

Accounting for disability in international humanitarian law

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Abstract

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD) represents an important and (potentially) progressive development in the protection framework under international humanitarian law (IHL). Article 11 of the CRPD specifically obliges States to protect persons with disabilities from harm in situations of risk, including armed conflict, consistent with IHL and human rights law. The CRPD framework signals the need to address the traditional framing of disability under IHL and to draw from human rights concepts in the CRPD in order to inform the protection accorded to persons with disabilities in armed conflict.

This article is divided into four main parts: the first three address three main lines of inquiry, while the fourth is forward-looking. The first part analyzes the framing and construction of disability in IHL and the implications of such framing for the protection of persons with disabilities. The second part analyzes fundamental IHL rules in an effort to demonstrate how the framing of disability and the protection framework of the CRPD can be used in the application of IHL. The third part identifies some specific problem areas ripe for further disability scoping and

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harmonization of the CRPD and IHL. Looking forward, the fourth part identifies entry points for focused action and research aimed at bringing about the kind of dynamic treaty practice envisioned by Article 11 of the CRPD.

Keywords: Article 11, Convention on the Rights of Persons with Disabilities, disability, social model of disability, treaty practice, persons with disabilities in armed conflict, persons with disabilities, international humanitarian law, situations of risk.

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Introduction

Armed conflict is both a cause of impairment resulting in disability and a complicating and risk-enhancing factor for persons already living with disability in conflict situations.¹ The violence of war – whether acts of violence conducted lawfully or unlawfully under international humanitarian law (IHL) – can result in trauma and impairment that lead to disability.

Persons with disabilities who are living in or fleeing from conflict zones face numerous threats to their physical and mental health and well-being, with the frequent effect of aggravating pre-existing disability or leading to secondary disability.² Armed conflict and the violence that it produces create a multitude of risks. These include attacks directed at individuals, the presence of landmines and other unexploded ordinance, exposure to the elements for civilians or combatants who have little protection, the breakdown of health and rehabilitation systems, damage to essential infrastructure, and risks of other trauma that can create or exacerbate psychosocial conditions.³

In addition, the barriers experienced by persons with disabilities during peacetime are intensified during conflict.⁴ These can manifest in acute protection needs. Persons with disabilities may be restricted in their mobility in times of conflict, and as such, they may not be able to call attention to their specific needs in situations of risk or heed evacuation warnings absent support and accessibility

1 World Health Organization and World Bank, *World Report on Disability*, Washington, DC, 2011 (World Report on Disability); Maria Berghs and Nawaf Kabbara, “Disabled People in Conflicts and Wars”, in Shaun Grech and Karen Soldatic (eds), *Disability in the Global South: The Critical Handbook*, Springer, London, 2016.

2 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), April 2019; Alexander Breitegger, *How Law Protects Persons with Disabilities in Armed Conflict*, ICRC, Geneva, 2017.

3 Office of the UN High Commissioner for Human Rights (UN Human Rights), *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the CRPD, on Situations of Risk and Humanitarian Emergencies*, UN Doc. A/HRC/31/30, 3 November 2013, available at: <https://undocs.org/en/A/HRC/31/30> (all internet references were accessed in November 2022); *Report of the Special Rapporteur on the Rights of Persons with Disabilities on the Protection of the Rights of Persons with Disabilities in the Context of Military Operations*, UN Doc. A/77/203, 20 July 2022 (SR Report on Disability and Military Operations).

4 See William I. Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022.

measures. Accessing medicines or treatments such as physiotherapy required to manage disability may be impossible. Physical and communication barriers, including those related to precautions issued by armed forces, may prevent access to emergency information during conflict. Women and girls with disabilities, at disproportionate risk of sexual violence during peacetime, are at still greater risk of violence due to the insecurity of wartime and the risk of caregiver separation or abandonment.⁵

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD)⁶ in 2006 (entered into force 2008) and its near-universal ratification represent an important and (potentially) progressive development in the protection framework accorded to persons with disabilities under IHL. Article 11 of the CRPD specifically obliges States to protect persons with disabilities from harm in situations of risk, consistent with IHL and international human rights law.⁷ The necessity of such protection is recognized in the CRPD's preamble, which proclaims that "the observance of applicable human rights instruments [is] indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation".⁸

Article 11 plays a unifying role in drawing together obligations to safeguard and protect persons with disabilities in both peace and conflict situations.⁹ The CRPD also contributes to the overall protection framework in human rights and IHL by explicitly introducing – for the first time in an international human rights treaty – the requirement that reasonable accommodation be provided to ensure non-discrimination and that the failure to do so results in a finding of discrimination.¹⁰ This duty to accommodate, along with the principles of accessibility, participation and respect for difference set out in Article 3 of the

5 See e.g. Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, U.N. Doc. A/67/227, 3 August 2012; Human Rights Watch, "As If We Weren't Human": *Discrimination and Violence against Women with Disabilities in Northern Uganda*, 2010, available at: www.hrw.org/en/reports/2010/08/26/if-we-weren-t-human.

6 Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, 13 December 2006 (CRPD). The CRPD currently has 185 States Parties which have made a commit to "ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability": CRPD, Art. 5. States therefore undertake to establish legislative provisions to prevent, prohibit or punish any acts, customs or regulations that discriminate against persons with disabilities.

7 *Ibid.*, Art. 11. For more on the drafting of Article 11, see Stephanie Motz, "Article 11: Situations of Risk and Humanitarian Emergencies", in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, Oxford, 2018, p. 314. See also the article by Andrew Begg in this issue of the *Review*.

8 CRPD, above note 6, preamble para. (o).

9 Assessing the trajectory of Article 11 and the CRPD framework into IHL accepts that IHL and human rights law are not discrete realms with no interrelationship: They connect, intersect, complement and inform each other. On the interrelationship between human rights and IHL, see International Committee of the Red Cross (ICRC), "IHL and Human Rights", available at: www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/index.jsp ("International humanitarian law and international human rights law are two distinct but complementary bodies of law. They are both concerned with the protection of the life, health and dignity of individuals. IHL applies in armed conflict while human rights law applies at all times, in peace and in war").

10 CRPD, above note 6, Art. 5.

CRPD, has important implications for applying IHL to the situation of persons with disabilities. United Nations (UN) Security Council Resolution 2475 of 2019 on the protection of persons with disabilities during armed conflict picks up on inequality and its implications for persons with disabilities in urging States “to take all appropriate measures to eliminate discrimination and marginalization of persons on the basis of disability in situations of armed conflict, particularly those who face multiple and intersecting forms of discrimination”.¹¹

The differential impact of armed conflict on men, women and children with disabilities (as compared to individuals without disabilities) is beginning to be acknowledged.¹² The specific constructions of disability in treaty provisions in IHL pertaining to persons with disabilities (pejorative terms such as “infirm” and “mutilated”, for instance) have been recognized as problematic, much as the constructions of gender in IHL have been questioned.¹³ The nascent state of a disability sensibility in IHL means that significant challenges remain. A disability-focused analysis can yield insight into many of the key humanitarian challenges in armed conflict, ranging from the avoidance of harm to civilians and civilian objects and the protection of refugees and displaced persons with disabilities, to the prevention of sexual and gender-based violence against persons with disabilities, to limiting the harmful effects of weapons.¹⁴ Such a perspective should also serve to highlight how ableist assumptions impact peace, justice and long-term recovery.¹⁵ This thematic issue of the *Review* on persons with disabilities is one step forward in working to address such challenges and to pose solutions for surmounting them.

This article canvasses three principal questions:

- Why is understanding the framing and construction of disability in IHL important? How does it influence the protection of civilians with disabilities and our understanding of risk during armed conflict?
- What are the practical implications of applying fundamental international humanitarian rules to persons with disabilities and in highlighting disability in the humanitarian response?
- What are some of the more pressing problems when it comes to integrating a disability perspective into IHL and humanitarian protection? What remains to be done?

11 UNSC Res. 2475, 20 June 2019, available at: [https://undocs.org/s/res/2475\(2019\)](https://undocs.org/s/res/2475(2019)). For discussion of Resolution 2475 and its genesis, see the article by Bogna Ruminowicz in this issue of the *Review*.

12 *Report of the Special Rapporteur on the Rights of Persons with Disabilities on the Rights of Persons with Disabilities in the Context of Armed Conflict*, UN Doc. A/76/146, 19 July 2021 (SR Report on Disability and Armed Conflict), paras 92–94 (noting the need to provide disability-inclusive protections for persons with disabilities during armed conflict and throughout the entire peace continuum).

13 Christine Chinkin, “Gender and Armed Conflict”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014.

14 Janet E. Lord, Elizabeth Heideman and Michael Ashley Stein, “Advancing Disability Rights-Based Asylum Claims”, *Virginia Journal of International Law*, Vol. 62, No. 3, 2022.

15 *Report of the Special Rapporteur on the Rights of Persons with Disabilities on the Impact of Ableism in Medical and Scientific Practice*, UN Doc. A/HRC/43/41, 17 December 2019 (SR Report on Ableism).

In response to the foregoing lines of inquiry, the first substantive part of this article focuses on the construction of disability in IHL, and its framing. The second part considers fundamental guarantees of IHL and their application in respect of persons with disabilities. The third part considers some specific problems concerning the harmonization of the CRPD and IHL in relation to humanitarian assistance, reintegration of combatants with disabilities, displacement, detention, means and methods of warfare and accountability. The fourth part looks forward and more broadly analyzes the landscape regarding the role of IHL in addressing disability-based harm in the context of armed conflict. In so doing, it identifies the opportunities for more focused action towards greater complementarity and dynamism between IHL and the human rights of persons with disabilities as set forth in the CRPD. Finally, the article ends with some concluding observations.

Constructing disability

The concept of disability is deeply implicated in the social, political and cultural environment. This means that armed conflict has a disability dimension that warrants examination. Much as armed conflict has been characterized as sexed and gendered,¹⁶ it is likewise ableist, reflective of systems (social, political, legal, environmental, cultural) that accord value to certain *typical* characteristics of body and mind based on strict standards of appearance, functioning and behaviour.¹⁷

Violence during armed conflict disproportionately affects persons with disabilities because of their disability status, and violence related to armed conflict impacts persons with disabilities differently due to their unequal social and economic position and consequent invisibility in society. These factors put persons with disabilities at risk in unique ways during armed conflict.¹⁸ The CRPD Committee, in calling attention to the needs of persons with disabilities in armed conflict and in response to the Syrian conflict, notes that persons with disabilities are “too often the forgotten victims of conflict” and are subject to “gross violations” of their human rights.¹⁹ Further, the Committee has asserted that persons with disabilities face disproportionate risk, including that of being

16 C. Chinkin, above note 13.

17 Ron Amundson, “Disability, Ideology, and Quality of Life: A Bias in Biomedical Ethics”, in David Wasserman, Jerome Bickenbach and Robert Wachbroit (eds), *Quality of Life and Human Difference*, Cambridge University Press, Cambridge, May 2005. See also SR Report on Ableism, above note 15.

18 See ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, available at: www.icrc.org/en/download/file/62399/how_law_protects_persons_with_disabilities_in_war.pdf. See also UNSC Res. 2475, above note 11 (“expressing its commitment to address the disproportionate impact of armed conflict and related humanitarian crises on persons with disabilities ...”).

19 Committee on the Rights of Persons with Disabilities, “Persons with Disabilities ‘Forgotten Victims’ of Syria’s Conflict – UN Committee”, press release, 17 September 2013.

“neglected, excluded or even abused because of their impairments and traumas, particularly the most vulnerable women and children with disabilities”.²⁰

Such circumstances underscore the rationale for the protected status of persons with disabilities under IHL and the application of human rights protections to the experiences of persons with disabilities as reflected in the CRPD. They also underscore the importance of effective action accounting for the distinct and diverse status, needs barriers and differential experience of harm by persons with disabilities in the context of armed conflict.

The framing of disability in IHL and international human rights law

One of the peculiarities of looking at disability within IHL is the sense that it is at once both everywhere and nowhere. Disability is denoted variously without uniformity in IHL, and terms used to conjure up certain notions of disability, while reflected throughout the regime, lack coherence or alignment with international human rights. Stereotyping about disability is woven into the fabric of IHL, where terminology marks persons with disabilities as, *inter alia*, “mutilated”, “maimed”, “wounded” and “infirm” – as *other*.²¹ From a disability rights perspective, such framings immediately call to mind ableist notions about the broken bodies of soldiers or the helplessness of civilians. These are terms associated with pejorative and outdated notions about disability insofar as they do not square with a disability rights sensibility emphasizing agency, inclusion, participation and equal rights. As summed up by the Office of the UN High Commissioner for Human Rights (UN Human Rights) in its study of Article 11, IHL “has been codified under previously dominant understandings of disability, notably the medical model of disability”.²² As explained in disability literature, the medical model of disability views disability as an individual and medicalized

20 *Ibid.*

21 Non-exhaustively, these terms appear in the following instruments: Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 16 (“state of health”); Art. 30 (“the disabled” and “the blind”); Art. 49 (referencing, for the determination of prisoners of war (PoWs) eligible for work, “physical aptitude” and the desire to ensure that they are kept in “a good state of physical and mental health”, though making no mention of disability status as such); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 16 (“wounded, sick and infirm”). And interestingly, the term “disabled” as used in the 1868 St Petersburg Declaration connotes rendering a soldier *hors de combat*. In its enunciation of the principles of military necessity and humanity, the Declaration states that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; ... for this purpose it is sufficient to disable the greatest possible number of men”. Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, 29 November/11 December 1868. It should be noted that terminology around disability is highly contested in all fields, including in international human rights law, and formed a major line of dialogue and discussion during the drafting of the CRPD, in which the terminology ultimately settled on was “persons with disabilities” as the term best reflecting the social model orientation and rights-based approach to disability. For a useful and parallel discussion regarding the use of the term “victim” in the humanitarian work of the ICRC, see Valerie M. Meredith, “Victim Identity and Respect for Human Dignity: A Terminological Analysis”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009.

22 UN Human Rights, above note 3.

phenomenon that does not account for broader, socially contextualized aspects of the disability experience.²³ In this sense, the disability narrative in IHL is narrowly formulated and largely equated with illness and the medicalized needs of the individual to the exclusion of non-medical needs and consideration of barriers inherent in society.

By contrast, the social model of disability embraced by international human rights law since the CRPD's adoption employs an analytical lens that rejects the conflation of disability with infirmity, disease, mutilation and the like. It also rebuffs the notion that disability is a unitary experience that is uniformly terrible.²⁴ The social model pivots away from seeing disability as an inherent deficit and a narrow health issue requiring medical intervention. The CRPD acknowledges that "disability is an evolving concept" and one that "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".²⁵ Under the Convention, individuals with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments".²⁶

The framing of disability under human rights law therefore presents some challenges for IHL, but these are surmountable. Protection requires some mechanism by which protected individuals with specific needs and subject to particular peril during armed conflict may be identified. The various terms used to mark disability status in IHL thus perform an important function in calling attention to individuals who have protection needs, albeit oftentimes in pejorative terms that do not square with a social model framing of disability. That said, applying the insights of the social model to the vulnerability framework utilized by humanitarian institutions/actors such as the International Committee of the Red Cross (ICRC) may help to expose the unique disadvantages that the diversity of the disability community possesses in situations of risk. As an illustration, a person's deafness does not equate with medical infirmity or sickness in the sense of the traditional IHL disability lexicon. Such an individual is, however, uniquely at risk during armed conflict where, for example, they cannot access critical emergency information delivered via radio or understand the directions of soldiers at a checkpoint. Likewise, a wheelchair user with lower limb weakness is not ill, but rather may require specific assistance in accessing evacuation

23 See, generally, Michael Ashley Stein, "A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities", *Mental and Physical Disability Law Reporter*, Vol. 31, No. 5, 2007.

24 The former Special Rapporteur's report on ableism notes: "Contrary to common belief, persons with disabilities can experience a good quality of life. They consistently report a quality of life as good as, or sometimes even better than, that of persons without disabilities." SR Report on Ableism, above note 15. See also Adrienne Phelps Coco, "Diseased, Maimed and Mutilated: Categorizations of Disability and an Ugly Law in Late 19th Century Chicago", *Journal of Social History*, Vol. 44, No. 1, 2010.

25 CRPD, above note 6, preambular para. (e).

26 *Ibid.*, Art. 1. And as in preambular paragraph (e), Article 1 acknowledges that disability results from the "interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

transport that is inaccessible. Greater attention within IHL to the diversity of disability, and consequently, the range of protection needs, would be helpful. Complementarity between IHL and human rights law means making visible strategies of protection that are responsive to persons with disabilities.

The conceptualization of disability reframed under the CRPD can be harnessed to shift the focus away from notions of individual deficit and tragic loss and towards the specific barriers that make it difficult for persons with disabilities to avoid harm. Disability as understood in international human rights law refers to the socially constructed differences that clearly run against the grain of IHL constructions of disability.²⁷ Core to a disability rights perspective is the notion that socially constructed differences between persons with and without disabilities are changeable over time and are different both within and between cultures. Disability, along with other factors such as gender, age, ethnicity and class, determines, notably, the expected attributes, behaviour, roles, power, needs, resources, constraints and opportunities for people in any culture. Individuals, in other words, have different statuses, needs and capacities due to social, economic, cultural and political structures and are therefore also affected differently by changes in society, as well as by actions meant to be beneficial to the population.

While traditionally, IHL has not aligned with a social model orientation, the CRPD's reframing can help foster more effective and meaningful implementation of IHL in relation to persons with disabilities (and potentially other protected persons). Essential to effective action in relation to armed conflicts is the consideration of the distinct and diverse statuses, needs and capacities of all protected persons, as well as the consequences of these in relation to plausible actions. The past few decades have witnessed an increasing recognition of this within the international community, and responses to it through international law. The development and application of IHL must accordingly account for persons with disabilities. Specifically, key stakeholders and decision-makers, both civilian and military, with responsibilities under IHL need to be equipped to understand how disability impacts the application of the law and to take responsibility for ensuring that this perspective informs the planning, conduct and evaluation of military operations and other actions under the law.

Finally, it bears mentioning that a disability perspective does not mean creating "special" rights or the prioritization of persons with disabilities over other protected individuals, and it does not purport to bring about radical social transformation in respect of the application of IHL. Rather, it is an analytical tool that facilitates the better identification of differential roles, needs, barriers and functions of individuals with disabilities. A disability-inclusive perspective on IHL would help ensure the non-discriminatory and equal application of the law by ensuring that all individuals are granted the protection and rights to which they are entitled under the law.

²⁷ *Ibid.*, Preamble and Art. 1.

Disability-related violence in armed conflict

“Disability-related violence in armed conflict” is violence that occurs during or in the immediate aftermath of armed conflict and is linked to the conflict, and that affects persons with disabilities. Both the incidence of disability-related violence during conflict and its impact are becoming better understood, as laid out by the UN Special Rapporteur on the Rights of Persons with Disabilities and in the emerging literature on the topic.²⁸

Conflict-related violence perpetrated against children and adults with disabilities, and its impact, has been reliably and credibly reported (albeit clearly underreported) and has largely been met with impunity, a circumstance addressed by several contributions in this issue of the *Review*.²⁹ Such violence takes various forms, as does its impact on persons with disabilities. Included among the array of egregious human rights and humanitarian law violations committed against persons with disabilities are genocide, mass murder and targeted killing; wilful targeting of civilians and civilian objects resulting in injury and destruction; forced sterilization; involuntary medical and scientific experimentation; use of persons with disabilities as human shields, suicide bombers and booby-traps; sexual violence, human trafficking and forced disappearance; and attacks against buildings dedicated to the education, health care and rehabilitation of persons with disabilities.³⁰

The nature of such violence of course depends on a wide range of factors, including whether the individual is a civilian or combatant, as well as their national identity, race, ethnicity, living situation, economic circumstances, geographic location, health status, age and, crucially, their gender. Thus, women and girls with disabilities are even more likely to experience sexual and gender-based violence than non-disabled women and girls.³¹ Though the inequality impacting

28 SR Report on Disability and Armed Conflict, above note 12. See also Helen Durham and Gerard Quinn, “Lifting the Cloak of Invisibility: Civilians in Armed Conflict”, *Humanitarian Law and Policy Blog*, 21 April 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/04/21/civilians-disabilities-armed-conflict>; W. I. Pons, J. E. Lord and M. A. Stein, above note 4.

29 A representative sampling includes Ariel Eytan *et al.*, “Determinants of Post-Conflict Symptoms in Albanian Kosovars”, *Journal of Nervous and Mental Disease*, Vol. 192, No. 10, 2004; William Fernandez *et al.*, “Mental Health Status among Ethnic Albanians Seeking Medical Care in an Emergency Department Two Years after the War in Kosovo: A Pilot Project”, *Annals of Emergency Medicine*, Vol. 43, No. e-1, 2004; Mevludin Hasanovic, “Posttraumatic Stress Disorder in Bosnian Internally Displaced and Refugee Adolescents from Three Different Regions after the 1992–1995 War in Bosnia and Herzegovina”, *Paediatrics Today*, Vol. 8, No. 1, 2012. See also the article by Emira Čerimović in this issue of the *Review*.

30 See UNSC Res. 2475, above note 11 (“Expressing serious concern regarding the disproportionate impact that armed conflict has on persons with disabilities, including abandonment, violence, and lack of access to basic services, stressing the protection and assistance needs of all affected civilian populations ...”). For a recent accounting of these violations, see W. I. Pons, J. E. Lord and M. A. Stein, above note 4. See also the articles in this issue of the *Review* by Alexander Breitegger; Alice Priddy; and William I. Pons, Janet E. Lord and Michael Ashley Stein.

31 See the article by Sara La Vecchia in this issue of the *Review*. See also Stephanie Ortoleva and Hope Lewis, *Forgotten Sisters – A Report on Violence against Women with Disabilities: An Overview of Its Nature, Scope, Causes and Consequences*, Northeastern University School of Law Research Paper No. 194, 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133332.

the experience of women and girls with disabilities warrants specific attention, it is also the case that gendered assumptions and expectations shape the experiences of all persons, including men and boys with disabilities, in the conduct of hostilities. Men with disabilities of fighting age have often been assumed to be evading military service and have faced harassment and violence at border crossings.³² Thus, in certain situations, the civilian status of men and boys with invisible disabilities may be improperly revoked because they are presumed to be combatants or to pose security risks by simple virtue of their gender. In sum, gender affects the conflict-related experiences of women, men, boys and girls with disabilities differently.

Armed conflict poses particular risks for children with disabilities.³³ The impact of armed conflict on children with disabilities – directly, in the form of physical injuries from attacks, artillery fire or landmine explosions, or in the form of psychosocial effects arising from injuries or from witnessing traumatic events – may enhance risks to life.³⁴ The indirect effects of armed conflict may likewise be more severe for children through, for example, the breakdown of health and rehabilitation services or increases in food insecurity.³⁵ Children are also separated from their families, homes and/or schools, sometimes for years. The nature of armed conflict, a major cause of disabilities among children, is changing. Fighting is increasingly taking the form of recurring civil wars and fragmented violence characterized by the indiscriminate use of force and weapons.³⁶ Parties to conflict have an obligation to protect children from the effects of armed violence and to provide them with access to appropriate health and psychosocial care in order to aid their recovery and reintegration.³⁷ Children

32 Eloise Barry, “Disabled Ukrainians Are Fighting for Survival”, *Time*, 7 April 2022, available at: <https://time.com/6161800/disabled-refugees-ukraine/>.

33 UNICEF, *Children with Disabilities in Situations of Armed Conflict*, New York, November 2018. See also the article by Emina Čerimović in this issue of the *Review*.

34 Rozanna Aitchison *et al.*, “Resilience in Palestinian Adolescents Living in Gaza”, *Psychological Trauma: Theory, Research, Practice and Policy*, Vol. 9, No. 1, 2016; Touraj Ayazi *et al.*, “Disability Associated with Exposure to Traumatic Events: Results from a Cross-Sectional Community Survey in South Sudan”, *BMC Public Health*, Vol. 13, 2013; Jeffrey Sonis *et al.*, “Probable Posttraumatic Stress Disorder and Disability in Cambodia”, *Journal of the American Medical Association*, Vol. 302, No. 5, 2009; Avi Bleich, Anat Dycian, Meni Koslowsky, Zahava Solomon and Michael Wiener, “Psychiatric Implications of Missile Attacks on a Civilian Population: Israeli Lessons from the Persian Gulf War”, *Journal of the American Medical Association*, Vol. 268, No. 5, 1992.

35 Bryce Austin Hollander, Janet E. Lord and Michael Ashley Stein, “Yemen Disability, Food Insecurity, and Health: Examining Linkages between International Humanitarian Law, Human Rights, Disability Assistance, and Food Aid in the Yemini Context”, in *Handbook on Global Health and Disability*, Routledge, London, 2023 (forthcoming). See also UN Economic and Social Commission for Western Asia, *Looking the Other Way: Disability in Yemen*, Social Development Division, Bangkok, 2009.

36 Barbara F. Walter, *Conflict Relapse and the Sustainability of Post-Conflict Peace*, World Development Report 2011 Background Paper, World Bank, Washington, DC, 13 September 2010.

37 Geneva Convention IV specifies measures relating to child welfare that must be taken by parties to an international armed conflict, including measures to ensure that children under 15, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education must, as far as possible, be entrusted to persons of a similar cultural tradition. The parties to the conflict must facilitate the reception of such children in a neutral country for the duration of the conflict, and they must endeavour to arrange for all children under 12 to be identified

with disabilities, especially those with learning disabilities, can also be directly involved in conflict – for example, they may be pressed into service as fighters, cooks or porters precisely because they are considered to be less valuable, or less likely to resist, than children without disabilities.

Poverty – experienced by an overwhelming percentage of persons with disabilities the world over – accentuates barriers that make it hard or impossible to seek safety and shelter away from armed conflict in cases where, for instance, public transport is inaccessible and private transport is not affordable.³⁸ Persons with disabilities are more likely, owing to their disadvantaged economic status, to live in socially deprived and/or isolated areas, further enhancing risk when conflict comes to the community.³⁹ Alongside the fear of physical violence that civilians with disabilities face during armed conflict, they face severe economic and social hardships which are increased by the danger of attacks and the inability of some persons with disabilities to evacuate, as the conflict in Ukraine illustrates.⁴⁰

Some persons with disabilities rely on caregivers and family for the assistance they need to access food, hydration, medicines, hygiene facilities and assistive products essential for daily survival and management of disability. An inability to receive services needed to maintain health is another challenge posed for some persons with disabilities during conflict.⁴¹ The collapse of government agencies further undermines community restraints on human rights violations. Persons with disabilities, already subject to greater abuse within the home at the hands of family and caregivers, are likely to suffer from a higher incidence of violence at home during an armed conflict, regardless of whether they are in close proximity to the actual combat zone.⁴²

The foregoing contemporary context is part of a long history of violence and abuse against persons with disabilities during armed conflict.⁴³ Indeed, some of the worst abuses perpetrated against persons with disabilities during the

by the wearing of identity discs, or by some other means. GC IV, Arts 23–24, 38, 50, 76, 89. See also Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 12 July 1978) (AP I), Art. 70(1).

38 According to the World Report on Disability, above note 1, persons with disabilities experience disproportionate rates of poverty.

39 Maria Kett and Jean-Francois Trani, “Vulnerability and Disability in Darfur”, *Forced Migration Review*, No. 35, July 2010.

40 Paolo Vargiu, “The Rights of Persons with Disabilities in a Post-conflict Ukraine and the Failures of International Law”, 2 April 2022, available at: www.paolovargiu.com/blog/the-rights-of-persons-with-disabilities-in-a-post-conflict-ukraine-and-the-failures-of-international-law.

41 Inter-Agency Standing Committee (IASC), *Guidelines on the Inclusion of Persons with Disabilities in Humanitarian Action*, 2019, available at: <https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/iasc-guidelines>.

42 S. Ortoleva and H. Lewis, above note 31.

43 See, generally, Janet E. Lord, “Genocide, Crimes against Humanity and Human Rights Abuses against People with Disabilities,” in Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes against Humanity*, Macmillan Reference, Detroit, MI, 2004.

Holocaust served as the impetus for modern prohibitions.⁴⁴ These include provisions regarding informed consent in the Nuremberg Code and reasserted in human rights instruments such as the CRPD and the anti-torture provision in Article 7 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁵ The addition of language specifically prohibiting medical or scientific experimentation absent consent was added to Article 7 of the ICCPR to explicitly account for the appalling abuses during World War II. These abuses, in which persons with disabilities were experimented upon and killed at the hands of the Nazi medical establishment, were the subject of one of the few war crimes prosecutions addressing disability-based crimes.⁴⁶ That history, however, did not result in any consistent efforts to document and specifically account for the impact of armed conflict on persons with disabilities until the treaty practice only recently triggered by the CRPD.

Understanding disability within an IHL context

Disability impacts how civilians with disabilities experience the effects of military operations in a number of ways, and these must be accounted for in efforts to implement IHL. First, the concept of “civilian harm” (in relation to the principle of proportionality in attack) must accommodate the differential impacts of armed conflict arising from the diversity of disability. Second, account must be given to the various attributes possessed by an individual with a disability in relation to gender, age, indigeneity, sexual orientation, gender identity and a host of other characteristics.⁴⁷ In this respect, the diversity of disability must be understood as a complicating factor for understanding the impact of military operations on persons with disabilities.

Third, disability is also deeply implicated in the *kinds of harms* that persons with disabilities may experience as a result of the conduct of military operations. Harm experienced by persons with disabilities caught up in armed conflict includes direct and indirect harm. Direct effects can include loss of life and injury

44 See Hugh Gregory Gallagher, *By Trust Betrayed: Patients, Physicians, and the License to Kill in the Third Reich*, Vandamere Press, Arlington, VA, 1995, p. 53; Suzanne E. Evans, *Forgotten Crimes: The Holocaust and People with Disabilities*, Disability Rights Advocates, Berkeley, CA, 2001, pp. 27–29; Robert Proctor, *Racial Hygiene: Medicine under the Nazis*, Harvard University Press, Cambridge, MA, 1988, pp. 41–43, 188–194.

45 See CRPD, above note 6, Art. 15; International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), 16 December 1966, Art. 7.

46 Janet E. Lord, “Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities”, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 33, No. 1, 2010, fn. 240 and accompanying text. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Oxford University Press, Oxford, 1993, p. 126. On the Nazi Doctors trial, see *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law, No. 10*, US Government Printing Office, 1949, pp. 795–796, 801 (twenty-three German physicians and administrators were criminally prosecuted by a US military tribunal for their willing participation in war crimes and crimes against humanity, including medical experimentation against disabled persons. Sixteen of the accused were found guilty, and seven were sentenced to death).

47 AP I codifies the principle of proportionality in attack. AP I, Art. 57.

to persons with disabilities resulting from attacks on institutions or medical or rehabilitation facilities. Disability-related indirect effects can include deprivation of access to caregiving when caregivers are killed or injured, or compromised and aggravated health conditions where access to medication and assistive products is limited because of armed conflict.

Finally, the lack of voice that persons with disabilities historically experience in decision-making means that they are likely to be less represented in decision-making roles regarding humanitarian aid delivery. This absence puts persons with disabilities at a serious disadvantage given the role that organizations of persons with disabilities and disability advocates can play in helping to find at-risk persons with disabilities and navigate barriers in their access to humanitarian aid, safe evacuation routes and the like.

As a general proposition, therefore, the systemic inequality experienced by persons with disabilities results in exposure to specific risks, influences access to resources and shapes coping strategies in armed conflict. A more granular understanding of how such systemic inequality influences the harm that hostilities cause to persons with disabilities would help to increase the likelihood that parties to armed conflict will act to mitigate this harm as they apply relevant rules of IHL.

Disability data gaps and the impacts of the conduct of military operations

Data gaps are a persistent barrier to advancing disability rights, and thus parties to an armed conflict may indeed make the claim that they lack sufficient evidence to adapt to disability-related impacts of the conduct of hostilities. For this reason, perhaps, the UN Security Council has addressed data gaps in its Resolution 2475. There, it acknowledges “the need for timely data and information on, and analysis of, the impact of armed conflict on persons with disabilities”.⁴⁸

The “invisibility” of persons with disabilities to data capture was well understood by the drafters of the CRPD, who argued for the first data-specific article in a core human rights convention. Article 31 of the CRPD, on disability data and statistics, is the result of these efforts, and provides that “States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention”.⁴⁹ What was clear at the time was that data collection methods which fail to account for stereotypes, social norms and other factors may introduce bias that compromises data quality, with knock-on blind spots in decision-making. An additional implication is that disability-inclusive protection requires the collection of baseline data on barriers and accessibility measures in order to understand and assess disability.⁵⁰ Article 31 is to be read as an element

48 UNSC Res. 2475, above note 11. For more on data disaggregation in relation to Resolution 2475, see the article by Gopal Mitra and Georgia Dominik in this issue of the *Review*.

49 CRPD, above note 6, Art. 31(1).

50 Article 31(2) provides in this regard: “The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties’ obligations

of implementation for all domains across the CRPD, Article 11 and protection during situations of armed conflict among them.

Understanding how civilian patterns of life might be different for individuals with disabilities is an important element of protection. Such differences include differences in utilization of transport, differences in access to shelter and evacuation points, differences in living arrangements (including likelihood of congregate living, for example in nursing homes, social care homes or rehabilitation facilities), and different ways of communicating and utilizing technology.

The collection of disability-specific information on civilians with disabilities by parties to an armed conflict alone will not address protection needs but may assist in ways that minimize risk. Gathering context-specific information on the civilian population of persons with disabilities – something that organizations of persons with disabilities can be positioned to help generate – could aid compliance with IHL obligations regarding the protection of civilians.

On the other hand, the absence of specific data on civilians where armed conflict is occurring does not preclude generalized guidance from commanders based on evidence-based trends and patterns regarding the inequalities and risks facing specifically protected groups, whether persons with disabilities, women and girls with disabilities or indeed others in conflict-affected contexts. As noted by the Special Rapporteur in his report on persons with disabilities and the conduct of military operations, it ought to be assumed that some 50% or more of civilians in a conflict environment where civilians are concentrated will be women and girls, and likewise “it can and should be assumed that at least 15 percent of a given population will be persons with disabilities (a percentage that reaches as high as 20 to 30 percent in situations of armed conflict)”.⁵¹ Key trends relating to disability inequality are well documented, and corrective measures based on general trends should be further explored.⁵² One such measure that could help parties to better understand the impact of attacks is the monitoring, tracking and reporting of disability-disaggregated civilian casualty data, and the use of that data to inform future assessments of reasonably foreseeable harm. This is an important element of the proportionality test, according to which the launching of an attack must be subjected to an analysis of expected incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁵³

under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.”

51 SR Report on Disability and Armed Conflict, above note 12.

52 World Report on Disability, above note 1.

53 AP I, Arts 51(5)(b), 57(2)(a)(iii).

Applying fundamental IHL rules to persons with disabilities in armed conflict

Article 11 of the CRPD, on “Situations of Risk and Humanitarian Emergencies”, provides an explicit obligation to accord protection to persons with disabilities consistent with international law obligations writ large. It makes explicit mention of IHL and of situations of armed conflict:

States Parties shall take, in accordance with their obligations under international law, *including international humanitarian law* and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, *including situations of armed conflict*, humanitarian emergencies and the occurrence of natural disasters.⁵⁴

The application of Article 11 anticipates a transversal reading of the protection of human rights in situations of risk across all domains of international law including, but not limited to, human rights law, IHL, refugee and asylum law and international criminal law. Core to the application of this provision are the general principles of the CRPD that animate the understanding of protections in IHL. Here, one is called on to assess the application of non-discrimination and the duty to provide reasonable accommodations, accessibility, participation and inclusion. These have clear application in targeting and proportionality assessments, the issuance of precautions, evacuation processes, the creation of humanitarian corridors, and addressing the specific needs of persons with disabilities in situations of detention and occupation, among others.

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. The work that Article 11 performs extends also to ensuring that perpetrators are held accountable for violations of international law against persons with disabilities in international criminal law processes and that disability-based persecution is prosecuted. Article 11 also supports the protection of refugees with disabilities, who are to be accorded their rights under international refugee law. In other words, Article 11 embraces a reading of norms from discrete areas of international law as complementary, co-applicable and mutually supportive.⁵⁵

The question of who is applying IHL is likely to affect whether and how disability-related impacts are taken into account. Compliance with IHL rules during the conduct of hostilities is dependent on what the commander knew or

54 CRPD, above note 6, Art. 11 (emphasis added).

55 For a discussion on this topic, see Ziv Bohrer, Janina Dill and Helen Duffy, “Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication”, in *Law Applicable to Armed Conflict*, Max Planck Trialogues No. 2, Cambridge University Press, Cambridge, 2020.

should have known at the time of an attack, based on information reasonably available from all sources in the circumstances. Relatedly, the concept of the “reasonable military commander” is subject to disability-related biases and ableist assumptions. The standard of “reasonableness” can contain hidden ableist preconceptions and, in practice, can vary depending on the identity of the military commander and their value judgements. A military commander might have a different calculus and attach a different value to different types of civilian harm. They might also be more likely, or less likely, to consider certain types of harm as “reasonably foreseeable”.⁵⁶

The principle of distinction

The IHL principle of distinction requires parties to an armed conflict to direct attacks only against combatants, and prohibits attacks directed against civilians and other protected persons and objects.⁵⁷ The determination of who is a combatant and who is a civilian by parties to a conflict has disability dimensions, which should be taken into consideration as part of the principle of distinction. For instance, patterns of activity and movement are part and parcel of the process of applying the principle of distinction. They are relevant to pre-strike assessments of where civilians are, how many civilians are present, and who is put at risk by the strike. A disability analysis can help to expose how regular civilian patterns may not be applicable for persons with disabilities – for instance, strikes near residential areas carried out in the daytime on the basis that people will be out at work or in schools ignore the reality that individuals with disabilities are more likely to be at home for a variety of reasons, such as poverty or barriers to education, employment or transport. Further, persons with disabilities may not be able to flee, may not be able to obtain access to underground shelters, and may not react in the same way to instructions issued by checkpoint personnel or by personnel running a convoy of military vehicles. This underscores the importance of training that can help identify such variations and thus assist in the application of the rule of distinction.

The application of the principle of distinction requires, therefore, looking to things like patterns of activity and movement. Persons involved in targeting procedures (both pre-planned and dynamic) should receive comprehensive training which is inclusive of considerations regarding persons with disabilities, who should not be presumed to follow the “typical” patterns of activity and movement associated with the general civilian population. Failure to do so will

56 Here, there are lessons learned in relation to the diverse views of expert witnesses during the *Gotovina* trial before the International Criminal Tribunal for the former Yugoslavia (ICTY). They help demonstrate how military commanders might come to very different assessments concerning the application of principles governing the conduct of hostilities. See Maya Brehm, *Unacceptable Risk: Use of Explosive Weapons in Populated Areas through The lens of Three Cases before the ICTY*, PAX, 2014, p. 60.

57 AP I, Art. 48; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 1, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

lead to an elevated risk of harm during military observations, as has been well documented by the Commission of Inquiry in Gaza.⁵⁸ Training should provide coverage of target selection and verification training, meaning the determination, with reasonable certainty, that a particular object of attack is indeed a lawful military target in accordance with the law of armed conflict.

A final point derives from the notion that the general rules of IHL are intended to be disability-neutral insofar as IHL protects civilians, regardless of disability status.⁵⁹ Largely unexamined is the extent to which the current legal regime and its application produces discriminatory effects – that is, whether it is disability-neutral in fact. This cannot be determined absent an examination of whether persons with disabilities – whatever their disability – are treated equally under the law in practice. Another question is whether or not existing legislation properly identifies and addresses differences in status, needs and barriers, and the implications these factors have on persons with disabilities during armed conflict. In acknowledging the role that IHL plays in armed conflict in providing protection to the victims of armed conflict, a disability perspective on IHL is a practical imperative as well as a human rights concern.

The principle of proportionality

The IHL principle of proportionality prohibits attacks expected to cause incidental civilian harm, death to civilians or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.⁶⁰ In assessing the anticipated concrete and direct military advantage against the expected incidental civilian harm, several factors must receive attention. Account must be taken of an attack's indirect effects on the civilian population of persons with disabilities as well as the civilian objects on which persons with disabilities heavily rely.

State practice does evidence consideration of a wide range of civilian objects as foci of a proportionality assessment, among them civilian areas, buildings, houses and schools; civilian modes of transport; and hospitals and medical establishments.⁶¹ The calculus could be sharpened to highlight the outsize harm

58 *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, para. 596 (recognizing that certain groups, including persons with disabilities, children and widows, often experience aggravated impacts from armed conflict).

59 ICRC Customary Law Study, above note 57, Rule 156.

60 AP I, Arts 51(5)(b), 57(2)(a)(ii), 57(2)(b); ICRC Customary Law Study, above note 57, Rule 14 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited”).

61 ICRC Customary Law Study, above note 57, Rule 9. Illustratively, in Côte d’Ivoire’s military teaching manual, examples of civilian objects include:

- buildings and installations used by civilians, as long as they are not used for military purposes, for example houses, apartment buildings, hospitals, factories and workshops producing goods devoid of military significance;
- offices, markets, warehouses, farms, schools, museums, places of worship and other similar buildings, as well as means of transport such as civilian aircraft, cars, trains and buses;

that can come to persons with disabilities. Proportionality assessments could, for example, look carefully at facilities such as orphanages (which are invariably full of children with disabilities who are not factually orphans), nursing home facilities, psychiatric facilities, special schools for children with disabilities and group homes. Other avenues for a disability-sensitive proportionality assessment could include pharmacies and assistive product suppliers, or rehabilitation clinics.

As the work of the ICRC in relation to other protected groups makes clear, operationalizing the principle of proportionality by military commanders could be assisted by greater understanding of core concepts that bear on this principle.⁶² In this regard, the core concepts at issue merit attention in relation to assessing harm to civilians with disabilities. For example, how does proportionality relate to incidental civilian harm in relation to civilians with disabilities? What civilian objects do persons with disabilities heavily rely on in their daily life? How does the calculus for incidental civilian harm change in relation to persons with disabilities? Further clarification of these questions in relation to proportionality would benefit from a disability perspective insofar as disability-related considerations have a bearing on what civilian harm is foreseeable to a given decision-maker or system of decision-makers, and what is assessed to be excessive.

Finally, the IHL notion of excessiveness could be influenced by the application of a disability lens. First, a military decision-maker may omit certain civilian harm from consideration that is reasonably foreseeable. In such instances, the incidental civilian harm against which military advantage is weighed is diminished. Evening assuming that certain civilian harm is foreseeable to a given military decision-maker, disability bias might result in assigning a different value to it. For example, a particular health-care facility might be the only one affording access to rehabilitation services (among other services offered to the community), such that damage to it would likely contribute to increased mortality among persons with disabilities in particular. Even where the disability-specific services are known, if they are not deemed valuable, a determination could be made that an attack which damages the facility would not be excessive. Many questions arise in this regard, none of which have been examined in any depth, but which merit consideration.

Reasonably foreseeable civilian harm and persons with disabilities

Proportionality assessments must consider incidental civilian harm that is foreseeable. This directs attention to incidental harm that is reasonably foreseeable based on an assessment of information from all sources available to

- foodstuffs and areas for the production of foodstuffs, springs, wells, water conveyance works and reservoirs.

See Côte d'Ivoire, *Law of War Teaching Manual*, Book III, Vol. 1, Ministry of Defence, 2007.

⁶² See e.g. ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of IHL*, Geneva, June 2022.

the party at the relevant time.⁶³ To the extent that an attack could foreseeably result in direct or indirect effects, such effects must be taken into account when weighing the anticipated concrete and direct military advantage against the expected incidental damage.

The scope of the obligation to take into account the indirect effects of an attack, and the related question as to when an indirect effect is reasonably foreseeable, will depend on the facts of each case. The factual assessment of information from all sources available at the relevant time should also be informed by past practices and empirical data. In addition, as information regarding the population of persons with disabilities increases, so too does the foreseeability of indirect effects, and assessments of excessiveness of incidental damage must begin to take disability-specific information into account.

There is room to improve the foreseeability of such harm for military decision-makers. While what is reasonably foreseeable will vary depending on the circumstances of the attack and the target, there are patterns of incidental civilian harm that can indeed be foreseen and derived from past experience. Paying attention to the effects of past attacks on persons with disabilities (including through the collection of disability-, sex- and age-disaggregated civilian casualty data), studies on the effects of conflicts, better understanding of the infrastructural set-up and interdependency between services, and new technologies to better assess the condition or status of infrastructure and service delivery during the conflict are all important in this regard. Enhancing the general evidence base to discern patterns relating to the disability-related impacts of attacks is vital. Further, indirect civilian harm must be factored into the proportionality assessment with regard to persons with disabilities.

The principle of precautions in relation to civilians and civilian objects

Parties to armed conflict are obliged to take a range of precautions in attack and against the effects of attack in order to protect civilians and civilian objects. All feasible precautions must be taken to avoid or at least minimize incidental civilian harm.⁶⁴ This means taking those precautions that are possible in practice, considering all of the circumstances at the time, including humanitarian and military considerations. Each party to the conflict must do everything feasible to verify that targets are military objectives before attacking.

All feasible precautions must be taken in the choice of means and methods of warfare with a view to avoiding, or in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. Parties could comply with this obligation by assessing the impact of the weaponry to be used and by using available alternative weaponry that reduces the risk of damage, for instance, to civilian objects on which persons with disabilities rely, such as rehabilitation

63 The obligation to take indirect effects on the civilian population into account is well grounded in IHL through Article 51(5)(b) of AP I.

64 AP I, Art. 57(2); ICRC Customary Law Study, above note 57, Rule 15.

facilities, community mental health centres, and para-transport facilities specifically serving persons with disabilities.

Prior assessments of the potential impact of an attack, including the expected consequences of the weapons and ammunition used, must be conducted whenever feasible. When planning attacks in or around areas where there are clearly likely to be concentrations of individuals with disabilities, the mapping of these areas could be conducted prior to the launching of an attack, if feasible, in order to assess the extent of the incidental damage likely to result to civilian infrastructure. Such mapping could include mainstream health and disability-targeted services, including primary health-care centres, acute and rehabilitation hospitals, early intervention services, community-based rehabilitation programmes, mental health and psychosocial support services at community and hospital level, and providers of assistive products.

The ability to take precautions to minimize injury to civilians relies on the military practitioner's understanding of the kind of harm that might result from an attack. A disability-based analysis offers a concrete technique for improving the precautionary measures taken to minimize civilian harm among persons with disabilities. Commander knowledge of how different groups – including persons with disabilities – use a space and thus stand to be differentially affected by an attack can help determine the precautions that might be feasible to reduce this harm. Here it is clear that engagement between militaries and organizations of persons with disabilities is key. Potential roles for disability organizations include helping to identify measures to safeguard the civilian population of persons with disabilities; highlighting accessible safe havens where civilians with disabilities can take refuge and accessible evacuation routes enabling civilians with disabilities to safely escape combat areas; providing access to medical treatment for civilians with disabilities; and making appropriate provision for persons with disabilities to access humanitarian services during curfews, closures and limitations on movement.

When a choice is possible between several military objectives to obtain a similar military advantage, the objective to be selected must be the one on which an attack may be expected to cause the least danger to civilian lives and to civilian objects. Parties to a conflict could comply with this obligation by taking into account when selecting military objectives those furthest from civilian objects, with attention paid, again, to those likely to be occupied by individuals with disabilities, as in housing located adjacent to a military objective which has been evacuated by some but not all civilians, or social enterprises predominantly employing persons with disabilities.

The principle of precautions in attack means that, unless circumstances do not permit, effective advance warning must be given of attacks that may affect the civilian population.⁶⁵ There are many examples of attacks that will merit such advance warnings in order to contribute to protection of the civilian population, including individuals with disabilities. For instance, giving a warning of an attack on an electricity network that – while also qualifying as a military objective –

65 AP I, Art. 57(2)(c); ICRC Customary Law Study, above note 57, Rule 20.

maintains a wastewater treatment system may allow the opposing party to put in place a temporary generator to support some key sewage treatment facilities and thus avoid serious damage to the quality of water depended upon by persons unable to evacuate or by hospitals and facilities where persons with disabilities reside.

The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected, including persons with disabilities. Standard warning delivery, for instance via loudspeakers or radio transmission, may not be accessible for certain members of the disability community. Reliance on only one or a few delivery mechanisms increases the chance that persons with disabilities will not be reached by messaging directly impacting their safety. This is illustrated pointedly by the case of Odai in Gaza. Odai is a young person with a hearing impairment and developmental disability who was unable to hear the warning issued prior to a bombing, and as a result, he experienced injury leading to paralysis and accompanying secondary disabilities.⁶⁶

Implementing effective warnings might mean the presentation of accessible information in a variety of formats that would, taken together, help overcome the limited access that some persons with disabilities will experience. Guidance is provided by the CRPD, which defines modes of communication utilized by the diverse population of persons with disabilities broadly, to include “languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”.⁶⁷

Effective warnings could be presented in a variety of formats, accounting for comparatively lower literacy rates among some groups. These could include digital communication and the use of a combination of radio messages and leaflets with image-based (instead of solely text-based) warnings. In some contexts, persons with disabilities spend little to no time outside the home; effective warnings to reach such persons could include media broadcasts and phone calls, as well as SMS warnings, which have proven effective in reaching persons who are hard of hearing or deaf.

Precautions and warnings must be made meaningful for the civilian population, and must be inclusive of persons with disabilities. The logic of the principle of precaution means that when the tactical situation permits, commanders should provide the civilian authorities with information to enable

66 Geneva Academy, “Odai, Gaza, 2015”, *Disability and Armed Conflict*, photo exhibition, Geneva, 2019. On 10 July 2014, while Odai was tending to cows on his family’s farm, it came under attack. Not hearing the warning alarms, he did not take cover. A rocket landed near him, throwing him 5 metres; he landed on his back and the impact left him paralyzed. Now in a wheelchair, Odai has struggled to regain his independence. Living in a second-floor apartment, he relies on his family to get him down the stairs. He is too scared to visit the farm and is prone to mood swings. For guidance on this type of risk, see especially Alice Priddy, *Military Briefing: Persons with Disabilities and Armed Conflict*, Geneva Academy, Geneva, 2021, available at: <https://www.geneva-academy.ch/research/publications/detail/567-military-briefing-persons-with-disabilities-and-armed-conflict>.

67 CRPD, above note 6, Art. 2.

them to issue effective advance warnings and to assess the risks an attack could pose for the civilian population and civilian property based on the characteristics of that population and property. Such information might include recommendations for specific actions and/or behaviour such as taking shelter or staying away from specific areas or routes used by the armed forces, and a disability-informed analysis is critical in this context. Shelters may not be physically accessible to persons with physical disabilities, and avoidance of areas or routes used by armed forces may also be untenable; thus, the provision of alternate sheltering options or other routes for evacuation could be considered and ought to, in any case, form part of civilian emergency management planning.

The concept of constant care

Part of the obligation to take feasible precautions by the attacking side in armed conflict, the obligation of constant care is particularly germane to the discussion on mitigating disability-based civilian harm. This general obligation supplements the fundamental IHL rule of distinction and requires that, in the conduct of military operations, constant care be taken to spare the civilian population, individual civilians and civilian objects.⁶⁸ What this means is that all those involved in military operations are obliged to continuously bear in mind the effects of those operations on the civilian population, individual civilians and civilian objects. Moreover, they are to undertake measures to reduce those effects as much as possible and to seek to avoid any that are unnecessary. Planning guidelines for military activities, to which military commanders should, where practicable, adhere, include taking account of the risks posed to the civilian population, of which it should be assumed that 15% or more will comprise individuals with disabilities.

A disability analysis undertaken to meet the obligation of constant care during operational planning could include an assessment of whether troops operating checkpoints are adequately trained so as to mitigate the risk of exposing persons with disabilities to potential abuse and violence (e.g., for not understanding or hearing instructions, or for not conforming to expected modes of behaviour), whether certain medical and rehabilitation services are more accessible or essential to persons with disabilities relative to others, and whether patterns of life around civilian objects differ according to disability. Other factors might include whether persons with disabilities have less access to transport in situations where civilians are expected to flee, whether persons with disabilities have specific communication needs, or whether persons with disabilities have lower literacy rates or face barriers in accessing digital technology. Applying a disability and gender lens together could help expose whether women with disabilities are likely to be less present outside the home in contexts where advanced warnings will be issued, and whether implications for precautions arise

68 AP I, Art. 57(1); ICRC Customary Law Study, above note 57, Rule 15.

from the fact that persons with disabilities who are reliant on family members or caregivers will be left stranded in cases where civilians are expected to flee.

Specific problems for disability-informed practice

There are a wide range of specific problems that arise in relation to advancing a disability-informed practice that seeks to harmonize CRPD obligations with rules of IHL. This section canvasses some of these and suggests entry points for furthering harmonization of the CRPD with the rules of IHL.

Access to humanitarian assistance

The rules of IHL require that assistance and protection be afforded to the civilian population during armed conflict.⁶⁹ In circumstances where the population in territory under the control of a party to the conflict cannot be adequately provided with food, water and medical supplies, humanitarian relief access must be facilitated.⁷⁰ Relief consignments must be allowed rapid, safe and unimpeded access⁷¹ regardless of their ultimate destination, including if the aid aims to support the needs of civilians belonging to the adverse party to a conflict. The implications for the population of persons with disabilities in such contexts are apparent given the enhanced risk for those who may be unable to obtain food, water, medicines, assistive devices and the like.⁷² In many instances, persons with disabilities in the civilian population are among the least accessible members of a community in need of assistance. Factors such as separation from caregivers, isolation, restricted mobility and communication or information barriers accentuate their risk and enhance their need to access humanitarian assistance. Human rights law amplifies these protections for persons with disabilities by setting out specific State obligations in respect of, for example, access to water, food, health, rehabilitation and personal mobility services and products, education, transport, and information and communication technology.⁷³

69 Responsibilities for States in respect of protection and humanitarian assistance derive from the Geneva Conventions and international customary law and are informed by the central rationale of IHL, which is to limit human suffering, even within the context of armed conflict. See Eve Massingham and Kelisiana Thynne, “Humanitarian Relief Operations”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 319. For more on the specific risks arising in humanitarian assistance contexts, see the articles in this issue of the *Review* by Kirsten Young; Carolin Funke; and Gauthier de Beco.

70 For individuals detained in the context of armed conflict, GC IV requires access to protected persons by the ICRC (as well as other humanitarian organizations) for the purposes of providing assistance, such as the distribution of relief supplies. GC IV, Art. 142.

71 Successive Security Council resolutions underscore this right and call upon parties to respect access of civilian populations to assistance. See e.g. UNSC Res. 1265, 1296 and 1314.

72 Gerard Quinn, Shantha Rau Barriga, Catalina Devandas and Janet E. Lord, “Protecting Civilians with Disabilities in Conflict”, *NATO Review*, 1 December 2017, available at: www.nato.int/docu/review/2017/Also-in-2017/Protecting-civilians-with-disabilities-in-conflicts/EN/index.htm.

73 CRPD, above note 6, Arts 9, 19, 20, 24, 25, 26, 28.

The Inter-Agency Standing Committee (IASC) *Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action* provide detailed operationally oriented guidance in the broader humanitarian action context, much of which is directly applicable to the provision of humanitarian assistance in conflict contexts.⁷⁴ Their reception as guidance for military decision-making would require adaptation, but could help to clarify the specific content of humanitarian assistance access. The practice, though not widely implemented, of integrating a humanitarian affairs focal point into combat units with the mandate to provide counsel to commanding officers and education to soldiers with regard to protection issues could provide an entry point for specific guidance on disability-inclusive humanitarian assistance. Such guidance would provide an opportunity for the planning of humanitarian assistance to meet the needs of persons with disabilities. It would also facilitate taking account of civilian property and infrastructure in connection with its use by persons with disabilities by identifying and marking those items of property and infrastructure that are critical to such persons.

Reintegration of ex-combatants with disabilities

It is axiomatic that persons with disabilities are not only victims of armed conflict; they also participate in armed conflict. A number of issues arise in respect of this recognition. First, the reintegration of ex-combatants with disabilities, those who have directly participated in hostilities, and persons with disabilities associated with fighting forces can be particularly difficult due to historic disadvantages and discrimination faced by persons with disabilities in society generally.⁷⁵ For female ex-combatants with disabilities, gender combines with disability to produce unique, specific barriers. Illustratively, as reflected in a study of the Intifada in Palestine, male ex-combatants with disabilities were considered heroes, whereas female ex-combatants with disabilities were outcasts because they were unable to play the traditional societal roles attributed to women.⁷⁶

Reintegration of certain classes of survivors of armed conflict is addressed in some international instruments. The Mine Ban Treaty contains obligations for States Parties to provide assistance to victims – whether ex-combatant or civilian – by providing medical care and rehabilitation, and to ensure the social

74 IASC, above note 41.

75 Janet E. Lord and Michael Ashley Stein, “Peacebuilding and Reintegrating Combatants with Disabilities”, *International Journal of Human Rights*, Vol. 19, No. 3, 2015; Minerva Rivas Velarde, Janet E. Lord, Michael Ashley Stein and Thomas Shakespeare, “Disarmament, Demobilization, and Reintegration in Colombia: Lost Human Rights Opportunities for Ex-Combatants with Disabilities”, *Journal of Human Rights*, Vol. 21, No. 1, 2021. For an early treatment, see ICRC, *Report on Assistance to War-Disabled: Replies to an Enquiry Opened by the International Committee of the Red Cross*, Geneva, 1949; ICRC, *The Return of the War-Disabled to Normal Life*, Geneva, 1949.

76 Nathalie de Watteville, *Addressing Gender Issues in Demobilisation and Reintegration Programs*, Africa Regional Working Paper Series No. 33, World Bank, Washington, DC, 2001, available at: <http://hdl.handle.net/10986/9810>.

and economic reintegration of landmine survivors.⁷⁷ More expansively, the Cluster Munitions Convention obliges States to provide for the medical care, rehabilitation, psychological support, and social and economic inclusion of cluster munitions victims in areas under their jurisdiction or control.⁷⁸ Such provisions are complemented and reinforced by human rights treaties that recognize the rights of trauma survivors and survivors of various human rights abuses to certain protections. Thus, for example, the Convention on the Rights of the Child recognizes the right of children to receive support if they have been subjected to maltreatment and to seek judicial intervention where necessary, a provision of relevance to child soldiers.⁷⁹ More comprehensively, the CRPD spells out State obligations in respect of persons with disabilities which address broader conceptualizations of rehabilitation that should be seen as informing survivor assistance protections.

The recently adopted module in the UN's Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS), developed by the Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, draws together the aforementioned protections into a single set of guidance.⁸⁰ This is an improvement upon the first edition of the IDDRS (2006), which did not include coverage of persons with disabilities. In order for such standards to be well utilized in practice, they will need to be socialized with a range of stakeholders, including peacekeeping actors engaged in such processes, and through giving a clear role to organizations of persons with disabilities.

Disability, forced displacement and evacuation

Persons with disabilities face extreme risk if subject to deportation or transfer, as the Nazi practice of immediate extermination of civilians with disabilities on arrival at concentration camps makes clear.⁸¹ IHL recognizes the prohibition on the

77 See e.g. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 3 December 1997 (entered into force 1 March 1999) (Mine Ban Treaty), Art. 6, available at: www.icbl.org/en-gb/the-treaty/treaty-in-detail/treaty-text.aspx.

78 Convention on Cluster Munitions, 2668 UNTS 39, 3 December 2008 (entered into force 1 August 2010), Art. 9.

79 Convention on the Rights of the Child, UNGA Res. 44/25, 20 November 1989 (entered into force 2 September 1990), Art. 19(1–2) (providing that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”, and further, that “[s]uch protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”).

80 Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, “Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)”, New York, 2019, available at: www.unddr.org/. The original IDDRS was adopted in 2006 and is available at: <https://digitallibrary.un.org/record/609144?ln=en>.

81 See, generally, S. E. Evans, above note 44.

deportation or transfer of civilians.⁸² Geneva Convention IV (GC IV) and Additional Protocol I (AP I) clarify that the deportation or transfer of the civilian population of an occupied territory, unless the security of the civilians involved or imperative military reasons so demand, is a grave breach.⁸³

Underscoring the precarity of women and girls with disabilities during forced displacement and evacuation related to armed conflict, the Committee on the Elimination of Discrimination against Women (CEDAW) indicated its concern regarding the situation of women and girls in Gaza, including women and girls with disabilities, who faced forced displacement and heightened risk of sexual and gender-based violence, along with limited access to social services.⁸⁴ CEDAW reporting in relation to Israel and concerning conditions in the Occupied Territories likewise points to the outsize risks faced by women with disabilities on account of imposed restrictions that have the effect of limiting access to essential services.⁸⁵

Additional international frameworks bear the imprint of the CRPD in general – and Article 11 specifically – and have broad relevance for persons with disabilities who are fleeing armed conflict. These include the Global Compact for Safe, Orderly and Regular Migration, wherein, under Objective 7 on addressing and reducing vulnerabilities during migration, there is a call for a “disability-responsive” review of relevant policies and practices to ensure that they do not create, exacerbate or unintentionally increase risk.⁸⁶ Also relevant are the *Guiding Principles on Internal Displacement*; these mention disability specifically in Principle 4(2), which outlines the principle of non-discrimination of any kind, and echoes the specific protections provided in IHL for certain groups.⁸⁷ More recently, the *Handbook for the Protection of Internally Displaced Persons* adopted by the Global Protection Cluster Working Group recognizes the need to ensure

82 GC IV, Art. 49(1).

83 *Ibid.*, Art. 147; AP I, Art. 85(4)(a). In addition, the Rome Statute of the International Criminal Court provides that “the deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside this territory” constitutes a war crime in international armed conflicts. Rome Statute of the International Criminal Court, 2187 UNTS 38544, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(b)(viii).

84 See CEDAW, *Statement of the CEDAW Committee on the Situation in Gaza*, July 2014, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/StatementsChair/GazaStatement_AsAdopted_18072014.pdf.

85 See CEDAW, *Concluding Observations on the Report of Israel*, UN Doc. CEDAW/C/ISR/CO/5, 4 February 2011, para. 38.

86 Global Compact for Safe, Orderly Migration, UNGA Res. 73/195, Annex, 11 January 2019.

87 Global Protection Cluster, *Guiding Principles on Internal Displacement*, ADM 1.1, PRL 12.1, PR00/98/109, 22 July 1998, available at: www.refworld.org/docid/3c3da07f7.html (Principle 4(2) provides: “Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs”). See also Office of the UN High Commissioner for Refugees, *Working with Persons with Disabilities in Forced Displacement*, 2011, available at: www.un.org/disabilities/documents/WH/Working-with-persons-with-disabilities-UNHCR-2011.pdf.

the protection of persons with disabilities and focuses on the inclusion of such persons, with particular emphasis on gender, violence and health.⁸⁸

Little in the way of operational guidance exists to specifically protect persons with disabilities who are subject to deportation or transfer owing to security considerations or imperative military reasons. Reporting by disability rights documentation organizations suggests that there is a need to amplify protection to highly at-risk groups who face displacement during hostilities.⁸⁹ Illustrative here is the transfer out of conflict zones of children with disabilities who live in institutions. Individuals with disabilities who too often lack official documentation and proof of identify – a serious protection risk – face a range of potential harms in such contexts, among them human trafficking. Further, transfers without adequate medical records place such individuals at risk if they require medication to manage their disability or medical conditions. Such precarity needs to be taken into account.⁹⁰ This points to the need for better tracking of highly at-risk children (and adults with disabilities), evacuation planning, prioritization of transport, and planning to retain caregivers.

The disability-related implications of detention

The rights accorded to all prisoners of war (PoWs) of course have a bearing on the treatment of PoWs with disabilities, applicable in international armed conflicts. This includes fundamental guarantees such as humane treatment, the general provisions regarding treatment during captivity, relations with the exterior, disciplinary action and termination of captivity.⁹¹

In circumstances of detention, States have the obligation to establish specific protection measures for persons with disabilities who are detained. The provision on equality of treatment in Geneva Convention III (GC III) provides an important basis for considering the needs of PoWs with disabilities: Article 16 requires that PoWs be treated alike by the Detaining Power, subject to any privileged treatment which may be accorded to them by reason of their age and health status, among other criteria.⁹² Privileged treatment in relation to disability

88 Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons*, June 2010, pp. 9, 14, 29, available at: www.unhcr.org/en-us/protection/idps/4c2355229/handbook-protection-internally-displaced-persons.html.

89 Disability Rights International (DRI), *Left Behind in the War: Dangers Facing Children with Disabilities in Ukraine's Orphanages*, May 2022. For an earlier example, see Mental Disability Rights International, *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo*, Washington, DC, 2002, pp. 9–11.

90 DRI, above note 89.

91 See e.g. ICRC Customary Law Study, above note 57, Rules 87 (“Humane Treatment”), 118 (“Provision of Basic Necessities to Persons Deprived of Their Liberty”), 126 (“Visits to Persons Deprived of their Liberty”), 128 (“Release and Return of Persons Deprived of their Liberty”). Also see the article by Alexander Breitetger in this issue of the *Review*.

92 Article 16 of GC III provides: “Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.” As noted in the ICRC’s 2020 Commentary on GC III,

status tracks with the recognition in the equality and non-discrimination provisions of the CRPD that certain positive measures are not to be regarded as discrimination on the basis of disability. Further, as noted in the ICRC 2020 Commentary on GC III, Article 16 does not mandate the *same* treatment for all PoWs and instead “acknowledges that such formal equality might easily become unjust if applied without regard to considerations such as state of health, age, sex, rank or professional qualifications”.⁹³ Notably, the Commentary affirms the ability to make adjustments in order to achieve substantive equality, which is core to a disability rights sensibility:

To achieve equal treatment of prisoners of war, non-adverse distinctions, i.e. distinctions that are justified by the substantively different situations and needs of protected persons, are allowed and may even be required under humanitarian law in certain circumstances.⁹⁴

In other words, such measures may be required in order to achieve the aims of disability equality. Some illustrations of how this might operate in practice in the context of detention are provided below by applying principles of accessibility along with the duty to provide reasonable accommodation as an anti-discrimination element.

Accessibility of detention facilities is one obvious example. When persons with disabilities are held in detention facilities that do not provide adequate care or which are inaccessible and provide no support, an aggravation of their disability may result, their health may be compromised, and the neglect in relation to their disability support needs may constitute inhumane treatment or torture.⁹⁵ This is clear in the case of a detainee with a mobility impairment who is totally reliant on others for accessing hygiene facilities or for accessing food and water. Protections laid out in GC III, in the chapters on quarters, food and clothing of PoWs (Chapter II), hygiene and medical attention (Chapter III), and medical personnel and chaplains retained to assist PoWs (Chapter IV), can accommodate a disability reading, drawing from existing guidance on protection of persons with disabilities in humanitarian action, while adapting for the context of internment.⁹⁶ Illustratively, while conditions of internment will vary, minimum

experiences of differential treatment of PoWs during World War II led to the revision of the equality of treatment clause as drafted in the 1929 Geneva Convention: “A more explicit obligation of equal treatment was included in the new Convention, together with a non-exhaustive list of prohibited grounds of adverse distinction.” ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), Art. 16.

93 *Ibid.*

94 CRPD, above note 6, Art. 5. See also the article by Alice Priddy in this issue of the *Review*.

95 ICRC Commentary on GC III, above note 92, Art. 16. See Juan E. Méndez and Andra Nicolescu, “Evolving Standards for Torture in International Law”, in Metin Başoğlu (ed.), *Torture and Its Definition in International Law: An Interdisciplinary Approach*, Oxford University Press, Oxford, 2017 (affirming that the legal definition of torture is not confined to circumstances of pain and suffering inflicted during the course of internment or as punishment, and that other practices may cross the threshold of severity so as to constitute torture or other cruel treatment. The prohibition is evolving in the light of the CRPD and indeed other developments under international human rights law).

96 See also ICRC Commentary on GC III, above note 92.

standards commensurate with the conditions of soldiers of the Detaining Power in the same area must be met. This means, in practical terms, ensuring the necessary support for PoWs to attain those standards. Thus, the regulation of items essential to prisoners' survival will require taking into account, for instance, assisted eating and dietary requirements or the provision of essential products and devices to ensure access to hygiene. To take another example, the requirement in GC III that the Detaining Power install a canteen in all camps for the purchase of everyday items to allow some measure of autonomy and to support well-being will necessarily require that a prisoner with a disability be able to participate in such access, as through the provision of assistance where needed.⁹⁷

Detainees with a hearing impairment are especially at risk where communications are not accessible and their non-compliance with directives may be misinterpreted as hostile. Isolation of detainees with disabilities as a mode of management, as with isolating detainees with mental disabilities, is a related concern. The provision in GC III concerning the permissible isolation of prisoners with mental disabilities "if necessary"⁹⁸ is clearly at odds with a disability rights reading of IHL, as is well laid out in another contribution to this issue of the *Review*.⁹⁹ Yet this provision could be interpreted through a disability rights lens to mean that prisoners with psychosocial disabilities who could benefit from separate quarters as a reasonable accommodation and not as a mode of discriminatory isolation are therefore owed such accommodation. What are abundantly clear in the literature, however, are the deleterious effects of solitary confinement on persons with mental disabilities, often leading to severe exacerbation of a previously existing mental condition. Research demonstrates that prisoners with mental health impairments deteriorate in isolation and that the adverse effects of such confinement are especially aggravated for persons with serious mental health conditions.¹⁰⁰

Prohibited means and methods of warfare

Rules prohibiting certain kinds of weapons and regulating their use, as well as rules prohibiting or otherwise limiting certain kinds of military strategy or conduct, also implicate disability in ways that call for inquiry. Article 35 of AP I enunciates the basic rule and provides:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

⁹⁷ GC III, Art. 28.

⁹⁸ *Ibid.*, Art. 30.

⁹⁹ See the article by Alexander Breitegger in this issue of the *Review*.

¹⁰⁰ Robert Wildeboer, "The Impact of Solitary Confinement in a Youth Prison", *WBEZ*, 2010; Stuart Grassian, "Psychiatric Effects of Solitary Confinement", *Washington University Journal of Law and Policy*, Vol. 22, No. 1, 2006; American Civil Liberties Union, "Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement", Washington, DC, 2011; Jeffrey L. Metzner and Jamie Fellner, "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics", *Journal of the American Academy of Psychiatry and the Law*, Vol. 38, No. 1, 2010.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.¹⁰¹

Key here, from a disability perspective, will be the analysis of whether a chosen action or omission regulated by IHL through rules on conduct of hostilities produces different effects on persons with disabilities than on non-disabled persons. This assessment calls for determining whether the use of specific means (e.g., choice of weapon or ammunition) or methods (e.g., day- or night-time operations, tactics and teams used, objects targeted) of warfare has differential impacts on persons with disabilities. Differences in status, needs and capacities might, for example, influence where persons with physical disabilities are located following evacuation or when sheltering in an underground bunker, or how they will be directly or indirectly affected by the use of a certain tactics, such as damage to power supplies in winter or summer and the resulting impact on persons who are heat- or cold-sensitive.

The application of a gender lens to rules concerning the means and methods of warfare lends some direction for applying a disability analysis. Commentators have signalled the gendered implications of the list of items prohibited from being booby-trapped in the Convention on Conventional Weapons Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (CCW Protocol II) in its Article 7.¹⁰² CCW Protocol II prohibits the use of booby traps, defined in Article 2(2) as “any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or an apparently safe act”. The Protocol also reaffirms the prohibition of indiscriminate means and methods of warfare and outlines an extensive list of objects prohibited from being booby-trapped. These include portable objects specially connected to children, like objects for feeding, health, hygiene, clothing or education. Applying a disability lens to the non-exhaustive list could result in the following examples of types of objects prohibited from being booby-trapped: (1) assistive devices used by persons with disabilities, especially those listed under the World Health Organization (WHO) Priority Assistive Products List; and (2) objects used for feeding, rehabilitation equipment, and medical supplies.¹⁰³

It is notable that more recently negotiated IHL treaties do make mention of the gendered impact of violence on civilians during armed conflict. The Convention on Cluster Munitions of 2008, in its Article 5, identifies the obligations of States Parties with regard to victims of cluster munitions:

Each State party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international

¹⁰¹ AP I, Art. 35.

¹⁰² Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996, 2048 UNTS 93, 10 October 1980 (entered into force 3 December 1998), Art. 7.

¹⁰³ See WHO, *Priority Assistive Products List*, WHO/EMP/PHI/2016.01, Geneva, 2016. The List includes fifty priority assistive products, selected on the basis of widespread need and impact on a person’s life.

humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.¹⁰⁴

The provision further outlines how States Parties are to fulfil these obligations by insisting on the principle of non-discrimination and the inclusion of victims in the decision-making process. This language has served as the impetus for a more dynamic treaty practice, for instance in the work on the gendered impacts of cluster munitions and other explosive weapons in heavily populated areas.¹⁰⁵ It offers a model for disability inclusion in future treaty texts but also an entry point for where disability advocates ought to focus their attention when delineating what disability-inclusive assistance would look like in relation to such provisions.

Weapons which are solely designed to cause permanent loss of vision are banned because they break the rule against unnecessary suffering, leaving a combatant with a potentially long-term disability. On a related note, unnecessary suffering can result from the simple reality of unmet needs – particularly relevant given that armed conflicts today are predominantly occurring in developing countries where rehabilitation access stands at a mere 3%.¹⁰⁶

Other prohibitions that clearly implicate disability can likewise be filtered more usefully through the lens of the social model, rights-based understanding of disability. Pillage, employed with frequency despite its long-established prohibition, provides an example.¹⁰⁷ Just as the raiding of housing materials, domestic goods and livestock is prohibited, so too is the pillaging of supplies on which persons with disabilities rely, such as assistive devices and products as well as necessary medicines and medical equipment. In this respect, therefore, a disability analysis can be brought to bear on understanding the pillage prohibition.

The foregoing is a representative sampling of how a disability sensibility could usefully be brought to bear on IHL rules relating to the means and methods of warfare. A deeper analysis would likely yield many other examples and would have a bearing on future lawmaking in IHL, as well as on the application of existing rules in practice.

The obligation to conduct new weapons reviews

In addition to placing limitations on the use of weapons and the means and methods of warfare, AP I requires that States conduct legal reviews of new weapons, means and methods of warfare that they are in the process of developing or acquiring.¹⁰⁸

104 Convention on Cluster Munitions, above note 78, Art. 5(1).

105 See e.g. United Nations Institute for Disarmament Research, “Gendered Impacts of Explosive Weapons in Populated Areas”, fact sheet, New York, 2021.

106 World Report on Disability, above note 1.

107 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Art. 47 (pillage is formally forbidden). See also ICRC Customary Law Study, above note 57, Rule 52.

108 AP I, Art. 36.

The inclusion of a disability analysis in the legal review of new weapons, means and methods is also a step towards fulfilling UN Security Council Resolution 2475, which directs all actors to incorporate disability perspectives into their peace and security efforts.¹⁰⁹ States are obliged to assess whether new weapons would, in some or all circumstances, be prohibited under the rules of IHL. In that regard, careful consideration must be given to the potential risks that the use of new weapons technologies will pose to persons with disabilities.

There are three principal reasons for undertaking a disability-informed review in Article 36 processes. First, IHL compliance requires adherence to the general principles and prohibitions found in IHL seeking to limit the effects of armed conflict in order to protect people who are not or are no longer participating in hostilities. It also restricts the means and methods of warfare. How armed conflict is fought (and consequently, its effects on protected persons) is an ever-changing process that is shaped by the means and methods used. Persons with disabilities are understood to experience armed conflict differently, and therefore, consistent with the humanitarian objective of IHL, it is important to identify and respond to the specific needs, risks and vulnerabilities brought on by conflict today for such persons. This includes new weapons reviews.

Second, the effects of weapons, especially on civilians, need to be better understood and addressed from a disability perspective. The different roles, rights, opportunities and functions of persons with disabilities in different societies impact the level and type of risk that civilians face in conflict (both from the immediate effects and from the indirect and long-term effects of attacks). In addition, the possibilities for persons with disabilities to access both emergency medical care and long-term rehabilitation, and how they are treated by society after an injury, are similarly shaped by societal norms around disability (and other attributes, including gender, age and the like).

A third dimension of new weapons reviews from a disability perspective relates to how new technologies may create protection risks specific to persons with disabilities. The Special Rapporteur has already expressed concern in his thematic study on the impact of artificial intelligence and machine learning on the rights of persons with disabilities in the context of the development of next-generation autonomous weapons systems.¹¹⁰ Likewise, in the report submitted to the UN General Assembly by the Special Rapporteur in September 2022, the IHL obligations to systematically review the legality of weapons were underscored.¹¹¹ Central among concerns that weapons reviews may fail to adopt relevant considerations in relation to persons with disabilities is the ability of new weaponry to discriminate between combatants and non-combatants: electric assistive devices that have a heat signature may be wrongly identified as a threat by weapons technology. Further, the use of facial or emotion recognition

109 UNSC Res. 2475, above note 11.

110 Artificial Intelligence and the Rights of Persons with Disabilities: *Report of the Special Rapporteur on the Rights of Persons with Disabilities on Artificial Intelligence*, UN Doc. A/HRC/49/52, 28 December 2021.

111 SR Report on Disability and Military Operations, above note 3.

technology at security checkpoints to assist in determining whether an individual may pose a threat presents risks related to the ability of such technology to correctly assess the reactions of persons with disabilities, owing to incomplete or biased data sets. To alleviate and address such concerns, persons with disabilities must be involved in the development, procurement and deployment of artificial intelligence technology as applied to situations of risk. This applies as much to the military field as it does to other fields, like employment.¹¹²

Accountability for war crimes

The historic and contemporaneous subjection of persons with disabilities to human rights abuses and violations of humanitarian rules on account of their disability is marginal at best in accountability mechanisms.¹¹³ While abuses constituting war crimes or crimes against humanity have at times been documented against persons with disabilities,¹¹⁴ such abuses are rarely appropriately accounted for in the law, legal process and institutions that seek to redress the most serious of international law violations perpetrated during armed conflict.¹¹⁵ This contrasts with the greater attention paid in recent years to other violations of international criminal law prosecuted as war crimes and crimes against humanity, including mass rape of women and girls during armed conflict and the use of child soldiers.¹¹⁶

While disability is a clear risk factor (owing to disability inequality and disability-based animus) when considering vulnerability to torture and other acts proscribed by IHL, practice suggests that fact-finding bodies and reporting entities mandated to consider possible violations of IHL invariably miss manifestations of disability-related persecution.¹¹⁷ This is an area ripe for more work, especially insofar as international practice is heavily reliant on commissions of inquiry for investigations into violations of IHL which, in turn, help pave the way for accountability under national and international criminal

112 See the article Mariana Díaz Figueroa, Anderson Henao Orozco, Jesús Martínez and Wanda Muñoz Jaime in this issue of the *Review*.

113 W. I. Pons, J. E. Lord and M. A. Stein, above note 4. See also the articles in this issue of the *Review* by Sara La Vecchia; Alexa Magee and David McIntire; and William I. Pons, Janet E. Lord and Michael Ashley Stein.

114 See e.g. Deutsche Presse Agentur, “U.N. Team Arrives in Cambodia to Investigate Khmer Rouge Genocide”, *LEXIS-NEXIS Academic Universe*, 14 November 1998 (suggesting that persons with disabilities were targeted for killing by the Khmer Rouge in Cambodia); Art Blaser, “From the Field – People with Disabilities and Genocide: The Case of Rwanda”, *Disability Studies Quarterly*, Vol. 22, No. 3, 2002 (referencing the Rwandan genocide, in which mass killings of persons with disabilities, including those housed in rehabilitation institutions and psychiatric hospitals built by missionaries in Kigali, were among the atrocities that took place).

115 W. I. Pons, J. E. Lord and M. A. Stein, above note 4.

116 See e.g. Rosalind Dixon, “Rape as a Crime in International Humanitarian Law: Where to from Here?”, *European Journal of International Law*, Vol. 13, No. 3, 2002; Christine Chinkin, “Rape and Sexual Abuse and Women in International Law”, *European Journal of International Law*, Vol. 5, No. 3, 1999; Matthew Happold, *Child Soldiers in International Law*, Manchester University Press, Manchester, 2005.

117 Jae-Chun Won *et al.*, “Disability, Repressive Regimes, and Health Disparity: Assessing Country Conditions in North Korea”, in Jure Vidmar and Ruth Kok (eds), *Hague Yearbook of International Law*, Vol. 27, 2014 (noting the absence of meaningful fact-finding in respect of international law violations against persons with disabilities in the work of commissions of inquiry).

law processes.¹¹⁸ The promise of better accounting for the impact of armed conflict on persons with disabilities was apparent in the Gaza findings – there, the team specially engaged with an organization of persons with disabilities. Its report pointed to some specific examples of how the hostilities affected persons with disabilities who, for example, were not able to access prior warnings as those warnings were in inaccessible modes of communication.¹¹⁹ This was a clear example of disability-related impact and suggests that engagement with organizations of persons with disabilities is an easily implemented practice.

Security Council Resolution 2475 emphasizes the “need for States to end impunity for criminal acts against civilians, including those with disabilities”, and to warrant those civilians’ “access to justice and effective remedies and, as appropriate, reparation”.¹²⁰ The CRPD obligates States to undertake specific measures to ensure substantive and procedural access to justice mechanisms for persons with disabilities whose rights have been violated. Efforts to align both the substance and process of accountability measures with principles in the CRPD regarding atrocity crimes and access to justice mechanisms are surely warranted. These should reach all levels within which accountability for violations exists – namely, in fact-finding missions and commissions of inquiry; international criminal law processes; and national criminal jurisdiction to recognize disability-based war crimes. As explored in more detail in other articles in this issue of the *Review*, more work is required to render accountability mechanisms fit for purpose in addressing violations of IHL and their impact on persons with disabilities.¹²¹

Charting the course for a more dynamic and complementary Article 11 treaty practice

Acknowledging the difference of disability within the context of IHL means applying the protective measures that address the status of persons with disabilities while acknowledging the stereotypes that may be sustained by traditional interpretations of IHL rules. To be sure, framings of disability in IHL can serve to perpetuate notions centred around the shame and horror of disabled bodies. And yet approaching the protection of persons with disabilities under the rules of IHL through the lens of complementarity between disability rights rules and IHL rules provides the opportunity to do more than deconstruct disability and can instead help to advance a dynamic, evolving treaty practice. The application of a disability lens to the rules of IHL can help to illuminate the

118 Janet E. Lord, William Pons and Michael Ashley Stein, “Commissions of Inquiry and Persons with Disabilities”, Harvard Law School Project on Disability Research Initiative Paper, Cambridge, MA, 2022 (under submission).

119 *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009.

120 UNSC Res. 2475, above note 11.

121 See the article by William I. Pons, Janet E. Lord and Michael Ashley Stein in this issue of the *Review*.

evolution of IHL and its dynamic interaction with human rights law, and to chart a course for greater interaction and complementarity through Article 11 of the CRPD.

Security Council Resolution 2475 as an engine of dynamic change

The adoption of Security Council Resolution 2475 in 2019 was intended among its supporters to empower as well as protect persons with disabilities. Work is under way to better understand how to integrate a disability perspective into military operations and to suggest pragmatic strategies for doing so.¹²² Some lessons for advancing disability inclusion could usefully draw from strategies utilized to inform gender integration, like the incorporation of gender advisers in military decision-making and coverage of gender guidance in coaching programmes for military leaders.

If IHL obligations governing the protection of civilians are to be translated into practice in a manner that takes account of the impact of conflict on persons with disabilities, then knowledge, skills and tools co-produced by persons with disabilities are required. A starting point could be developing a practical tool that sets out the kinds of questions that personnel should ask when assessing civilian harm. These questions might include:

- How do women, men, girls and boys with disabilities use, need or rely on a particular civilian object or space differently from their non-disabled counterparts?
- How might civilian objects be valued differently among persons with disabilities relative to their non-disabled counterparts?
- What civilian objects utilized by persons with disabilities are essential to, or if destroyed would seriously impact, the survival of such persons or subgroups of such persons?

These and other queries might help bring a disability perspective into analyses and decision-making.

While Resolution 2475 is beginning to be used to mainstream disability in security sector reform, it is important that disability-inclusive approaches learn from the shortcomings of integrationist gender mainstreaming efforts that attempt to consider women's experiences but fail to challenge how existing legal provisions, combined with gender-blind international institutions, have disempowered women and exacerbated the exploitation of gender stereotypes. The same call for action in relation to Security Council Resolution 1325 that stronger links need to be established with substantive legal provisions, including the Geneva Conventions and Additional Protocols, the Convention on the Elimination of All Forms of Discrimination against Women and the Rome Statute of the International Criminal Court, should also inform an IHL disability rights agenda.

122 See e.g. testimonies of organizations of persons with disabilities, regional consultations convened by the UN Special Rapporteur on the Rights of Persons with Disabilities, ICRC, IDA and Diakonia, May 2022. See also A. Priddy, above note 65.

The CRPD must be harnessed to help inform and reinforce existing IHL norms as they apply to persons with disabilities.

Engagement in disarmament, non-proliferation and arms control

The role of persons with disabilities in disarmament, non-proliferation and arms control should be further developed.¹²³ Here, there is a need to facilitate the participation and representation of organizations of persons with disabilities in policy-making, planning and implementation processes related to disarmament, non-proliferation and arms control. Resolution 2475 recognizes the role of persons with disabilities in conflict prevention, management and resolution, and highlights the roles that persons with disabilities can assume in those situations. In so doing it recognizes the population of persons with disabilities not only as recipients of aid or justice but also as agents of peace, stability and security.

Arms control and disarmament are therefore important elements for achieving the overarching goals of disability equality. As such, further integration between arms control and disarmament, on the one hand, and the disability, peace and security agenda, on the other, should be pursued. Practical ways of doing so might include (1) addressing disability considerations in national arms control strategies; (2) supporting programming to expand the participation of persons with disabilities in treaty negotiations along the lines of the Mine Ban Treaty process; and (3) provision of disability-specific assistance to victims/survivors of armed violence and conflict. At the same time, in the field of disarmament and arms control, a sustained effort is required to ensure the meaningful participation of persons with disabilities in all of its processes, and that the differentiated impacts of weapons are assessed and understood.

Needless to say, ensuring participation of persons with disabilities in assessments of progress in relation to the fulfilment of Resolution 2475 is key. The trajectory of Resolution 2475 must continue to move away from the image of the disabled person in wartime as a hapless victim or pitiable, broken soldier in order to adequately redress the conceptual constraints present in IHL in relation to persons with disabilities. It must likewise move forward in efforts to empower persons with disabilities in conflict prevention, resolution and peace-building processes.

Addressing non-international armed conflict

The complexity of non-international armed conflicts, which engage multiple non-State actors and militia groups, means that the scope of IHL must develop further or risk being seriously undermined. This relates to a range of issues, including the responsibilities of organized armed groups who are party to a conflict in respect of persons with disabilities.

123 For a detailed account of certain aspects relating to this broad realm, see the articles in this issue of the *Review* by Bonnie Docherty and Alicia Sanders-Zakre; and Mariana Díaz Figueroa, Anderson Henao Orozco, Jesús Martínez and Wanda Muñoz Jaime.

While IHL relating to non-international armed conflicts is less developed, there is nonetheless a core of principles that apply, in addition to the protections laid out in Additional Protocol II (AP II).¹²⁴ First, Article 3(1) common to the four Geneva Conventions requires that persons placed *hors de combat* by, *inter alia*, sickness or wounds be treated humanely. Second, common Article 3(2) requires that “[t]he wounded and sick shall be collected and cared for”.¹²⁵

Beyond the general principles that are applicable in non-international armed conflict, an additional core of protections laying out more detailed rules on the protection of persons who are wounded, sick and shipwrecked in non-international armed conflicts were included in AP II, Articles 7–12. AP I clarifies that the concept “wounded, sick and shipwrecked” applies to those who are “infirm” or “disabled”, and thus persons who are disabled are to be granted protections applicable to the “wounded, sick and shipwrecked”. It follows that the definition set out in AP I supplies a definition for persons who are “infirm” or “disabled” under AP II. This, together with the evidence collected in the ICRC Customary Law Study to indicate that protections accorded to persons with disabilities and older persons reflect customary law, applicable in both international and non-international armed conflicts, is a reasonable proposition.¹²⁶ The proposal to further clarify definitions in relation to persons classed variously as disabled in IHL in both international and non-international armed conflicts is likewise reasonable and would lend far greater coherency to the protection of persons with disabilities under the framework. It would also avoid faulty conclusions drawn by some commentators that persons with disabilities are not a specifically protected group under IHL.¹²⁷ Utilization of the terminology provided in the CRPD would be an obvious point of departure for such an exercise.

Engagement by the institutional arrangements of the CRPD and beyond

While it is clear that the relationship between disability and IHL is problematic, in the absence of moves to amend the Geneva Conventions, the adoption of the CRPD and disability-informed guidance must be harnessed to support existing IHL provisions. Efforts to bring about the harmonization and dynamic complementarity implicated by Article 11 of the CRPD should focus first on the decisional and operational pathways of IHL and its institutions. An obvious place to start is the still nascent but emerging disability rights dialogue within the framework of the victim assistance pillar of the Mine Ban Treaty and the Cluster

124 Protocol Additional (II) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 4.

125 GC III, Art. 3.

126 ICRC Customary Law Study, above note 57.

127 See e.g. Robin Geib and Christophe Paulussen, “Specifically Protected Persons and Objects”, in B. Saul and D. Akande (eds), above note 69, p. 186 (wrongly asserting that “IHL does not single out disabled persons as a specific category of protected persons”).

Munitions Convention.¹²⁸ Late in coming, the UN Mine Action Service is nonetheless releasing a forthcoming Mine Action Standard on Victim Assistance that connects to the CRPD, if incompletely.¹²⁹

At the same time, the CRPD's institutional arrangements have a role to play in this effort – one that they have been slow to take on. The CRPD enjoys two co-leading secretariats (UN Human Rights and the UN Department of Economic and Social Affairs) and has not only a treaty body – the CRPD Committee – but also, novelly, an annual Conference of States Parties (COSP). This latter body meets not only to elect treaty body members, but also, pursuant to Article 40 of the CRPD, to consider “any matter with regard to implementation of the present Convention”.¹³⁰ The COSP has to date been more of a promotional vehicle for States, international non-governmental organizations and civil society to spotlight treaty-related activities – and these do have their uses – but less the kind of generative body that supports the development of the treaty.¹³¹ There is nothing to preclude the COSP from playing a more active role in engaging with military decision-makers, providing guidance on the interrelationship between IHL and the CRPD, aiding in the dissemination of IHL to disability advocates, and rendering decisions with regard to moves to achieve greater understanding and complementarity between the CRPD and IHL.

The CRPD Committee, while considering as of October 2022 the adoption of a General Comment on Article 11, has not focused its attention on the implications of Article 11 for IHL.¹³² Rather, it has, under the CRPD reporting process, addressed risk in the context of natural disasters and humanitarian action more generally. As the Special Rapporteur on the Rights of Persons with Disabilities has recommended, the CRPD Committee could usefully expand its focus on the protection of persons with disabilities under IHL in its reporting process and in guidance provided on the understanding of Article 11.¹³³ In addition, the Committee, together with organizations of persons with disabilities, could foster engagement with national committees on IHL.

128 See Suzanne Fiederlein, “Victim Assistance: A Way Forward Emerges”, *Journal of Mine Action*, Vol. 6, No. 3, 2002 (discussing victim assistance as a pillar of United Nations Mine Action Service (UNMAS) programming). A useful practice of the Mine Ban Treaty implementation process lies in regular meetings of States Parties providing an important forum for the reporting on and sharing of best practices in Mine Ban Treaty implementation. For more on Mine Ban Treaty implementation and meetings of States Parties, respectively, see the International Campaign to Ban Landmines website, available at: www.icbl.org/en-gb/the-treaty/treaty-status.aspx and www.icbl.org/en-gb/the-treaty/treaty-meetings/meetings-of-states-parties.aspx.

129 UNMAS, “Victim Assistance in Mine Action”, International Mine Action Standard 13.10, Draft 1, September 2021.

130 CRPD, above note 6, Art. 40.

131 Michael Ashley Stein and Janet E. Lord, “Monitoring the Committee on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential”, *Human Rights Quarterly*, Vol. 32, No. 3, 2010 (arguing for the COSP to take on an active role in the development of the treaty, parallel to similar conferences in the international environmental law domain).

132 Janet E. Lord, “Treaty Practice, Connectivity and the Potentiality of Article 11 of the CRPD in Advancing Disability Rights within IHL”, in Gloria Gagglioi (ed.), *The Role of Human Rights Mechanisms in Implementing International Humanitarian Law*, 2023 (forthcoming) (assessing the practice of the CRPD Committee in relation to its engagement with IHL in its reporting).

133 SR Report on Disability and Military Operations, above note 3.

Conclusion

Conceptualizing disability rights within IHL is clearly a work in progress, and an important and consequential one. The construction of disability, the stigma and stereotyping reflected in societies around disability, and the manifestations of disability-related abuse during peacetime and in times of armed conflict are all part of the context and understanding that can be used to bring about a transformation in societal attitudes concerning disability. The paradigmatic framing of persons with disabilities as hapless victims or mutilated bodies serves only to perpetuate ableism. That said, even the outmoded framing of disability in many IHL instruments is subject to change. Language in earlier instruments has given way to the clarification, in AP I, of what terms ought to be understood as comprising a “disability” in IHL. AP I supports a broad-based approach and lends some definition to the various terms associated with disability in clarifying that the terms “wounded” and “sick” should be understood to cover persons with mental or physical disabilities.¹³⁴

The treaty practice generated by the CRPD is beginning to bring about some changes in orientation in respect of persons with disabilities and IHL. Security Council Resolution 2475 concerning the protection of persons with disabilities in armed conflict highlights the interface between the CRPD and IHL and places the interaction between them squarely on the international agenda. The UN Special Rapporteur on the Rights of Persons with Disabilities initiated in 2022, for the first time, consultations between organizations of persons with disabilities and militaries, facilitated by the ICRC and Diakonia, in three regions – a mechanism for which there is appetite for continued engagement. Disability rights activism and interventions are also beginning to address the need for greater visibility of disability-based crimes perpetrated during armed conflict, hopefully with the effect of achieving greater prioritization by commissions of inquiry, other fact-finding missions, and domestic and international criminal tribunals.

As a minimalist regime designed to manage an exceptional situation, it would be foolhardy to suggest that IHL’s project is to bring about structural and systemic change for persons with disabilities or other specially protected groups exposed to conflict. But as with the work that has helped to forge a greater understanding of gender and children during armed conflict and its aftermath, understanding the disability dimensions of conflict can help to foster greater understanding of how disability ought to figure in IHL and thereby contribute to transforming disability in society. Further, addressing the disability dimension of crimes committed during armed conflict can serve to give greater attention to the formal legal commitments of States and can help to diminish impunity and the unchallenged continuation of crimes impacting persons with disabilities. This issue of the *Review* is a part of that effort.

134 AP I, Art. 8(a). That said, even the language of AP I Article 8 does evoke the traditional conceptualization of disability given its emphasis on medical and care needs as opposed to a broader set of human needs and the reality that societal barriers greatly inhibit full participation by persons with disabilities.