

Who is the civilian population? Ensuring IHL is implemented for the protection of the entirety of the civilian population – including persons with disabilities

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Abstract

Despite progress in recent years, including UN Security Council Resolution 2475 of 2019, there remains a significant gap in our awareness of the disability dynamics of armed conflict and the barriers that persons with disabilities experience in accessing the protections of international humanitarian law (IHL). This brief article will consider the protective purpose of IHL and the diversity of civilian populations, and, focussing on the principle of proportionality as an example, demonstrate how IHL must be interpreted, implemented and monitored in a manner that is inclusive and reflects the reality that civilian populations are diverse.

Keywords: disability, conduct of hostilities, proportionality, inclusion, protection, adverse distinction.



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Introduction

Who is the civilian population? Ask any practitioner or student of international humanitarian law (IHL) this question and they will no doubt provide you with the clear response that a civilian is a person who is not a member of the armed forces and who is the subject of IHL protections. They may refer to Article 50 of Additional Protocol I to the Geneva Conventions (AP I) or the International Criminal Tribunal for the former Yugoslavia's (ICTY) definition of civilians as “persons who are not, or no longer, members of the armed forces”.¹ This response is of course legally correct – but is it telling us everything that we need to know to apply and monitor IHL in an effective and inclusive manner?

The protection of civilians is the cornerstone of IHL.² Rules on the conduct of hostilities protect civilians by limiting the means and methods used during military operations so that harm to civilians is restricted as far as possible, whilst still allowing military objectives to be achieved.³ IHL protects civilians not just from direct targeting but also from all forms of violence, torture, inhumane or degrading treatment, sexual violence, hostage taking, unfair trial, forcible transfer and collective punishment, as well as from discriminatory treatment.⁴ Further protections include the prohibition on attacks against civilian objects and objects indispensable to the survival of the civilian population,⁵ and the protection of humanitarian assistance to civilians in need, as well as a number of protections that are applicable to civilians living in occupied territory.⁶ The common purpose of these rules is to limit the harm to civilians in situations of armed conflict; the term “civilian” thereby triggers a range of protections and limitations that are

1 ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgment (Trial Chamber), 3 March 2000, para. 180.

2 IHL also serves to protect fighters, including through limiting the means and methods of conflict and providing minimum standards of treatment for prisoners of war.

3 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 1–24, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in September 2022).

4 Torture and cruel treatment are prohibited in Article 3 common to the four Geneva Conventions, Article 12 of Geneva Convention I, Article 12 of Geneva Convention II, Articles 17,87 and 89 of Geneva Convention III (GC III), Article 32 of Geneva Convention IV (GC IV), Article 75(2) of Additional Protocol I and Article 4(2) of Additional Protocol II (APII). The prohibition against rape and other forms of sexual violence is a norm of customary international law: see ICRC Customary Law Study, above note 3, Rule 93 and its sources. The prohibition against hostage taking is found in common Article 3, Articles 34 and 147 of GC IV, Article 75(2)(c) of AP I and Article 4(2)(c) of AP II, and is a norm of customary international law: see ICRC Customary Law Study, above note 3, Rule 96. It is prohibited to convict or sentence a person “except pursuant to a fair trial affording all essential judicial guarantees”: see ICRC Customary Law Study, above note 3, Rule 100. It is prohibited to forcibly displace the civilian population “unless the security of the civilians involved or imperative military reasons so demand”: see ICRC Customary Law Study, above note 3, Rule 129. The prohibition against collective punishment is contained in Article 87 of GC III and Article 33 of GC IV, and is a norm of customary international law: see ICRC Customary Law Study, above note 3, Rule 103. Regarding non-discrimination, see ICRC Customary Law Study, above note 3, Rule 88.

5 ICRC Customary Law Study, above note 3, Rule 54; AP I, Art. 54(2); AP II, Art. 14.

6 ICRC Customary Law Study, above note 3, Rule 55; AP I, Art. 70(2).

integral to IHL. As such, it is crucial to have an accurate understanding of who the civilian population is in order to inform the application of these protections.

This paper dives into those dynamics – and how they can be shifted. First, the paper will explore the actual composition of the civilian population, with a focus on disability. Next, the paper explores the tangible effects of conflict on persons with disabilities and the unique harms and barriers they face. Third, the paper will explore the legal infrastructure that protects persons with disabilities during armed conflict, before explaining how the core protections of IHL have, to date, been implemented in a manner that is not inclusive of persons with disabilities, with a particular focus on the principle of proportionality. Finally, the paper will briefly touch on how a disability-inclusive approach will lower militaries' operational risks, and on the role of accountability and monitoring in protecting the rights of persons with disabilities during armed conflict.

What does the civilian population look like?

Civilian populations within any conflict setting will be diverse. They will include women, girls, men, boys, infants and elderly persons, undocumented migrants, ethnic and religious groups, and persons of diverse gender identities and sexual orientations. At least 15% of the civilian population will be comprised of persons with disabilities.⁷ In situations of protracted armed conflict, the percentage of the population who will have a disability will be significantly higher, as the violence results in injuries that may lead to long-term impairments. The destruction of medical facilities and infrastructure will also increase the prevalence of disability, as injuries are not treated and lack of access to medical care and essential services results in aggravation of existing impairments or leads to secondary ones.

In addition, disability itself is diverse. Persons with disabilities will include persons with sensory, physical, intellectual and psychosocial impairments, including some with multiple impairments. Whilst recognizing that disability is an evolving concept which will change across contexts and time,⁸ the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) states that persons with disabilities will include persons who have “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁹

Collecting accurate data that captures the diversity of disability is a challenge. Under-inclusive methodologies, social stigma and prevalent discriminatory attitudes continue to result in underreporting, particularly of intellectual and psychosocial

7 World Health Organization, *World Report on Disability*, 2011.

8 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), Preamble.

9 *Ibid.*, Art 1.

impairments. The insecurity and chaos of conflict poses a further practical challenge in gathering reliable data on the civilian population.

The few accurate data sets which do exist confirm that rates of disability are higher in places and regions of protracted armed conflict. In Syria, home to a conflict that has been ongoing for eleven years, it is thought that approximately 28% of the population are persons with disabilities, compared to the global average of 15%.¹⁰ This rises to 37% in northeast Syria, where increased exposure to the violence and the destruction of medical facilities and infrastructure means that there are limited opportunities for accessing health care and support services.¹¹ One in five children in the region aged between 2 and 4 are reported to have a disability,¹² in comparison to the estimated global average of one in ten.¹³

In short, disability – in its many and diverse forms – is a prevalent feature of the civilian population, and one that becomes more prevalent as conflict continues.

Impact of conflict on persons with disabilities

In conflicts across the globe, civilians with disabilities continue to be disproportionately exposed to harm and are largely denied the protections of IHL. Reliable data on casualty numbers from conflicts is scarce, and accurate casualty data that is disaggregated by disability is non-existent. However, we do know that proportionality assessments which fail to consider the impact of an attack on civilians in an inclusive manner, ableist assumptions regarding how civilians will respond to an incoming attack, and inaccessible warnings, shelters and transport all result in a disproportionately high number of deaths and injuries among civilians with disabilities.¹⁴

The particular harms that persons with disabilities face during armed conflict are many. Owing to inaccessible shelters and infrastructure, as well as lack of access to assistive devices and support personnel, persons with disabilities are often denied the right to flee the violence and families are separated, leaving persons with disabilities behind.¹⁵ Persons in institutionalized settings are particularly vulnerable to death and injury from the fighting, as well as abuse,

¹⁰ UN Humanitarian Needs Assessment Programme Syria, *Disability in Syria: Investigation on the Intersectional Impacts of Gender, Age and a Decade of Conflict on Persons with Disabilities*, 2021.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ UNICEF, *Seen, Counted, Included: Using Data to Shed Light on the Well-Being of Children with Disabilities*, November 2021.

¹⁴ *Report of the UN Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/76/146, 19 July 2021; *Report of the UN Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/77/203, 2 September 2022.

¹⁵ See first-hand accounts of the impact of conflict on persons with disabilities living in Ukraine, including Olha Telna, “Here’s What Ukrainians with Disabilities Face as we Cope with War”, *The New Humanitarian*, 18 April 2022. See also Human Rights Watch, *Persons with Disabilities in the Context of Armed Conflict*, 8 June 2021.

neglect and abandonment.¹⁶ We also know that persons with disabilities tend to have less access to financial resources, a necessity for those wanting to flee a dangerous conflict situation and resettle elsewhere.¹⁷

In addition, persons with disabilities will have multiple and intersecting identities that will impact on their experience of armed conflict and the vulnerabilities to which they are exposed. Women and girls with disabilities, for example, are at increased risk of sexual and gender-based violence.¹⁸ Owing to exclusion in the design and implementation of services and infrastructure, women and girls with disabilities are also less likely to have access to health and support services, as well as access to justice. Children with disabilities face an increased risk of exploitation, abuse and neglect.¹⁹ Refugees and internally displaced persons with disabilities will face particular challenges in accessing essential humanitarian support owing to inaccessible information, shelter and services, including education programmes for displaced children. Undocumented migrants with disabilities, or persons with disabilities who rely on undocumented workers for personal assistance, may face particular barriers in fleeing conflict across borders.

Legal framework protecting civilians with disabilities during armed conflict

The protections of IHL clearly apply to the entirety of the civilian population, including persons with disabilities. Two particularly pertinent norms of IHL are humane treatment and the prohibition of adverse distinction. Civilians and person *hors de combat* must be treated humanely.²⁰ Humane treatment is not explicitly defined in IHL, as its meaning is context-specific; at its core, however, it entails respect for human dignity and for a person's physical and mental integrity.²¹

A further pertinent IHL norm is adverse distinction. In providing IHL protections, any adverse distinction based on race, religion, sex, birth, wealth "or any other similar criteria" is prohibited.²² Disability, although not expressly referenced, falls under "similar criteria". Of course, it is only *adverse* treatment that is prohibited; *different* treatment may be necessary, and even required, to respond to the specific needs of a person.

16 Committee on the Rights of Persons with Disabilities, *Guidelines on Deinstitutionalization, Including in Emergencies*, UN Doc CRPD/C/27/3, 9 September 2022; UN Doc. A/76/146, above note 14.

17 Office of the UN High Commissioner for Human Rights, *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies*, UN Doc. A/HRC/31/30, 39 November 2015.

18 UN Doc. A/76/146, above note 14, para. 34.

19 Human Rights Watch, "*It Was Really Hard to Protect Myself': Impact of the Armed Conflict in Syria on Children with Disabilities*", 8 September 2022.

20 Common Article 3.

21 See ICRC Customary Law Study, above note 3, Rule 87, "Definition of Humane Treatment".

22 Common Article 3; GC III, Art. 16; GC IV, Art. 13; AP I, Art. 75(1); AP II, Art. 4(1).

The CRPD, a widely ratified treaty that enshrines the human rights of persons with disabilities, reinforces these IHL norms and strengthens their inclusive interpretation. The Convention, which continues to apply during armed conflict,²³ affirms that persons with disabilities are entitled to the full and equal protections of IHL. Article 11 of the CRPD expressly provides that States Parties, in accordance with their obligations under IHL, must take all necessary measures to ensure the protection of persons with disabilities in situations of armed conflict. Furthermore, different treatment, including reasonable accommodation,²⁴ may be required to ensure that applicable IHL protections are applied in a non-discriminatory manner and are accessible to all persons with disabilities.

In short, IHL in general – and notably the norms of humane treatment and adverse distinction in particular – and the CRPD mutually reinforce the fundamental point that persons with disabilities have a right to the full and equal protection of IHL.

Under-inclusive application of IHL protections

IHL is often implemented in an under-inclusive manner, resulting in a piecemeal application of the fundamental protections and limitations of this body of law. This under-inclusive approach is a product of what some have called the “invisibility cloak” – the assumption that the civilian population is largely a homogenous group, devoid of persons with disability.²⁵ This assumption is of course incorrect: the civilian population within any conflict setting will be diverse and will include persons with disabilities, including persons with sensory, physical, intellectual and psychosocial impairments, some with multiple impairments. It will include women, girls, men, boys, elderly persons, undocumented migrants, ethnic and religious groups, and persons of diverse gender identities and sexual orientations. These various identity markers, and how they intersect, will hugely influence a civilian’s experience of armed conflict and, where IHL is not interpreted in an inclusive manner, their level of exposure to harm.

Overall, policies based on ableist biases continue to result in exclusion and harm across the spectrum of conflict. Let me give an example. In 2016, I was at a checkpoint where many civilians were crossing from an area of high shelling to a safe zone. For security reasons, the checkpoint had a blanket policy of not allowing animals to cross, the concern being that an animal could be booby-trapped with explosives. A man with a disability who had an assistance dog

²³ The extent of the CRPD’s application will be context-dependent and influenced by factors including who the actors are (State or non-State), for how long and to what extent an actor has control over territory, and the right or rights engaged. For analysis of the application of the CRPD in armed conflict see Alice Priddy, *Disability and Armed Conflict*, Geneva Academy Briefing No. 14, April 2019, pp. 35–47.

²⁴ CRPD, above note 8, Art. 2.

²⁵ Helen Durham and Gerard Quinn, “Lifting the Cloak of Invisibility: Civilians with Disabilities 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/>.

attempted to cross the checkpoint with his family. The dog was not allowed to cross the checkpoint, leaving the man with a terrible choice: one option was to cross the checkpoint to safety but leave his assistance animal behind, despite the dog being integral to his independence and daily life, and in a context where the dog would be unlikely to be replaced as it had been provided as a one-off by an NGO. The alternative was to stay in the conflict zone at great risk to his safety, and to be separated from his family. He decided to stay rather than be parted from his assistance animal. In the end, after a couple of days of negotiations led by a local organization of persons with disabilities (OPD), the military controlling the checkpoint allowed the dog to cross with the man, following a security examination.

This policy exposed the man to an increased risk of harm through its discriminatory effect and clearly goes against IHL's principles of humane treatment and the prohibition on adverse distinction. Humane treatment requires respect for human dignity and for a person's physical and mental integrity, and a person's identity, including their disability status, will shape the meaning and content of inhumane treatment in any given context. This context-specific approach means that a policy which may otherwise be considered humane, such as prohibiting animals from passing through a checkpoint, may nevertheless constitute inhumane treatment when its negative impact on a person with a disability is considered.

In addition, the policy described above also runs counter to the obligations set out in the CRPD. Complementing IHL, the CRPD explicitly requires different treatment in order to ensure *de facto* equality. Any failure to take necessary measures to ensure that persons with disabilities are equally protected and have equal enjoyment of their rights may amount to unlawful discrimination.²⁶

Applying IHL in a disability-inclusive manner: The principle of proportionality

Under IHL, parties to an armed conflict are required to respect the principle of proportionality. This principle dictates that, during the conduct of hostilities, parties to a conflict must make an assessment of the impact of an attack on civilians. An attack must not be launched if it "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".²⁷ Military commanders are responsible for

26 See CRPD, above note 8, Arts 5, 11. Note that denial of reasonable accommodation is a form of discrimination in accordance with Article 2 of the CRPD. Reasonable accommodation means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

27 AP I, Art. 51(5)(b). As a rule of customary IHL, this rule applies in both international and non-international armed conflicts: see ICRC Customary Law Study, above note 3, Rule 14. Launching an attack that would be excessive in relation to the concrete and direct military advantage anticipated is a

making these notoriously difficult calculations. Depending on your perspective, the rule can be seen as protective by limiting harm to civilians, or conversely, as permissive by allowing harm to civilians, as civilian deaths can be lawful if proportionate.²⁸

Making a proportionality assessment is not – nor can it ever be – an exact science. The weight given to civilian harm versus the expected military benefit is a question of degree and balance, based on all the information available to military commanders at the time. Military commanders routinely consider the location of civilians, civilian objects, hospitals, schools and cultural property, the choice of weapons to use, the time of day to launch the attack, and any precautions that can be taken, including providing warnings to the civilian population about the attack.

However, what is routinely *not* considered is who the civilian population actually is. This matters. It matters because the harm experienced by a civilian will vary greatly depending on their individual identity markers, including disability status. An attack using explosive weapons in an urban area, for example, may have a particularly harmful effect on persons with mobility or sight restrictions. Such an attack would likely cause significant damage to roads and pavements, making them particularly difficult, or potentially impossible, for a person who is a wheelchair user or who has a visual impairment to navigate. This will thereby reduce the likelihood of such a civilian being able to flee the area under attack and impede their access to essential medical care and food supplies.

It also matters because, as evidence suggests, proportionality assessments are likely to be based on ableist assumptions, given that targeting decisions and proportionality assessments are taken by military commanders (usually males who do not have a disability).²⁹ This includes common assumptions that the civilian population will all be able to access, understand and respond to warnings of an attack – but what about a person who is deaf and therefore cannot access an audio warning? What about a wheelchair user who cannot flee because the power has been cut and they need to use a lift to leave their fifth-floor flat? What about a person who has an intellectual disability and does not understand the danger to their life of an incoming attack, and therefore doesn't seek shelter? If commanders are not sensitized to the disability dynamics of conflict, their ability to undertake thorough proportionality assessments will be greatly limited.

war crime: see Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(b)(iv).

28 Judith Gardam, "Proportionality as a Restraint on the Use of Force", *Australian Yearbook of International Law*, Vol. 20, 1999; Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules", *Yearbook of International Humanitarian Law*, Vol. 8, 2005; Ben Clarke, "Proportionality in Armed Conflicts: A Principle in Need of Clarification?", *Journal of International Humanitarian Legal Studies*, Vol. 3, No. 1, 2012.

29 A. Priddy, above note 23. Feminists have pointed to the fact that proportionality assessments are likely to be highly gendered, with targeting decisions and proportionality assessments taken by military males reflecting their military priorities and biases. See, for example, Judith Gardam, "Women and the Law of Armed Conflict: Why the Silence?", *International and Comparative Law Quarterly*, Vol. 46, No. 1, 1997.

The more information a commander has, the higher their chance of making a decision that complies with the rule of proportionality. Commanders are expected to rely on information that is “reasonably available”, at a minimum. Should they have access to information that goes beyond this minimum standard, they are required to make use of it. The type of information that is expected to be reasonably available will be context-dependent and has evolved over time with advances in society and technology. For example, satellite imagery and GPS tracking were certainly not available to militaries when the Geneva Conventions were drafted, but the use of these technologies is now commonplace, and a well-equipped military is expected to have access to such technologies, to use them to track both enemy and civilian movements, and to then use this information in operational planning, including proportionality assessments.

Just as technology has advanced, so too has our knowledge of the demographics of the civilian population. As mentioned, it is widely known that at least 15% of all populations are persons with disabilities. At a minimum, this should be considered as information that is “reasonably available” to commanders. Further to this, reasonable efforts should be made to gather available data on the civilian population that is disaggregated by disability (as well as age and gender), such as through national censuses. Where militaries are operating in conflicts within their own territory, or where they have a degree of control and access over the situation on the ground, the level of information that can be expected to be “reasonably available” should increase. Reasonable efforts to understand civilian life patterns, accessibility of shelters and evacuation infrastructure, the location of day centres or support services for persons with disabilities, assistive device manufacturers, storage units and repair services would all be pertinent to ensuring that proportionality assessments and military operational planning are accurate and effective in accounting for the reality of the civilian population. Meaningful engagement with OPDs to better understand the daily lives of persons with disabilities, as well as the services and infrastructure available to them, will also allow commanders to more accurately anticipate the harm of an attack.

Under-inclusion poses operational risk

In planning and engaging in a military operation, a commander’s primary concern will be risk to the success of the operation. Aside from legal arguments as to why IHL protections should be applied in an inclusive manner, inclusivity is also highly relevant to the success or failure of a military operation – if we are to understand failure to include unforeseen civilian harm resulting from the operation. It is hard to think of a situation in which the dynamics of the civilian population, their life patterns and behaviours, will not be relevant to an operation and the risks it faces. As such, not understanding the diversity of the civilian population poses a significant operational risk. This in turn triggers a need to sensitize militaries to the disability dynamics of conflict during military training and to ensure that

military manuals and texts reflect an inclusive interpretation of IHL which complies with Article 11 of the CRPD. Embedding this within military doctrine will save lives and increase the overall success of military operations.

Inclusive monitoring of IHL

Those charged with monitoring the implementation of IHL – including commissions of inquiry, formal accountability mechanisms such as investigations by the International Criminal Court, and “soft” monitoring by civil society – all have a responsibility here, too. They must ensure that their monitoring work is inclusive and reflects the experiences of the entirety of the affected civilian population. Their ultimate starting point should be to ask: who is the civilian population? Is IHL being applied in a manner that meets its core objective of providing protection to *all* civilians?

Monitoring work that is not inclusive will leave already marginalized groups further behind, exacerbating exclusion and leading to further harms. Within monitoring, the UN Committee on the Rights of Persons with Disabilities has a unique and important role, as it is specifically mandated to consider whether States Parties are taking all necessary measures in accordance with IHL and the CRPD to ensure the safety and protection of persons with disabilities in situations of armed conflict.

Conclusion

The question asked at the outset of this article was: who is the civilian population? It is a question that is integral to IHL’s application, but it is also one that has been answered in haste and on the basis of incorrect assumptions and biases. Arms bearers, IHL practitioners and those responsible for implementing and monitoring IHL cannot ensure that IHL is serving its protective purpose if they cannot answer this fundamental question. The civilian population is women, girls, boys, men; it is infants and elderly persons; persons of diverse ethnicities and faiths, sexual orientations and gender identities; migrants and undocumented workers; and it includes persons with physical, sensory, intellectual or psychosocial disabilities. All of these individuals have an equal right to the protections of IHL, and all are at the core of the objective of IHL, which is to reduce civilian harm.