<sup>76</sup>See, for example, Resolution 1894, S/RES/1894 (11 November 2009); Resolution 2217, S/RES/2217 (28 April 2015); Resolution 2225, S/RES/2225 (18 June 2015).

<sup>77</sup>S/RES/2475 (20 June 2019); B. Ruminowicz, ‘Advancing towards Inclusive Peace and Security: Persons with Disabilities and Security Council Resolution 2475’, (2023) 105(922) *International Review of the Red Cross* 449, at 456.

<sup>78</sup>See CRPD/C/UKR/CO/1, *supra* note 48, paras. 22–25.

<sup>79</sup>M. Cherif Bassiouni and C. Abraham (eds.), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013), at 8.

<sup>80</sup>See UN Doc. A/HRC/RES/49/1, *supra* note 12, paras. 11(a) and (b).

<sup>81</sup>Human Rights Council, Resolution adopted by the Human Rights Council on 12 May 2022, UN Doc. A/HRC/RES/S-34/1 (16 March 2022).

<sup>82</sup>See First Report, *supra* note 14, para. 10.

The question then becomes, ‘Which facts are relevant?’ As past commissions of inquiry have emphasized, it is impossible for commissions, with finite resources and a limited duration, to individually document the hundreds of alleged violations that may occur within the geographic region and temporal period specified in their mandate.<sup>83</sup> Indeed, the Commission for Ukraine’s Conference Room Paper acknowledged that, ‘given the vast number of allegations, the limited resources and time available [and] the challenges to access certain victims, witnesses, and areas affected by the hostilities’,<sup>84</sup> it would be impossible to investigate all reported violations falling under its mandate. Accordingly, the Commission for Ukraine, like commissions of inquiry in the past, will focus on establishing *patterns* of violations, bearing in mind that such violations have a disparate effect on people from different social categories.

Intersectionality is a relatively new feature of human rights fact-finding, which was only widely adopted after years of advocacy by survivors of gender-based violence and their allies. Emily Kenney, writing in 2013, expressed how UN commissions of inquiry historically displayed ‘astonishing disparity’ in their reporting of gender issues, from describing broad patterns of violations to providing only a few paragraphs on specific incidences of sexual violence.<sup>85</sup> The result of this advocacy is that commissions of inquiry today are now directed to adhere to comprehensive guidelines and a four-step framework on collecting data on gender-based violence, as established by the OHCHR in 2018.<sup>86</sup>

If the gender-based analyses of past commissions of inquiry have been said to display ‘astonishing disparity’, the disability-based analyses of those same commissions can only be described as ‘shockingly absent’. When disability has been mentioned at all in commission reports, the commissioners have very rarely gone further than simply underscoring the well-known risks and harms experienced by persons with disabilities and their families during armed conflict. For example, the second report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory and Israel merely acknowledged that access to basic medical care ‘especially affects pregnant women, the elderly and those with disabilities in need of emergency treatment and health care’.<sup>87</sup> Similarly, the Commission for Lebanon noted that individuals facing ‘difficulties related to age or disability’ were made more ‘vulnerable to the ongoing violence and were further at risk due to limited access to water, electricity, food and medical care, as well as restricted humanitarian access’.<sup>88</sup>

A notable exception to this trend of disregarding disability when investigating human rights abuses was the Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory (the Border Protests Commission), which was not specifically mandated to consider violations against persons with disabilities but did so in a comparatively fulsome manner. In describing its methodology, the Border Protests Commission explicitly stated that it had paid special attention to ‘groups warranting protection under international law, including . . . persons with disabilities’ in determining the facts of the conflict.<sup>89</sup> Like some other commissions, the Border Protests Commission noted the disproportionate impact that attacks on the health sector and power grids

<sup>83</sup>See International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005), para. 270, available at [www.legal-tools.org/doc/1480de/pdf/](http://www.legal-tools.org/doc/1480de/pdf/).

<sup>84</sup>See Conference Room Paper, *supra* note 21, para 13.

<sup>85</sup>E. Kenney, ‘Developing a Gender Methodology for UN Commissions of Inquiry’, (2013) 46(2) *New York University Journal of International Law and Politics* 589, at 595.

<sup>86</sup>See ‘Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice’, OHCHR, 2018, available at [www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective\\_EN.pdf](http://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf).

<sup>87</sup>Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328 (14 September 2022), para. 56.

<sup>88</sup>Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2 (10 November 2006), para. 204.

<sup>89</sup>Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory, UN Doc. A/HRC/40/74 (25 February 2019), para. 6.



have on persons with disabilities, but it also went further than that. A small section of the Border Protests Commission's primary report was devoted to recounting specific acts of violence committed against persons with disabilities.<sup>90</sup> The supplementary report did the same, and described, in particular, the death of Karam Faiyad, a 26-year-old man from Khan Younis with an intellectual disability who was shot in the head by Israeli Special Forces (ISF) during the protests. At the time of his death, Mr. Faiyad had been standing 150 metres away from the separation fence between Gaza and Israel, and the Border Protests Commission concluded there were 'reasonable grounds to believe that he did not represent an imminent threat of death or serious injury to ISF soldiers'.<sup>91</sup>

It is unfortunate that the HRC did not direct the Commission for Ukraine to take note of the impact of the war on persons with disabilities, given the country's staggering rate of institutionalization and the well-documented risks that institutionalization presents during armed conflict. As the reports of the Border Protests Commission indicate, however, this does not bar the Commission for Ukraine from investigating and reporting on violations against persons with disabilities. The Commission for Ukraine has repeatedly emphasized that it will adopt a 'victim-centred approach' to all aspects of its work, which will take into consideration 'the gender dimensions of violations and their impact on women, children and people affected by intersectional inequalities'.<sup>92</sup> This, of course, includes persons with disabilities.

Yet, even if the Commission for Ukraine does report on patterns of violations against persons with disabilities during this conflict, such 'independent fact-finding, while important in and of itself, is insufficient to achieving justice for the victims of the violations'.<sup>93</sup> Despite reporting on the violence against persons with disabilities that occurred during the 2018 protests, the Border Protests Commission provided no recommendations on how to promote accountability for these violations, and thus delivered little justice to the victims and their families. While it is crucial that the Commission for Ukraine investigate gross violations against persons with disabilities, this alone is not enough; the Commission must use those findings to develop specific recommendations that hold responsible individuals and institutions accountable, in order to ensure that the victims of these atrocities receive lasting justice.

### 3.3 Forms of accountability

Following the introduction of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005, most commissions of inquiry have been directed by their mandates to suggest appropriate avenues of accountability for parties that have committed grievous violations of international law.<sup>94</sup> Contemporary commissions of inquiry can therefore be said to have two broad purposes: first, to impartially collect information about the facts being investigated, and second, to take a proactive role in analysing that information and making prodromal legal determinations on certain conduct.<sup>95</sup>

<sup>90</sup>*Ibid.*, paras. 75–77.

<sup>91</sup>Report of the detailed findings of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory, UN Doc. A/HRC/CRP.2 (18 March 2019), para. 537.

<sup>92</sup>See First Report, *supra* note 14, paras. 7, 8.

<sup>93</sup>T. Piccone, 'U.N. Human Rights Commissions of Inquiry: The Quest for Accountability', *The Brookings Institution*, December 2017, at 2, available at [www.brookings.edu/articles/u-n-human-rights-commissions-of-inquiry-the-quest-for-accountability/](http://www.brookings.edu/articles/u-n-human-rights-commissions-of-inquiry-the-quest-for-accountability/).

<sup>94</sup>The Basic Principles and Guidelines were introduced in General Assembly Resolution 60/147. See, for example, Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, UN Doc. S/2005/822 (2 October 2006), paras. 4, 175.

<sup>95</sup>M. Odello, 'The Interplay between International Human Rights Law and International Humanitarian Law in the Practice of Commissions of Inquiry', in C. Henderson (ed.) *Commissions of Inquiry: Problems and Prospects* (2017), 199, at 200.

Appeals for accountability feature prominently in the mandate of the Commission for Ukraine. After expressing concern ‘at the ongoing human rights and humanitarian crisis in Ukraine’ and particularly ‘the reports of violations and abuses of human rights and violations of international humanitarian law by the Russian Federation, including gross and systemic violations and abuses of human rights’, the mandate’s preamble stresses the importance of ‘ensuring accountability for violations and abuses of human rights and violations of international humanitarian law’. The mandate’s operative part then instructs the Commission for Ukraine to ‘investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation’ and to ‘identify, where possible, those individuals and entities responsible for violations or abuses of human rights, of violations of international humanitarian law, or other related crimes, in Ukraine, with a view to ensuring that those responsible are held accountable’.<sup>96</sup>

Accountability is not defined in the mandate of the Commission for Ukraine. While some commissions have defined accountability as a broad principle which ‘attaches consequences to individuals [and] institutions deemed responsible’ for human rights abuses,<sup>97</sup> others have interpreted this phrase to refer exclusively to legal accountability under domestic and international criminal law – which, after all, does constitute part of the competence *rationae materiae* for most commissions of inquiry, including the Commission for Ukraine. As many commentators have discussed at length, this focus on criminal justice may be problematic because of the structural tensions that exist between commissions of inquiry and courts of law that are bound by strict rules of evidence and procedure. Commissions of inquiry are primarily responsible for ascertaining patterns of violations of international human rights and international humanitarian law; international criminal law is ‘not merely an enforcement mechanism of human rights and international humanitarian law, but a discrete system of substantive and procedural rules’.<sup>98</sup> As a result, some criminal justice mechanisms, including the ICC, have cautioned that reports tendered by commissions of inquiry may have less probative value than other sources, given the different contexts and purposes for which they are prepared.<sup>99</sup>

Concerns about the propriety of commission engagement with criminal law are arguably overstated. It is settled that the findings made by commissions of inquiry are not legal determinations of individual criminality, and commissions of inquiry themselves have repeatedly contrasted their lower standard of proof (i.e., reasonableness) with the higher standard of proof required to secure a criminal conviction (i.e., beyond a reasonable doubt).<sup>100</sup> International criminal law terminology is simply used by commissions of inquiry as ‘a yardstick for collection and evaluation of relevant facts’.<sup>101</sup> When commissions use terms like ‘war crimes’, ‘genocide’, or ‘crimes against humanity’, they are employing a common and ‘predominant language of communication and construction of facts’ to describe the nature of the violations observed.<sup>102</sup> These are *references* to international criminal law, rather than the *application* of such.

<sup>96</sup>See UN Doc. A/HRC/RES/49/1, *supra* note 12, paras. 11(a) and (d).

<sup>97</sup>Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka (31 March 2011), para. 299, available at [www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php](http://www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php).

<sup>98</sup>C. Harwood, ‘Human Rights in Fancy Dress: The Use of International Criminal Law by Human Rights Council Commissions of Inquiry in Pursuit of Accountability’, (2015) 58(1) *Japanese Yearbook of International Law* 71, at 78.

<sup>99</sup>See *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12., 18 December 2012, para. 294.

<sup>100</sup>See Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, *supra* note 94, para. 110; International Commission of Inquiry on the Central African Republic, Letter dated 19 December 2014 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2014/928 (22 December 2014) para. 16.

<sup>101</sup>L. J. van den Herik, ‘An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International law’, (2014) 13(3) *Chinese Journal of International Law* 507, para. 38.

<sup>102</sup>*Ibid.*, para. 46.

Regardless of concerns about the ‘juridification’ of commission mandates, commissions of inquiry have proven to be important ‘force multipliers’ or ‘catalysts’ for legal accountability.<sup>103</sup> Commissions have almost uniformly recommended or been relied upon in support of ICC action.<sup>104</sup> the report of the Commission for Darfur, for example, compelled the Security Council to refer the conflict to the ICC,<sup>105</sup> while former prosecutor Luis Moreno Ocampo drew on the findings of the Commission for Cote D’Ivoire in requesting authorization from the ICC judges to open investigations into war crimes and crimes against humanity committed in that country.<sup>106</sup> Commissions of inquiry have also provided support to domestic criminal and civil proceedings, including in Canada<sup>107</sup> and the United States.<sup>108</sup> In instances where neither international nor domestic criminal justice fora would be appropriate, the recommendations made by commissions of inquiry have spurred the creation of *ad hoc* tribunals and mechanisms, such as the Extraordinary Chambers in the Courts of Cambodia<sup>109</sup> and the International, Impartial and Independent Mechanism for the Syrian Arab Republic.<sup>110</sup>

All this is to say nothing of the other forms of accountability which commissions of inquiry can, and do, promote. The current ‘age of accountability’ has developed in parallel with a movement towards victim-centred justice, which recognizes that international criminal law’s traditional focus on the wrongdoing of a single individual is poorly equipped to address systemic or institutional factors that contributed to the commission of that crime in the first place. The 2005 Basic Principles and Guidelines not only prescribe that gross violations of international human rights law and international humanitarian law must be investigated, prosecuted, and punished,<sup>111</sup> but this instrument also stresses the need for reparation and guarantees of non-repetition, which include ‘reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law’.<sup>112</sup> Commissions of inquiry, as investigative bodies that establish and contextualize broad patterns of violations, are uniquely situated to promote this kind of systemic accountability, which identifies institutional shortcomings or failures and recommends corrective action, including political or social reforms.

Such holistic understandings of accountability have been discussed at some length in the reports of past commissions of inquiry. Accountability has been defined as ‘a broad process that addresses the political, legal, and moral responsibility of individuals and institutions for past violations of human rights and dignity’,<sup>113</sup> which ‘incorporates various methods including criminal prosecutions, disciplinary measures, administrative procedures and victim compensation measures’.<sup>114</sup> Commissions of inquiry frequently recognize that ‘judicial measures alone do not

<sup>103</sup>See Harwood, *supra* note 65, at 301.

<sup>104</sup>See Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/CRP.1 (7 February 2014), para. 1225(a); Commission of Inquiry on Human Rights in Eritrea, Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc. A/HRC/32/CRP.1 (8 June 2016), para. 361(b).

<sup>105</sup>See International Commission of Inquiry on Darfur, *supra* note 83, paras. 571–572. Darfur was referred to the ICC through Security Council Resolution 1593, UN Doc. S/RES/1593 (31 March 2005).

<sup>106</sup>See ‘Statement of the International Criminal Court, Luis Moreno-Ocampo in relation to Cote d’Ivoire’, 22 June 2011, available at [www.icc-cpi.int/news/statement-international-criminal-court-luis-moreno-ocampo-relation-cote-divoire](http://www.icc-cpi.int/news/statement-international-criminal-court-luis-moreno-ocampo-relation-cote-divoire).

<sup>107</sup>*Araya et al. v. Newsun Resources Ltd.*, 2016 BCSC 1856, para. 138, referencing the findings of the Commission for Eritrea.

<sup>108</sup>*Louise Mushikwabo et al. v. Jean Bosco Barayagwiza*, No. 94 CIV. 3627 (JSM), 9 April 1996, referencing the findings of the Commission for Rwanda.

<sup>109</sup>See Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850-S/1999/231 (16 March 1999), para. 219(1).

<sup>110</sup>Created pursuant to UN Doc. A/RES/71/248 (21 December 2016), following reports of the Commission for Syria, itself created pursuant to UN Doc. S-17/1 (22 August 2011).

<sup>111</sup>See Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, *supra* note 94, paras. 4–7.

<sup>112</sup>*Ibid.*, para. 23(h). See also ‘Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda’, OHCHR, 2013, available at [www.ohchr.org/sites/default/files/Documents/Publications/WhoWillBeAccountable.pdf](http://www.ohchr.org/sites/default/files/Documents/Publications/WhoWillBeAccountable.pdf).

<sup>113</sup>See Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, *supra* note 97, para. 299.

<sup>114</sup>Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (2 March 2012), para. 763.

suffice to sustainably address serious violations' that occur during conflict, and that a broader approach to accountability would better contribute to 'a sustainable culture of accountability and rule of law'.<sup>115</sup> These articulations of accountability are reflected in the recommendations made by commissions of inquiry, which have included lustration and vetting of public officials;<sup>116</sup> reparations;<sup>117</sup> restoration of property;<sup>118</sup> establishment of truth commissions;<sup>119</sup> and guaranteed access to healthcare for victims.<sup>120</sup> Most importantly for the purposes of this article, commissions of inquiry have long been recognized as mechanisms 'for identifying a road-map to structural reform of legal, political and other public institutions'.<sup>121</sup>

The members of the Commission for Ukraine have indicated that they will interpret the mandate's references to accountability in a holistic manner that includes, but is not limited to, criminal justice. In a statement on 15 June 2022, Commissioner Erik Møse noted that 'criminal accountability is important, but so are other forms of accountability, including those that enhance the possibility that victims will be able to reconstruct their lives'.<sup>122</sup> The Commission for Ukraine's First Report confirmed that, 'in addition to making recommendations regarding criminal accountability and identifying responsible individuals or entities where possible, the Commission will make recommendations about other dimensions of accountability to which victims have rights'.<sup>123</sup> The Second Report further affirmed the Commission for Ukraine's holistic approach to accountability, as evidenced by the commissioners' reference to 'other dimensions of accountability, including truth, reparations, and guarantees of non-recurrence'.<sup>124</sup> This broad and inclusive conception of accountability is not only appreciated, but necessary for the responding to the atrocities that have been committed against persons with disabilities during the war in Ukraine.

#### 4. Seeking victim-centred accountability for violence against persons with disabilities in Ukraine

The Commission for Ukraine must address the violence that has been committed against persons with disabilities in Ukraine since Russia's invasion of the country in February 2022. Unlike other investigatory mechanisms operating in Ukraine, the Commission has the ability – indeed, the responsibility – to ascertain the facts of these violations, encourage the prosecution of individual perpetrators, and address the policy decisions that contributed to the commission of those crimes: namely, the segregation of persons with disabilities in institutions. The Commission for Ukraine must espouse a victim-centred approach of accountability that is both backward- and forward-looking.

<sup>115</sup>Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/22/59 (5 February 2013), paras. 127, 128.

<sup>116</sup>See, for example, International Commission of Inquiry on the Central African Republic, *supra* note 100, para. 27.

<sup>117</sup>See, for example, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 115, para. 112(l).

<sup>118</sup>See, for example, International Commission of Inquiry on the Central African Republic, *supra* note 100, para. 16(2)(a).

<sup>119</sup>See, for example, International Commission of Inquiry on Darfur, *supra* note 83, para. 617.

<sup>120</sup>See, for example, International Commission of Inquiry for Guinea, Letter dated 18 December 2009 addressed to the President of the Security Council by the Secretary-General, UN Doc. S/2009/693 (18 December 2009), para. 270.

<sup>121</sup>See Nesbitt, *supra* note 62, at 84. See, for example, International Commission of Inquiry on Libya, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (8 March 2012), para. 128; OHCHR Investigation on Sri Lanka, Report of the OHCHR Investigation on Sri Lanka, UN Doc. A/HRC/30/CRP.2 (16 September 2015), paras. 6–16; Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, *supra* note 94, para. 229.

<sup>122</sup>'Opening Statement: Press Conference on the Commission of Inquiry on Ukraine on the Conclusion of its First Visit to Ukraine', 15 June 2022, available at [www.ohchr.org/en/statements/2022/06/opening-statement-press-conference-commission-inquiry-ukraine-conclusion-its](https://www.ohchr.org/en/statements/2022/06/opening-statement-press-conference-commission-inquiry-ukraine-conclusion-its).

<sup>123</sup>See First Report, *supra* note 14, para. 6.

<sup>124</sup>Report of the Independent International Commission of Inquiry on Ukraine, UN Doc. A/HRC/52/62 (15 March 2023) (the Second Report), para. 105.

Procedurally, there are a number of actions the Commission for Ukraine could take to improve disability inclusion and awareness, including engaging disability advisors, linking investigators to local organizations for persons with disabilities, encouraging those organizations to make submissions, and providing investigators with disability-sensitive training and sign language interpreters.<sup>125</sup> An easy first step would be to strengthen the Commission's working relationship with the Committee on the Rights of Persons with Disabilities, which has played a critical role in alerting the global community to the violence that has been committed against persons with disabilities during the course of this conflict. Doing so would enable the Commission to conduct informed, nuanced, and victim-centred investigations.

Substantively, these investigations must inform the Commission's final report and be meaningfully reflected in the commissioners' recommendations. In particular, these recommendations must contribute to both legal accountability of individual perpetrators and systemic accountability for the policies that have contributed to the unacceptable scale of violence that persons with disabilities have experienced in this conflict.

#### 4.1 Legal accountability

The Commission for Ukraine can contribute to the investigation and prosecution of individuals who have committed violations against persons with disabilities during the war in a number of ways. Simply by recording abuses against persons with disabilities, the Commission for Ukraine will put these crimes on the prosecutorial agendas at both the domestic and international levels. Although Ukrainian courts cannot accept evidence directly from outside investigators, and although international and domestic criminal law have more stringent standards of proof than those of commissions of inquiry, the information gathered by the Commission for Ukraine can point prosecutors in the direction of crimes committed against persons with disabilities, just as the evidence gathered by the Commission for Yugoslavia helped to 'establish the location, character and scale of violations' at the International Criminal Tribunal for the former Yugoslavia.<sup>126</sup>

In addition to supporting investigators and prosecutors, the Commission for Ukraine may follow the trend of past commissions of inquiry in suggesting appropriate venues for the adjudication of these atrocities. The Commission for Cambodia, for example, opposed local tribunals because of concerns regarding security and corruption,<sup>127</sup> while the Commission for Sri Lanka recommended the creation of an *ad hoc* hybrid special court operated by both local and international judges, prosecutors, lawyers, and investigators.<sup>128</sup> The impartiality of criminal prosecutions in Ukraine has already been flagged as a potential concern,<sup>129</sup> especially given the fact that the Commission for Ukraine has indicated that war crimes have been committed by both Russian and Ukrainian armed forces,<sup>130</sup> including at the institution housing persons with disabilities in Stara Krasnianka. The Commission for Ukraine may determine that fairness necessitates the creation of a hybrid or international tribunal and recommend the creation of such.

Finally, the Commission for Ukraine may propose follow-up mechanisms to facilitate and monitor the prosecution of those who committed atrocities against persons with disabilities. Just as the Commission for Eritrea, for example, proposed the creation of an OHCHR structure 'to

<sup>125</sup>See Pons, Lord and Stein, *supra* note 10, at 479.

<sup>126</sup>L. Sunga, 'How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?', (2011) 15(2) *International Journal of Human Rights* 187, at 193.

<sup>127</sup>See Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135, *supra* note 109, paras. 126–130, 148.

<sup>128</sup>See OHCHR Investigation on Sri Lanka, *supra* note 121, at recommendation 20.

<sup>129</sup>See C. Bardet, 'Ukraine: The Risk of Judging War Crimes During War', *JusticeInfo.net*, 30 May 2022, available at [www.justiceinfo.net/en/93059-ukraine-risk-judging-war-crimes-during-war.html#utm\\_source=twitter&utm\\_medium=reseaux-sociaux](https://www.justiceinfo.net/en/93059-ukraine-risk-judging-war-crimes-during-war.html#utm_source=twitter&utm_medium=reseaux-sociaux).

<sup>130</sup>See Summary of the First and Second Reports (notes 14 and 124, *supra*).



assist in ensuring accountability for human rights violations’,<sup>131</sup> the Commission for Ukraine could recommend that the Human Rights Council establish a dedicated committee to monitor and assess prosecutions of crimes against persons with disabilities.

## 4.2 Systemic accountability

The Commission for Ukraine must condemn the practice of institutionalization in Ukraine and acknowledge the devastating and exacerbating impacts that this policy has had on persons with disabilities during Russia’s ongoing war in Ukraine. To do so will not only affirm the personhood and dignity of persons with disabilities, but it may also influence the Ukrainian public’s perceptions of persons with disabilities and their role in society. This will provide the necessary foundation for Ukraine to implement sustainable reforms away from institutionalization and toward community-based care, which will significantly advance the fulfillment of the country’s obligations under international accords such as the CRPD.

For the past decade, the Government of Ukraine has implemented fragmentary measures to reform its policies regarding the care of persons with disabilities. As recently as February 2023, President Volodymyr Zelenskyy has promised to ‘change the system of children’s institutions’ in Ukraine,<sup>132</sup> which would hopefully include those institutions housing persons with disabilities. Thus, by making recommendations to deinstitutionalize the care of persons with disabilities, the Commission for Ukraine would be contributing to an existing, years-long evolution of government policy, rather than introducing something new, foreign, or impractical.

To this end, the Commission for Ukraine must stress the need for a policy of immediate deinstitutionalization, in conformation with the relevant guidelines produced by the Committee on the Rights of Persons with Disabilities.<sup>133</sup> The Commission must also specifically call on the Government of Ukraine to reverse the June 2021 order that excluded special boarding schools, sanatorium boarding schools, and education and rehabilitation centres from deinstitutionalization reform, which is contrary to international standards and Ukraine’s own pledges towards modernizing its welfare system. Finally, in order to reduce the risk of the ‘worrisome U-turns’ that have occurred in the past, the Commission for Ukraine should recommend the establishment of a committee or a special rapporteur for deinstitutionalization in Ukraine to provide oversight on this process. This would follow similar recommendations made by other commissions, such as those from the Commission on North Korea (which led to the establishment of an OHCHR field office in Seoul)<sup>134</sup> and the Commission on Eritrea (which led to the Human Rights Council renewing the mandate of the Special Rapporteur on Eritrea).<sup>135</sup>

Admittedly, commissions in the past, in their recommendations, have rarely gone so far as to make such expansive social policy recommendations. As Catherine Harwood notes, ‘commissioners’ recommendations for political and institutional reform [have been] rather broad and generalized in comparison with their detailed consideration of modalities for legal accountability’.<sup>136</sup> However, given the competency of these bodies to investigate human rights violations, in addition to violations under international humanitarian law and international criminal law, there is no principled reason why the Commission for Ukraine should not

<sup>131</sup>See Commission of Inquiry on Human Rights in Eritrea, *supra* note 104, para. 358(e). See also Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *supra* note 104, para. 1225(c), recommending a field-based structure to ensure accountability and collect evidence.

<sup>132</sup>See Van Esveld et al., *supra* note 52, at 2.

<sup>133</sup>See Guidelines on Deinstitutionalization, including in Emergencies, *supra* note 42.

<sup>134</sup>See Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, *supra* note 104, paras. 1225(c) and (d); ‘UN Human Rights Chief Opens New Office in Seoul’, 26 June 2015, available at [www.ohchr.org/en/stories/2015/06/un-human-rights-chief-opens-new-office-seoul](http://www.ohchr.org/en/stories/2015/06/un-human-rights-chief-opens-new-office-seoul).

<sup>135</sup>Report of the Special Rapporteur on the situation of human rights in Eritrea, UN Doc. A/HRC/35/39 (24 July 2017), para. 1.

<sup>136</sup>See Harwood, *supra* note 65, at 312.

acknowledge the clear link between the egregious violations of international human rights law, implicit in the practice of institutionalization, and the flagrant violations of international humanitarian law that have occurred in the current conflict. In fact, it makes more sense for commissions of inquiry to make these kinds of policy recommendations rather than provide assessments on criminal liability, which is often done but is technically outside the competency of commissions by virtue of the fact that they are not courts of law. This squares more precisely with the contemporary understanding that accountability, while also legalistic, is a 'fundamentally political process'<sup>137</sup> which often necessitates broad societal change.

#### 4.3 Proposed recommendations

In summary, with regard to the above discussion, the author respectfully submits that the Commission for Ukraine include the following recommendations in their report:

1. The parties to the conflict must prioritize the safe evacuation of persons with disabilities, who are a protected class of persons under the Geneva Conventions.
2. The Russian Federation must immediately:
  - a. Cease all acts of aggression and violence against persons with disabilities in Ukraine;
  - b. Cease attacks on Ukraine's energy infrastructure, which disproportionately impacts persons with disabilities;
  - c. Cease the use of institutions for persons with disabilities as military bases and the use of persons with disabilities as human shields; and
  - d. Ensure that all perpetrators, including commanders and other superiors, and those ordering, soliciting, or inducing the commission of crimes against persons with disabilities, are held accountable.
3. The Government of Ukraine must:
  - a. Acknowledge the particular harms that institutionalization has caused for persons with disabilities during Russia's war in Ukraine;
  - b. Repeal the June 2021 orders that excluded special boarding schools, sanatorium boarding schools, and education and rehabilitation centres from deinstitutionalization reforms;
  - c. Accelerate efforts to close institutions for persons with disabilities, prioritize family- and community-based care, and develop inclusive community support services, systems, and networks, in line with the Committee on the Rights of Persons with Disabilities' 'Guidelines on deinstitutionalization, including emergencies'.
4. The Office of the High Commissioner of Human Rights must consider establishing a committee to work with various stakeholders, including the Ukrainian government and non-governmental organizations, to oversee the transition from institutional to community-based care for persons with disabilities in Ukraine.

## 5. Conclusion

Individuals who have committed atrocities against persons with disabilities during Russia's war in Ukraine must be held accountable. What created the context of many of those crimes, however, are policy choices that have exacerbated the pre-existing vulnerabilities of persons with disabilities. In the words of Gerard Quinn, the United Nations Special Rapporteur on the rights of persons with disabilities from 2020 to 2023, 'all wars reveal historic wrongs in the heat of the

<sup>137</sup>S. Ratner, 'After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses', (2015) 36(3) *Michigan Journal of International Law* 541, at 554.

moment, and institutionalization is one of those'.<sup>138</sup> The investigations, reporting, and recommendations of the Commission for Ukraine must support what Mr. Quinn has termed the 'reset button to the future' of the rights of persons with disabilities in Ukraine by denouncing institutionalization and affirming the rights to family- and community-based care.

The Commission for Ukraine, as an international mechanism, represents the interests of humanity in redressing egregious violations against civilians in this conflict. The extent to which it will respond to violence against and support justice for persons with disabilities in Ukraine will reflect global understandings of the rights, worth, and personhood of persons with disabilities. The Commission must take as its starting point the fundamental and inalienable human rights of persons with disabilities, and seize the opportunity to effect profound change for those who have too often been neglected by accountability mechanisms.

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<sup>138</sup>R. Clegg, 'Disabled Children Abused in Ukraine's Orphanages, Warns UN', *BBC*, 11 August 2022, available at [www.bbc.com/news/disability-62513459](http://www.bbc.com/news/disability-62513459).