

Taking economic and social rights earnestly: What does international human rights law offer persons with disabilities in situations of armed conflict?

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Abstract

This article studies the economic and social rights of people with disabilities in times of armed conflict. While hostilities prevent them from accessing the essential goods and services that they rely on to enjoy these rights, the topic has attracted little attention to date. Calling upon international human rights law, the article applies the Convention

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on the Rights of Persons with Disabilities, with a view to complementing the provisions of international humanitarian law. It focuses on the requirements above the provision of medical care and examines the legal obligations attached to economic and social rights.

Keywords: Persons with disabilities, economic and social rights, goods and services, Convention on the Rights of Persons with Disabilities, legal obligations.



Introduction

This article studies the economic and social rights of persons with disabilities in times of armed conflict. These rights include the rights to work, education, health, housing, food, water and social security, which are provided in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ Although the importance of these rights has been recognized over the years, they have drawn limited attention in the context of an armed conflict. The protection of economic and social rights, however, is essential for safeguarding the livelihood of the population. Persons with disabilities will particularly endure the consequences of war, which involves the destruction of infrastructures which they use in order to access all kinds of goods and services.

International humanitarian law (IHL) includes a number of provisions that are relevant to the subject matter. It requires that the parties to the conflict limit the adverse effects of the armed conflict on the civilian population both by avoiding attacks on certain “objects” that are needed for its survival and by providing relief to those who are suffering from exposure to war. However, given the limited scope of IHL, it is necessary to call upon international human rights law (IHRL) to give more substance to these provisions. The present article provides an examination of how the Convention on the Rights of Persons with Disabilities (CRPD),² in addition to the ICESCR, helps to define the conditions for allowing persons with disabilities to enjoy economic and social rights in situations of armed conflicts. Considering the difficulties encountered by persons with disabilities in real-life situations, it investigates what should be done to respond to their different needs in a way that goes beyond the mere provision of medical care. It focuses not only on the meaning of economic and social rights for persons with disabilities but also on States Parties’ responsibility for complying with human rights treaties. It thereby follows the usual way of approaching these

1 International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations (UN) General Assembly Resolution 2200A (XXI), 16 December 1966 (entered into force 3 January 1976).

2 Convention on the Rights of Persons with Disabilities (CRPD), UN General Assembly Resolution A/RES/61/106, 13 December 2006 (entered into force 3 May 2008).

rights in IHRL, which considers their content alongside an analysis of the legal obligations that are attached to them.

The article itself is divided into three parts. The first part discusses not only the provisions of IHL that relate to economic and social rights but also the applicability of IHRL in times of armed conflict (“IHL and economic and social rights”). The second part explains the way in which hostilities prevent persons with disabilities from accessing essential goods and services and examines a number of rights on which such hostilities have particular bearing (“The protection of economic and social rights in the context of an armed conflict”). The third part addresses permissible limitations to economic and social rights before turning to the legal obligations that are incumbent on the belligerents (“Legal obligations of the parties to the conflict”).

IHL and economic and social rights

Armed conflicts have serious implications on the enjoyment of economic and social rights. In recent decades, the role of IHRL in relation to the conduct of war has grown in importance with a focus on establishing how far States Parties remain responsible for complying with human rights treaties notwithstanding the armed conflict. The debate has mostly revolved around the protection of civil and political rights, such as the right to life and protection against arbitrary detention. By contrast, less has been said about economic and social rights. Although it is true that IHL in appearance engages more with civil and political rights than economic and social rights, this discrepancy reflects the broader debate on the categorization of human rights and the hierarchy between both sets of rights, whereby one set of rights is given priority over the other.³

This categorization of human rights has proven to be false, as testified by the literature that contributed to improving the understanding of economic and social rights and the legal obligations attached to them.⁴ The indivisibility of human rights has come to mean that civil and political and economic and social rights have equal value in reality.⁵ As far as warfare is concerned, the latter are in fact very often violated even though they are much less discussed than the former. The destruction of infrastructures has not only huge economic costs for

3 Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, Oxford, 2014, pp. 136–9; Martin Scheinin, “Characteristics of Human Rights Norms”, in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook*, 2nd ed., Åbo Akademi University, Turku, 2009, p. 22.

4 See, *inter alia*, Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995; Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*, 2nd rev. ed., Martinus Nijhoff Publishers, Dordrecht, 2001; Isfahan Merali and Valerie Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights*, University of Pennsylvania Press, Philadelphia, 2001; M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerp, 2003.

5 Jean-Philippe Thérien and Philippe Joly, “‘All Human Rights for All’: The United Nations and Human Rights in the Post-Cold War Era”, *Human Rights Quarterly*, Vol. 36, No. 2, 2014, pp. 381–2.

the countries involved but also hinders access to healthcare, food, housing, water, education and all other goods and services which are needed by the population for its livelihood.

Although academic scholarship on the subject matter does indeed exist, not only is it rather scarce, but it is also no longer up to date.⁶ The focus of the attention has been on the kind of legal obligations related to economic and social rights that are imposed on belligerents. Less attention has been drawn to the proper significance and meaning of individual rights that belong to this category within the context of an armed conflict. Moreover, academic scholarship has not considered the necessity of protecting economic and social rights for various vulnerable groups of people. While these rights are fundamental for all individuals alike, the reality is that the lives of such groups are particularly affected by the armed conflict.

The applicability of IHRL in situations of armed conflict raises specific issues when it comes to economic and social rights. IHL has to be seen as *lex specialis* towards IHRL, as initially considered by the International Court of Justice (ICJ) in the Advisory Opinion on Nuclear Weapons.⁷ This view has subsequently been abandoned in favour of their mutual application in order to strengthen the international legal framework. The relationship between them therefore is no longer a question of precedence or exclusivity but one of complementarity. A holistic approach is even more recommended for protecting economic and social rights since the ICESCR contains no derogation clause in contrast to the International Covenant on Civil and Political Rights (ICCPR).⁸ While the desirability of inserting such a clause in the ICESCR was not discussed during its drafting process, it did in any event not appear needed especially given its overall limitation clause, which provides enough flexibility to cover situations of armed conflict.⁹ Economic and social rights thus remain fully in force or, at least, so in theory, and the question hence is how to protect them against the background of warfare.

As far as IHL is concerned, the provisions that are the most relevant to the subject matter are those that deal with the victims of war. Although there are relevant provisions on prisoners of war, the latter will be left out in this article. The main international legal instrument that must be looked at is therefore the Convention relative to the Protection of Civilian Persons in Time of War

6 See Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict*, Oxford University Press, Oxford, 2014; Eibe Riedel, "Economic, Social, and Cultural Rights in Armed Conflict", in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014; Elizabeth Mottershaw, "Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law", *International Journal of Human Rights*, Vol. 12, No. 3, 2008.

7 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1961, *ICJ Reports 1996*, para. 25.

8 International Covenant on Civil and Political Rights (ICCPR), UN General Assembly Resolution 2200A (XXI), 16 December 1966 (entered into force 23 March 1976), Art. 4(1).

9 Amrei Müller, "Limitations to and Derogations from Economic, Social and Cultural Rights", *Human Rights Law Review*, Vol. 9, No. 4, 2009, pp. 591–4.

(GC IV). GC IV focuses on a number of vulnerable groups while prescribing the conditions for the operation of humanitarian assistance. It addresses the impact that armed conflict has on such groups, which the belligerent should mitigate by adhering to the rules of war.

The provisions of IHL that relate to economic and social rights are not only very succinct but also revolve around the very survival of the civilian population. GC IV provides that “wounded and sick, as well as the infirm shall be the object of particular protection and respect”.¹⁰ It also requires that the parties to the conflict ensure the “removal from besieged or encircled areas” and protect those “engaged in the search for, removal and transporting of transporting of and caring for wounded and sick civilians, the infirm and maternity cases”.¹¹ Customary IHL further adds that “[t]he elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection” and stresses the need to provide medical care to the “wounded, sick and shipwrecked” as well as protection to “medical personal” generally.¹² A few other requirements of IHL fall within the broader remit of economic and social rights. GC IV includes the guarantee that those who “have lost their gainful employment ... shall be granted the opportunity to find paid employment” and given support if they are “prevented for reasons of security from finding paid employment on reasonable conditions”.¹³ It also obliges the parties to the conflict to “take the necessary measures to ensure that children under fifteen ... are not left to their own resources, and that ... their education [is] facilitated in all circumstances” whilst the occupying power must “facilitate the proper working of all institutions devoted to the care and education of children”.¹⁴

Although IHL covers certain matters of relevance to economic and social rights, it does by far not match the breadth and precision of human rights treaties, such as the ICESCR. As its provisions are incomplete, they need to be buttressed by IHRL which can make better sense of them. In order to overcome this incompleteness, the provisions of IHL should therefore be read and elaborated in the light of such treaties.¹⁵ IHRL is indeed much more detailed with regard to economic and social rights, as can be seen both from the ICESCR itself as well as the Committee on Economic, Social and Cultural Rights (CESCR)’s jurisprudence.¹⁶ It provides for the substance of those very rights that can give shape to the adoption of measures which may help secure the livelihood

10 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.

11 GC IV, Arts 17 and 19.

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (International Committee of the Red Cross (ICRC) Customary Law Study), Rules 25 and 110, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in November 2022). See also Rules 28 and 29.

13 GC IV, Art. 39.

14 GC IV, Arts 24 and 50.

15 G. Giacca, above note 6, pp. 166–7.

16 E. Mottershaw, above note 6, pp. 456–7.

of the population. The ICESCR sets out precisely what States Parties must achieve for realizing the rights to health, housing, food, water and education, amongst others.¹⁷

There are two more reasons why IHRL should be more at the forefront of the protection of economic and social rights in situations of armed conflict.

First, these rights presuppose a key role of the government in regulating the activities that actually matter to the population, which to a large extent falls outside the scope of IHL.¹⁸ This regulation will reach to all areas of life that are affected by the armed conflict even if they might not always be connected to the conflict itself. IHRL requires that States Parties adopt a series of measures to ensure that individuals are able to enjoy economic and social rights, the elements of which are outlined in the aforementioned Covenant and further developed by the CESCR.

Second, IHLR has monitoring mechanisms to hold the parties to the conflict accountable for violations of economic and social rights.¹⁹ There are tribunals to enforce the rules of war, including the International Criminal Court, which can prosecute individuals accused of having committed war crimes, grave breaches or serious violations of IHL; however, they have no universal coverage and have no jurisdiction over States themselves. By contrast, the United Nations (UN) treaty bodies have the task of assessing compliance with human rights treaties and have the mandate to issue recommendations urging States Parties to increase this level of compliance.

The protection of economic and social rights in the context of an armed conflict

As armed conflict transforms the physical and social environment, it creates hardship especially for vulnerable groups such as persons with disabilities. It leads to the breaking down of infrastructures and the increase of barriers to their participation in society. As the armed conflict in Ukraine has demonstrated, this not only endangers their life but also makes it impossible for them to evacuate the affected regions as transport is inaccessible.²⁰ While many persons with disabilities have no information on how to get out of settings of active hostilities, those placed in institutions are at particular risk of being forgotten and abandoned to their own fate.²¹ At the same time, armed conflicts not only result

17 ICESCR, Arts 11, 12 and 13.

18 G. Giacca, above note 6, p. 181.

19 E. Riedel, above note 6, p. 466.

20 See Michelle Cullen, “Ukrainian Woman Says People with Disabilities ‘Left Behind’ After ‘Almost Impossible’ Journey Across the Border”, *Irish Mirror*, 2 March 2022, available at: www.irishmirror.ie/news/irish-news/ukrainian-woman-says-people-disabilities-26370327.

21 See, *inter alia*, Rebecca Thomas and May Bulman, “Millions with Disabilities ‘Abandoned’ in Ukraine, Charities Fear”, *Independent*, 8 March 2022, available at: www.independent.co.uk/news/uk/home-news/learning-disabilities-refugees-ukraine-invasion-b2029894.html; Liz Plank, “Humanitarian Efforts Aren’t Doing Enough to Evacuate Ukrainians with Disabilities”, *MSNBC*, 8 March 2022, available at: www.msnbc.com/opinion/msnbc-opinion/ukraine-s-most-vulnerable-refugees-are-against-more-just-russia-

in all forms of physical disabilities, but its horrors also create and exacerbate existing intellectual disabilities, thereby generating a number of additional needs which have to be addressed in order to survive.²²

The protection of the economic, social and cultural rights of vulnerable groups in the context of an armed conflict has not drawn particular attention, except by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which examined the consequences that warfare has for women in addition to making recommendations to improve consideration for gender in the recovery of society. As explained by the CEDAW Committee, the destruction of infrastructures “[results] in the lack of delivery of essential services to the population. In such situations, women and girls are at the front line of suffering, bearing the brunt of the socioeconomic dimensions.”²³ Unable to use these services, their economic and social rights, especially those relating to sexual and reproductive health, are seriously at risk. The different kinds of violence taking place throughout the conflict further increase this risk, thereby placing them in a very vulnerable position.

While belligerents may be aware of the need to take care of persons with disabilities, there is no literature on the way to further their economic and social rights in situations of armed conflict. Academic scholarship has examined infringements of the right to life as well as related rights of persons with disabilities caused by affronts to their personal integrity. However, the way in which a State’s infrastructures are destroyed because of war impinges on all rights of persons with disabilities. The latter have particular needs that are exacerbated by the armed conflict and require action to be taken in order to remove the obstacles faced by them. This is the case both for those who still live in institutions, who may find themselves even more in isolation, and for those who are living in the community, who have lost the support they require to participate in society. There is a limited amount of data on such issues, which makes it harder to inquire into the social and economic rights of persons with disabilities. While humanitarian assistance tends to focus on gender and age, it does not always cater for the needs of persons with disabilities and has not involved their representative organizations.²⁴

IHL requires that the belligerents safeguard “objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the

n1291106; Theresa Vargas, “From Ukrainians with Disabilities Comes a Desperate Plea: ‘We Have No Chance Without Help’”, *Washington Post*, 9 March 2022, available at: www.washingtonpost.com/dc-md-va/2022/03/09/disabled-ukrainians-desperate-plea; Catarina Demony, “Fate of Ukrainians with Disabilities a ‘Crisis Within a Crisis’”, *Reuters*, 11 March 2022, available at: www.reuters.com/world/fate-ukrainians-with-disabilities-crisis-within-crisis-2022-03-11.

22 See Milan Šveřepa, “100 Days: Ukrainians with Intellectual Disabilities and their Families Surviving the War”, *Inclusion Europe*, 4 June 2022, available at: www.inclusion-europe.eu/100-days-people-intellectual-disabilities-ukraine.

23 CEDAW, General Comment No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 1 November 2013, paras 48 to 52.

24 Handicap International, *Unshielded, Unseen: The Implementation of UNSC Resolution 2475 on the Protection of Persons with Disabilities in Armed Conflict in Yemen*, May 2022, pp. 8 and 12, available at: https://assets.nationbuilder.com/handicapinternational/pages/6066/attachments/original/1653336082/HI_Case_study_Resolution_2475_YEMEN_2022_opt.pdf?1653336082.

production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.²⁵ These “objects” also include “[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases”.²⁶ Health facilities and medical supplies on which people with disabilities depend are often disrupted or damaged by the armed conflict.²⁷ The same happens to those devices designed to assist these people in their daily life and allow them to take part in the labour market.²⁸ In addition to breaching the rules of war, the unavailability of such goods and services results in multiple violations of economic and social rights. While these goods and services may fall within the ambit of “objects indispensable to the survival of the civilian population”,²⁹ since people with disabilities cannot function without them, IHRL reinforces the prohibition of attacks on those “objects” through its provisions that ensure the protection of these rights. States Parties should therefore by all means avoid such attacks under IHRL as well, as several UN bodies have indicated.³⁰ These attacks could sometimes even amount to war crimes although they have not yet been prosecuted as such.³¹

Some of the inevitable restrictions to the freedom of movement will be a main strain on the life of the population, thereby attesting – in a negative way – to the indivisibility of human rights. These restrictions are *prima facie* related to the protection of civil and political rights, as the freedom of movement belongs to that category whilst being reflected in the principle of humanitarian access recognized by customary IHL.³² They have, however, serious implications in terms of economic and social rights since they diminish the production of goods and services.³³ Lack of consideration for such implications will be mostly detrimental to persons with disabilities who depend on the well-functioning of available infrastructures. As a result, they will often struggle to obtain healthcare, food and water as well as information and can be easily the object of violence and abuse by the military forces.³⁴ It will be, above all, those who straddle

25 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 7 December 1978) (AP I), Art. 54(2).

26 GC IV, Art. 18.

27 Handicap International, above note 24, p. 10; Alice Priddy, *Disability and Armed Conflict*, Geneva Academy of International Humanitarian Law and Human Rights, April 2019, p. 12, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf.

28 Human Rights Watch, “*It Was Really Hard to Protect Myself*”: Impact of the Armed Conflict in Syria on Children with Disabilities, September 2022, pp. 18–19, available at: www.hrw.org/sites/default/files/media_2022/09/syria0922_web.pdf.

29 AP I, Art. 54(2).

30 G. Giacca, above note 6, pp. 210–13.

31 William I. Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes Against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022, p. 70.

32 ICRC Customary Law Study, above note 12, Rule 56.

33 G. Giacca, above note 6, p. 106.

34 See Human Rights Watch, “Cameroon: People With Disabilities Caught in Crisis”, 5 August 2009, available at: www.hrw.org/news/2019/08/05/cameroon-people-disabilities-caught-crisis.

different categories who will find themselves in the most vulnerable position, such as women and children with disabilities.³⁵

What does the protection of the economic and social rights of persons with disabilities entail in the context of an armed conflict? In order to respond to the question, it is necessary to inquire into the application of the CRPD alongside the ICESCR. As with the ICESCR, the CRPD does not allow for any derogation. Article 11 of the Convention even contains a provision requiring that States Parties take steps to protect persons with disabilities “in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”. However, this does not mean that the remaining parts of this Convention lose their relevancy in “situations of armed conflict”, especially when it comes to economic and social rights. The CRPD has broken new ground with that provision, but its other provisions need to be upheld if persons with disabilities are to continue to be able to exercise all their rights as far as possible. The Convention can inform the provisions of IHL with a view to fully appreciating what needs to be done in order to remove the obstacles faced by persons with disabilities. The prohibition of discrimination enshrined in the ICESCR, stipulating that States Parties should ensure that “the rights enunciated in the ... Covenant will be exercised without discrimination of any kind”,³⁶ further supports the requirement that the parties to the conflict should behave in conformity with the CRPD. In this way, IHRL can be used to define what the States Parties, as well as the international community, must do to ensure that persons with disabilities enjoy economic and social rights.

The CRPD adds another dimension to the provisions of IHL. As seen earlier, GC IV refers to “the infirm” alongside “[t]he wounded and sick” while customary IHL uses the terms “[t]he elderly, disabled and infirm”.³⁷ This terminology stands in opposition to the CRPD’s understanding of disability that is rooted in the social model of disability. Relying instead on the medical model, IHL considers that disability is a consequence of war or entails the provision of medical care.³⁸ Other kinds of support are required for the participation of persons with disabilities in society. Persons with disabilities face a variety of health issues that are not directly connected to the hostilities even if they may be exacerbated by them. As noted by Human Rights Watch, armed conflict deprives these people of those devices that assist them in their mobility, such as wheelchairs, prostheses, artificial legs and crutches.³⁹ These devices are often not

35 Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/76/146, 19 July 2021, para. 34.

36 ICESCR, Art. 2(2). The CESCR has subsequently confirmed that “other status” encompasses disability. CESCR, General Comment No. 5, Persons with Disabilities, UN Doc. E/1995/22, 9 December 1994, para. 5.

37 GC IV, Arts 16 and 18; ICRC Customary Law Study, above note 12, Rule 138.

38 Janet E. Lord, “Persons with Disabilities in International Humanitarian Law – Paternalism, Protectionism or Rights?”, in Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London, 2014, p. 160.

39 Human Rights Watch, “Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities regarding Persons with Disabilities in the Context of Armed Conflict”, 8 June 2021, pp. 3–4, available at:

adapted to meet the needs of children with disabilities, who risk a worsening of their impairment in the long term by using the adult ones.⁴⁰ Children suffering from intellectual impairments no longer have access to the therapeutic support that enables them to pursue their education.⁴¹ Hostilities make it also harder to repair assistive devices, as is the case with hearing aids for those who have sensory disabilities, which prevents them from being aware of any military attacks.⁴² IHL thus overlooks the fact that there are barriers that are not necessarily medically related but that result from the actual shape of the environment.⁴³

The adoption of a disability perspective to applying economic and social rights can help revise this approach. Rather than focusing all the attention on medical care, this perspective calls for elaborating upon the rules of war to provide guarantees that persons with disabilities can still access essential goods and services. So doing may enhance the international community's awareness of how IHRL can be used both to incite the parties to the conflict to realize economic and social rights and to hold them accountable for their violations.

This perspective may shed light upon the following rights of persons with disabilities which are affected by the conflict in different ways.

Right to health

Both the ICESCR and the CRPD protect the right to the enjoyment of the highest attainable standard of health.⁴⁴ By contrast, IHL is confined to a narrow vision of health, concentrating on those who are in urgent need of assistance.⁴⁵ GC IV provides that the occupying power has “the duty of ensuring the food and medical supplies of the population” to the greatest of its availabilities.⁴⁶ Customary IHL also indicates that “[t]he wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”.⁴⁷ IHL does not allow for care other than that that is medical in nature and that remains essential for persons with disabilities, such as mobility aids and equipment as well as assistive technology. It focuses on a range of materials that the authorities should provide a population, which include “any article necessary to support life”,⁴⁸ but does not consider the availability of support in order to carry out day-to-day activities.

www.hrw.org/sites/default/files/media_2021/06/Protection%20of%20Persons%20with%20Disabilities%20in%20Armed%20Conflict.pdf

40 Human Rights Watch, above note 28, pp. 34–5.

41 *Ibid.*, pp. 30–1.

42 *Ibid.*, p. 15.

43 Naomi Hart, Mary Crock, Ron Mccallum and Ben Saul, “Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts”, *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 162.

44 ICESCR, Art. 12; CRPD, Art. 25.

45 G. Giacca, above note 6, p. 178.

46 GC IV, Art. 55(1).

47 ICRC Customary Law Study, above note 12, Rule 110.

48 ICRC, Commentary on GC IV, 1958, p. 309, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B11A237E0C281E5DC12563CD0042C7FF>.

IHRL provides clarification as to what are the requirements of providing healthcare to persons with disabilities. The CESCR not only advises that in cases of emergency States Parties must put in place “a system of urgent medical care for a variety of cases” but also stresses that they should “cooperate in providing ... humanitarian assistance [by giving] priority ... to the most vulnerable or marginalized groups of the population”.⁴⁹ The CRPD further expands these requirements to include “those health services needed by persons with disabilities specifically because of their disabilities”.⁵⁰ These services should come in addition to those available to the population in general and enable persons with disabilities to function without aggravating their impairment.

Right to food, clothing and housing

The ICESCR and CRPD protect the right to an adequate standard of living, which includes the provision of “adequate food, clothing and housing”.⁵¹ IHL also prescribes such provision with a view to safeguarding the livelihood of the population, aligning it again with that of medical care throughout its provisions. GC IV thus imposes an obligation on the parties to the conflict to “bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate”.⁵² The purpose of IHL is limited to avoiding starvation and maintaining reasonable living conditions.⁵³ The CESCR recommended that “[p]riority in food aid ... be given to the most vulnerable populations” during the hostilities.⁵⁴ In a similar way, it advised making water available through the safekeeping of “drinking water installations and supplies and irrigation works”.⁵⁵ In this regard, it provided that States Parties should “give special attention to women, children, minority groups indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees”.⁵⁶ Persons with disabilities, however, have particular needs when it comes to the right to food, clothing and housing, which are ignored by the ICESCR. Such needs call for adopting a series of measures that are tailored to their situation, so that they can exercise this right. The CRPD stipulates that States Parties should guarantee access to “affordable services, devices and other assistance for disability-related needs” and offer those “living in situations of

49 CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, 11 August 2000, paras 16 and 40.

50 CRPD, Art. 25(b).

51 ICESCR, Art. 11(1); CRPD, Art. 28(1).

52 GC IV, Art. 55(1).

53 ICRC, above note 48, p. 309.

54 CESCR, General Comment No. 12, The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5, 12 May 1999, para. 38.

55 CESCR, General Comment No. 15, The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, 20 January 2003, para. 22.

56 *Ibid.*, para. 16. Although disability is implicitly covered by the Covenant’s general non-discrimination clause, the Committee omitted to mention explicitly persons with disabilities, which confirms its lack of awareness of their situation.

poverty ... assistance ... with disability-related expenses”.⁵⁷ Although this stipulation should be brought into perspective in light of legal obligations for economic and social rights (examined in the final part below), it means that the States Parties should allow persons with disabilities to hold onto a minimal quality of life despite the conflict by covering the cost of expenditures incurred due to their varied needs.

Right to education

The right to education is protected by both the ICESCR and the Convention on the Rights of the Child (CRC).⁵⁸ While both human rights treaties enunciate in detail the elements of this right, the CRPD provides for the right to inclusive education through its emphasis on the imperative of including children with disabilities.⁵⁹ IHL is again more succinct, as GC IV just requires that “education [is] facilitated in all circumstances”.⁶⁰ It offers no guidance as to what such education entails, but the fact that it requires that it does so only for those “who are orphaned or are separated from their families as a result of the war” testifies its limited scope.⁶¹ IHRL expands this scope by supporting the sustaining of an education system that is able to offer education to all the children. As explained by the Committee on the Rights of the Child (CRC Committee), belligerents are forbidden to target schools, which States Parties should protect against attacks.⁶² While IHRL may permit closing down schools during a short period, it requires that they proceed with re-organizing education as soon as possible.⁶³ States Parties should do so in an inclusive way, considering that some children will find it harder to benefit from this education and depend on specific intervention programmes towards this end. According to the CRC Committee, there is indeed a need for “the recovery and social re-integration of children who suffer disabilities as a result of armed conflicts”.⁶⁴ While it is true that armed conflict may lead to disabilities, those with disabilities before the conflict who dropped out because of war also should be included in such efforts. Delivering education requires that States Parties keep an education system, which, however transitory, encourages the schools to be responsive to the needs of all children with disabilities.

57 CRPD, Art. 28(2)(a) and (c).

58 ICESCR, Art. 13; Convention on the Rights of the Child (CRC), UN General Assembly Resolution 44/25, 20 November 1989 (entered into force 2 September 1990), Art. 28. The CRC applies in the context of an armed conflict especially through its Article 32, which deals with their protection from such conflict. Its standards are further raised by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

59 CRPD, Art. 24.

60 GC IV, Art. 50(1).

61 *Ibid.*

62 CRC Committee, Day of General Discussion on “The Right of the Child to Education in Emergency Situations”. Recommendations, Report on the Forty-ninth Session, UN Doc. CRC/C/49/3, 15 September–3 October 2008, para. 73.

63 G. Giacca, above note 6, p. 97.

64 CRC Committee, General Comment No. 9, The Rights of Children with Disabilities, UN Doc. CRC/C/GC/9, 27 February 2007, para. 78.

The Committee on the Rights of Persons with Disabilities (CRPD Committee) recommends doing so, not only by providing reasonable accommodation for them but also by arranging for “accessible educational materials, school facilities, counselling, or access to training in local sign language for deaf learners”.⁶⁵

Finally, humanitarian action has generally been out of reach for persons with disabilities. Persons with disabilities are generally unable to take advantage of evacuation plans and aid to refugees organized by governments and UN agencies.⁶⁶ As mentioned earlier, Article 11 of the CRPD requires that States Parties “take ... all necessary measures to ensure the protection and safety of persons with disabilities ... in ... situations of armed conflict”.⁶⁷ It calls for making humanitarian assistance disability-friendly by providing support, so that persons with disabilities are not excluded from any assistance offered to those whose life is in danger. Although this assistance is mainly connected to the right to life, it does pertain to the protection of economic and social rights. It is important that the building of any facilities for the population provides for accessibility which allows persons with disabilities to exercise their rights to health, food, housing and education. The Inter-Agency Standing Committee (IASC), for instance, has elaborated recommendations on how to facilitate access in education, food, employment as well as healthcare for persons with disabilities with regard to humanitarian action.⁶⁸ It is important to go further than providing assistance in general and ensure that such people do not face even higher levels of disadvantage as a result of the conflict.

Legal obligations of the parties to the conflict

The first step relating to legal obligations is to define which State should be held accountable for any violations of economic and social rights. According to IHL, a State is responsible for ensuring respect for the rules of war by its organs, which is a responsibility that other States or stakeholders can invoke before the ICJ. Individuals can also be prosecuted in the case of grave breaches which constitute war crimes under international criminal law. With regard to non-international armed conflicts, non-State armed groups (NSAGs) are also required to comply with certain rules, including those of Article 3 common to the four Geneva Conventions as well as Additional Protocol II, but they will not be dealt with here.⁶⁹

By contrast, IHRL places responsibility for meeting legal obligations on the States Parties that have effective control over a given territory. This kind of control

65 CRPD Committee, General Comment No. 4 on the Right to Inclusive Education, UN Doc. CRPD/C/GC/4, 25 November 2016, para. 14.

66 N. Hart *et al.*, above note 43, p. 149.

67 CRPD, Art. 11.

68 IASC, *Inclusion of Persons with Disabilities in Humanitarian Action*, July 2019, pp. 83–139, available at: https://reliefweb.int/attachments/ebc305c6-9252-3412-8ddd-2695ece185af/iasc_guidelines_on_the_inclusion_of_persons_with_disabilities_in_humanitarian_action_2019.pdf.

69 The responsibility of NSAGs is beyond the remit of the present article. NSAGs cannot adhere to human rights treaties although they can be encouraged to abide by IHRL. UN treaty bodies are in any event not competent to deal with such actors. E. Riedel, above note 6, p. 455.

may – sometimes more than once – change throughout the conflict. There is therefore a shared responsibility to comply with human rights treaties. In the case of prolonged occupation, this responsibility will gradually shift from the State Party that has lost control over the territory to the occupying power which has gained it.⁷⁰

States Parties have a duty of progressive realization in relation to economic and social rights. The ICESCR provides that a State Party must “take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”.⁷¹ It may therefore delay fulfilling some of the legal obligations attached to these rights although it must “move as expeditiously and effectively as possible towards” this realization according to the CESCR.⁷² The Committee also advised that States Parties fulfil at all times “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” in the Covenant.⁷³ In contrast to the duty of progressive realization, this is an immediate obligation. Its breaching will constitute a violation of economic and social rights, unless the State Party is able to demonstrate its inability to meet it even by transferring resources that are being used for other purposes including warfare.⁷⁴ While the CESCR has established what “minimum core obligations” exists for the rights in the ICESCR, the prohibition of discrimination is likewise regarded as an obligation that is immediate in nature.⁷⁵ This obligation includes the duty to provide “reasonable accommodation” to persons with disabilities,⁷⁶ which applies to both civil and political and economic and social rights.⁷⁷

Given the instability of the regime, the occurrence of armed conflict can provide justification to limit economic and social rights. The ICESCR stipulates that States Parties “may subject such rights only to such limitations ... in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.⁷⁸ Restrictions might be in the interest of national security, since the States Parties are obliged to preserve the safety of individuals in the areas that are affected by the conflict. The question is how long the Covenant tolerates these limitations “for the purpose of promoting the general welfare in a democratic society”. They should arguably be short term in view of the hardship endured by the population.

70 G. Giacca, above note 6, p. 119.

71 ICESCR, Art. 2(1). The CRPD similarly provides that “[w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights” (CRPD, Art. 4(2)).

72 CESCR, General Comment No. 3, The Nature of State Parties Obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23, 14 December 1990, para. 9.

73 *Ibid.*

74 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford University Press, Oxford, 2014, p. 147.

75 “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 20, No. 3, 1998, para. 11.

76 CRPD, Art. 5(3). In the terms of Article 2 of the CRPD, this obligation involves “adjustments not imposing a disproportionate or undue burden”, so that persons with disabilities can exercise their rights on an equal footing with other individuals.

77 CESCR, above note 36, para. 15.

78 ICESCR, Art. 4.

Contrary to common perceptions, it can sometimes be harder to justify limitations to economic and social rights than limitations to civil and political rights in times of armed conflict. There is indeed a threshold below which States Parties should not venture. There is no reason to impose restrictions to what may be called “substance rights”, such as freedom from hunger and access to basic healthcare.⁷⁹ Not only would these kinds of measures threaten the right to life itself, but their consequences on the economic and social rights of persons with disabilities are potentially extreme given how they decrease their chance of survival. It is important that States Parties ensure that persons with disabilities are not completely cut off from all facilities notwithstanding the armed conflict.

Furthermore, in situations of armed conflict, there is a consensus that any restrictions that States Parties are bringing to economic and social rights should be consistent with the aforementioned “minimum core obligations”.⁸⁰ Failure to fulfil such obligations would not be “compatible with the nature of these rights”,⁸¹ because it would render the content of these rights obsolete. The belligerents are therefore required to safeguard the “minimum essential levels of each of the rights” in the territory over which they have effective control. While IHL tolerates limitations to economic and social rights, it does in principle not allow for restrictions that would prevent them from reaching those “essential levels”. This concerns especially those who are already in a vulnerable position for whom the fulfilment of the “minimum core obligations” will be more crucial than ever.⁸²

Accordingly, the duty of progressive realization will vary according to two interrelated factors. The availability of resources will determine the extent of the obligation to realize economic and social rights. If the level of economic development is very low, States Parties may indeed have no such resources at their disposal. Effective control over the territory will be key for this purpose, as it determines which State will be accountable for any violations of economic and social rights. The more the parties to the conflict exercise this kind of control, the more they will have to fulfil the duty of progressive realization. High levels of violence, on the other hand, will allow them to restrict such rights while there may be situations in which meeting the “minimum core obligations” will simply be impossible.

As a result, the legal obligations attached to economic and social rights will fall on different States Parties throughout the armed conflict. While the hostilities are ongoing, all of them will be required to discharge the “minimum level obligations” identified by the CESC. This will include the provision of reasonable accommodation for persons with disabilities – failure of which amounts to discrimination –, which calls for adapting any measures taken to their individual needs. Once the armed conflict has more or less stabilized, the State Party will be expected to go further in the implementation of economic and social rights by discharging the duty of progressive realization.

79 A. Müller, above note 9, p. 593.

80 *Ibid.*, pp. 581–3.

81 ICESCR, Art. 4.

82 E. Riedel, above note 6, p. 463.

In the case of occupation, there is an additional factor of timing concerning the aforementioned legal obligations. While its effective control over the territory remains limited, a State Party might have no capacity to realize economic and social rights, and therefore it may suspend the duty until some form of authority is re-established.⁸³ When this power becomes more durable, it will be expected not just to meet the “minimum core obligations” but to allocate its available resources – including those that can be made available by changing its priorities in the territory it occupies – for the full realization of economic and social rights.

An occupation for a protracted period will therefore result in an expansion of the applicability of IHRL in situations of armed conflict, which will place itself at the forefront of determining the legal obligations that are incumbent on the belligerents. The CRPD will then come into play further. Its application will point to the need for States Parties to remove the different barriers faced by persons with disabilities, which the conflict has erected or reinforced and are hindering access to all kinds of goods and services.

Taking the right to education as an example, the CESCR considers that there is a minimum core obligation to “provide primary education for all [and] adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education”.⁸⁴ The parties to the conflict must not only maintain education at primary level but also seek to encourage attendance at further levels. It is possible that the high levels of violence will delay the operation of the education system, but restrictions are not permissible for any other reason. In the view of the CEDAW, the States Parties should focus on both fixing the environment and making schools a safe place for all the children.⁸⁵ The same applies to children with disabilities, who should be taught in mainstream settings rather than being excluded from education. Once the hostilities have diminished or are contained, the CRPD requires that they go further by offering children with disabilities an environment in which their varied needs can be met, so that they can be educated in a meaningful way. The CRC Committee also recommended that the States Parties reach out to those who have dropped out and offer them appropriate support to re-integrate into the education system.⁸⁶ The more a State Party consolidates its power, the more it will thus be required to take steps in order to realize the right to education of persons with disabilities.

Conclusion

The protection of economic and social rights in times of armed conflict is a neglected topic. While the belligerents may introduce restrictions temporarily in the name of national security, their violation will dramatically increase the

83 N. Hart *et al.*, above note 43, pp. 158–9.

84 CESCR, General Comment No. 13, The Right to Education (Article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999, para 57.

85 CEDAW, above note 23, para. 52(a).

86 CRC Committee, above note 62, paras 35–36 and 46.

amount of hardship endured by the population. Without disregarding other kinds of violations that will take place throughout the conflict, these violations will leave lasting marks on the regions affected by them, especially for vulnerable groups of people.

This includes persons with disabilities, whose ability to exercise their rights to health, food, housing and education and so on depends on the provision of various kinds of support. There has been little attention on how to meet their needs in order to maintain their living or facilitate their evacuation. The destruction of infrastructures means that they will often be left behind without any means of subsistence. Armed conflict will in particular endanger their life through the dismantling of essential goods and services, “thereby creating new barriers on the top of already existing ones”, as noted by Gerard Quinn.⁸⁷ While IHL includes provisions that relate to economic and social rights, it does not offer much guidance on how to tackle those barriers while it regards disability as an issue that just calls for the provision of medical care. Not only does it embrace a medical model of disability in its terminology, but its approach is limited to shielding persons with disabilities as far as possible from the ravages of warfare.

The present article proposed a reading of IHL’s provisions in the light of human rights treaties that help to take economic and social rights earnestly. It demonstrated what the CRPD offers to define the conditions for allowing persons with disabilities to enjoy these rights in situations of armed conflict and what kind of legal obligations related to such rights are imposed on States Parties. It is important to see the fulfilment of these obligations not as mandatory at a specified point in time but as the start of a process towards rebuilding the infrastructures of the territory post-conflict, in a way that shows sensitivity to disability from the outset and lays the groundwork for the future.

⁸⁷ Report of the Special Rapporteur, above note 35, para. 29.